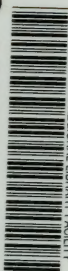


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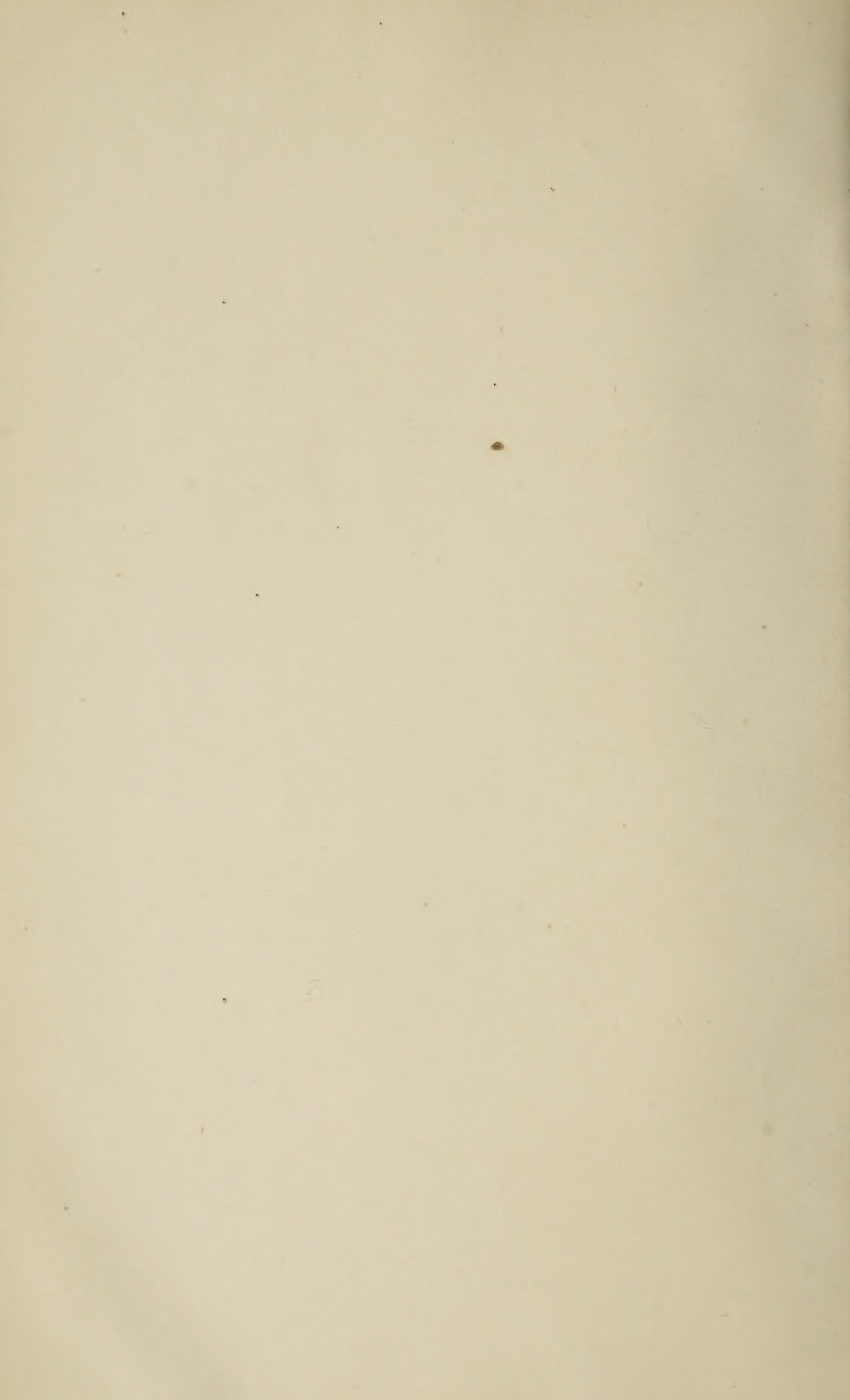














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VOLUME XIV

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III

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# REPORTS OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, 1852-54. By EDMUND F. MOORE, Barrister-at-Law. Vol. VIII.

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*In re* LOWE'S PATENT \* [Feb. 2, 1852].

The Judicial Committee will not permit a party to be heard in opposition to an application for a prolongation of the term of Letters Patent, unless a caveat has been entered in his name.

Any one of the public has a right to enter a caveat and to be heard in opposition at the hearing.

This was an application by the patentee, James Lowe, for prolongation of the term of Letters Patent for certain improvements in propelling vessels. Separate caveats were entered by various parties, and objections against an extension lodged; the principal objections being, first, that the Petitioner had been sufficiently rewarded; and, secondly, that the application of the screw propeller was well known before Lowe's patent.

Sir Frederick Thesiger, Q.C., Mr. Montagu Smith, and Mr. Webster, appeared for the Petitioner.

The Solicitor-General (Sir W. P. Wood), for Messrs. Maudslay and others.

Mr. Serjeant Shreeve and Mr. Bovill, for the Peninsular and Oriental Steam Navigation Company.

[2] Mr. Vance, for Captain Carpenter; and the Attorney-General (Sir A. Cockburn), for the Crown.

The only question of importance raised, was, as to the competency of Messrs. Maudslay and others to be heard in opposition.

It appeared that a caveat had been entered by Robertson, a patent agent, in his own name, but in reality as the agent for several large engineering firms, among whom were Messrs. Maudslay, and under such caveat they claimed to be heard in opposition to an extension.

Dr. Lushington.—How can Messrs. Maudslay and the other firms, for whom the Solicitor-General appears, be heard? The caveat is in Robertson's name.

Sir Frederick Thesiger, Q.C.—First, Robertson has no right to enter a caveat at all. It was not competent to him as one of the public to appear. The public is represented by the Attorney-General. Secondly, Messrs. Maudslay and the other parties for whom the Solicitor-General appears, cannot be heard in opposition, as no caveats have been entered in their names. They have no *locus standi*.

The Solicitor-General [Sir W. P. Wood], *contra*.—Robertson was clearly entitled to enter a caveat; he has a patent of his own, involving the very same principle of this screw propeller. It is no objection to Messrs. Maudslay and others being heard, because the caveat was in the name of their agent, which was done to save expense and trouble.

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\* Present: Lord Cranworth, the Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

[3] Lord Cranworth.—Any one of Her Majesty's subjects has a right to enter a caveat, and has equally a *locus standi* here to oppose an application for the extension of Letters Patent; the public have the same right, in the first instance, to go before the Attorney-General and oppose the grant of the original Letters Patent. We are, however, of opinion, that we cannot hear the Solicitor-General for any other person than Mr. Robertson, and that he can only ask such questions as respects Robertson's interest.

The merits of the petition were then investigated, which, however, presented no feature of importance requiring notice, and at the conclusion their Lordships expressed their opinion, that there had not been a case made out, either of unrequited merit or unproductive expenditure, which warranted them in recommending the further extension of the term.

[Mews' Dig. tit. PATENT: F. CONFIRMATION, ETC.; 2. *Renewal and Extension: e. Practice on application for.* See now Privy Council Rules of 26 Nov. 1897 (Stat. R. and O. 1899, p. 1837), and s. 25 of the Patents Act, 1883 (46 and 47 Vict., c. 57).]

#### [4] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT BOMBAY.

HER HIGHNESS RUCKMABOYE,—*Appellant*; LULLOOBHOY MOTTICHUND,—*Respondent* \* [Dec. 5, 6, and 7, 1851; Nov. 26 and 27, 1852].

The English Statute of Limitations, 21 Jac. I., c. 16, extends to India, and applies to Hindoos and Mahomedans as well as Europeans, in civil actions in the Supreme Court [8 Moo. P.C. 20].

The law of prescription, or limitation, is a law relating to procedure, having reference only to the *lex fori* [8 Moo. P.C. 35].

Where a Court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the Court proceeds according to the prescription of the country in which it exercises jurisdiction.

Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning prior to a particular Statute, in which they are used, the rule of construction of Statutes requires, that the words used in such Statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words [8 Moo. P.C. 20].

The words in the Statute of Limitations, 21 Jac. I., c. 16, s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally [8 Moo. P.C. 23].

Trover for 200 chests of opium, both parties were Hindoos. The Defendant pleaded in bar the English Statute of Limitations, 21 Jac. I., c. 16, in the ordinary form. Replication, that the Plaintiff resided during the period of prescription at Malwa, in India, without the territories of the Government of the East India Company, and without the jurisdiction of the Supreme Court of Bombay. Rejoinder, that the Defendant, though not personally resident at Bombay, carried on business there by a Mooneem or Gomastah,

\* Present at the first hearing, on the 5th, 6th, and 7th December, 1851: The Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), and the Right Hon. Edward Ryan.

Present at the second hearing, on the 26th and 27th November, 1852: Lord Truro, Lord Cranworth, the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

an inhabitant of Bombay, and subject to the jurisdiction of the Supreme Court, and that the goods were the property of Defendant. General demurrer to rejoinder. The Supreme Court at Bombay held, first, that as the Statutes of Limitation, 21 Jac. I., c. 16, and 4 Anne, c. 16, applied to Bombay and to Hindoos, the fact of the Plaintiff being resident at Malwa was not "beyond the seas," so as to bring the Plaintiff within the 7th section of the 21 Jac. I., c. 16; and, secondly, that the carrying on business at Bombay amounted to a constructive inhabitancy at Bombay, so as to exclude her from the benefit of the exception in the Statute. Upon appeal, held by the Judicial Committee, reversing the judgment of the Supreme Court,—

First. That the saving words of the Statute, 21 Jac. I., c. 16, s. 7, "beyond the seas," were not to be construed literally, those words being in legal import and effect synonymous with the words "without the territories," and that the replication disclosed a valid answer to the Defendant's plea. And, as the words of the replication, "without the territories," were equivalent to the words "beyond the seas," the Plaintiff was within the express provision of the seventh section, and that the plea, setting up the Statute, was no bar [8 Moo. P.C. 30].

Second. That the rejoinder, that the Plaintiff might sue or be sued during the time by reason of a constructive inhabitancy, was no answer in law to the replication; for although it might give the Court jurisdiction, yet it did not prevent the express operation of the 7th section of the 21 Jac. I., c. 16 [8 Moo. P.C. 30].

The Charter of the 8th December, 1823, which created the Supreme Court at Bombay, provides, by section 29, that, "in cases of Mahomedans or Gentoos, their inheritance, and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in cases of Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined, if the suit had been brought in a Native Court;" and the 37th section directs, that "the Court shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted, within their jurisdiction, as shall be necessary for the due execution of all or any of the powers thereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants living within its jurisdiction, and accommodating the same to their religion, manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law and the attainment of substantial justice."

Held, upon a construction of these sections, that, as the law of limitation is a matter of procedure, and the Supreme Court at Bombay had power to frame its procedure different from the Native Courts, the Court was right in allowing the plea of the English Statute of Limitations, in an action between Hindoos upon a Hindoo contract, as the judgment of the Court on such plea was no determination relating to any right arising out of any contract or dealing involved in the cause of action [8 Moo. P.C. 38].

*Semble*.—The mere allegation in the plaint, that the parties are Hindoos, is a sufficient averment of the fact to raise an objection to the cause being decided by the English law of limitations [8 Moo. P.C. 16, 17].

This was an action of trover, in which the Appellant was the Plaintiff, and the Respondent and Sewlall Mottichund, since deceased, were Defendants.

[5] The plaint alleged, that the Appellant, Her Highness Ruckmaboye, of Malwa, a Hindoo, was possessed at Bombay, as of her own property, of two hundred chests of opium, and that the Respondent and Sewlall Mottichund, Hindoo inhabitants, trading in Bombay, under the name and firm of Brizlall Mottichund, and, [6] therefore, persons subject to the jurisdiction of the Supreme Court, afterwards converted them to their own use. To this plaint the Respondent and Sewlall Mottichund pleaded, first, not guilty; secondly, not possessed; and thirdly, that the causes of



action in the plaint mentioned, did not, nor did any of them, accrue to the Appellant at any time within six years next before the commencement of the suit.

After pleading these pleas, and before replication, Sewlall Mottichund died, whereupon a suggestion was entered on the roll, that Sewlall Mottichund had died, and that the Respondent had survived him.

The Appellant replied to the pleas of the Respondent and Sewlall Mottichund, and joined issue on the first and second pleas; and to the third plea she replied, that, at the time when the causes of action in the plaint mentioned, and each of them, accrued, she (the Appellant) was residing in India, in parts without the territories subject to the government of the East India Company, and without the jurisdiction of the Supreme Court, to wit, at Rutlam, in Malwa; and that she (the Appellant) did not, at any time, from the time when the causes of action accrued, until within six years of the day of the commencement of the suit, come or return within the territories, or within the jurisdiction of the Court.

To this replication to the third plea, the Respondent pleaded, by way of rejoinder, that the Appellant, for a long time previously to, and at the time when, the alleged causes of action, and each and every of them, accrued to her, and from thence up to and until the time of the commencement of that suit, though personally resident in Malwa, was, and continued to be, a Hindoo, and carried on, and still carries on, the business or trade of merchandize at a shop or house of business situate in Moombadavee-street, in Bombay, under the name and style of "Gunness-dass Kistnajee," by a Mooneem or Gomastah, named Amerchund Keshorechund, and during all that time was, and continued to be, an inhabitant of Bombay, and subject to the jurisdiction of the Court, and that the goods and chattels in the plaint mentioned, were, at the time of the trover and conversion thereof in the plaint mentioned, in Bombay, and the goods and chattels of the Appellant's Bombay firm.

To this rejoinder the Appellant demurred generally, and the Respondent joined in demurrer.

The point marked by the Appellant for argument of the demurrer was, "That the constructive residence of the Appellant in Bombay, at the time when the cause of action accrued, or at any time since, was immaterial, if the Appellant were at that time actually and in fact residing beyond the territories subject to the government of the East India Company."

The demurrer was argued on the 14th of November, 1848, and the 23rd of February, 1849, before Sir Erskine Perry, Chief Justice, and Sir William Yardley, Puisne Judge, of the Supreme Court, when it was adjudged by the Court, that the rejoinder of the Respondent to the replication of the Appellant to the third plea was sufficient in law; and, by an order of the Court made on the last-mentioned day, it was [8] ordered, that the demurrer should be overruled, with costs.

In compliance with the rule of the Privy Council (see rule, 3 Moore's P.C. Cases, p. xxv.), the Judges of the Supreme Court transmitted to the Privy Council the following reasons, which governed the Court in overruling the demurrer to the third plea:—

"The Supreme Court at Bombay, having, for some years past, held that the Statutes of Limitation (21 Jac. I., c. 16 (a), and 4 Anne, c. 16) apply to Bombay

(a) The section of this Statute upon which the question raised turned, was the 7th; it is as follows:—

"Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such Action of Trespass, Detinue, Action sur Trover, Replevin, Actions of Accounts, Actions of Debts, Actions of Trespass for Assault, Menace, Battery, Wounding or Imprisonment, Actions upon the Case for Words, be or shall be at the time of any such Cause of Action given or accrued, fallen or come, within the Age of Twenty-one Years, *Feme Covert*, *Non Compos Mentis*, imprisoned or beyond the Seas; that then such Person or Persons shall be at Liberty to bring the same Actions, so as they take the same within such Times as are before limited, after their coming to or being of full age, Discoverd, of sane Memory, at Large, and returned from beyond the Seas, as other persons having no such Impediment should have done. 20 Hen. III., c. 8; 3 Ed. I., c. 39; 32 Hen. VIII., c. 2; 1 Ma. I., Sess. 2. c. 5."



and to Hindoos, as well as to Europeans, on the ground of such laws being laws affecting procedure, and not affecting the contract (see Story's Conflict of Laws, p. 483, Edin.), the point argued before us was, whether the Plaintiff, not residing personally within the jurisdiction of the Supreme Court of Bombay, was not to be considered as being 'beyond the seas' at the time of the cause of action accruing and of its being commenced.

[9] "Rutlam is one of the petty Rajpoot rajahships of Malwa, adjoining the Bombay Presidency, and tributary to Scindia, under the guarantee of the British Government. The Plaintiff, who, by her title, is probably connected with the ruling family in Rutlam, appears by the record to keep a money-shop in Bombay, under an assumed name, which is a custom very prevalent amongst monied natives of rank in most parts of India.

"We thought that the expression 'beyond the seas,' which can only be applied *cy prés* in India, did not include a place situated like Rutlam; and the case of *King v. Walker* (1 W. Bla. 286) clearly shows, that the being without the jurisdiction of the Court is not equivalent to the above expression.

"We also thought, that the carrying on a business or trade in the island of Bombay amounted to a constructive presence in the island, so as to exclude the exception in the Statute, even if Rutlam were to be considered as coming within the expression 'beyond the seas;' and we conceived, that the like conclusion would be arrived at by the Courts of Westminster Hall, if one of the great banking-houses in London, such as Coutts' or Hammersley's, which are often known to have been represented by a single individual, were to claim the right of bringing an action of assumpsit twenty years after the contract was made, on the ground, that the individual had been, during the period, 'beyond the seas.'"

From the above judgment the present appeal was brought.

The Appellant, in support of the appeal, submitted that the judgment of the Supreme Court ought to be reversed, for the following reasons:—

[10] First. Because the Statute of Limitations, the 21 Jac. I., c. 16, did not extend to India.

Second. Because, at all events, it did not apply to an action between Hindoos.

Third. Because, even assuming that the Statute did extend to India, and also, that it applied to an action between Hindoos, yet that it sufficiently appeared that the Appellant was within the exceptions and saving proviso of the Statute.

The Respondent, on the other hand, relied upon the following reasons in support of the judgment of the Court below:—

First. Because the rejoinder of the Respondent to the replication of the Appellant to the third plea of the Respondent was sufficient in law.

Second. Because, under the circumstances, and under Reg. III. of 1827, the Appellant was an inhabitant of the island of Bombay, and subject to the jurisdiction of the Supreme Court at the time when the cause of action in the plaint mentioned accrued, and ever since had been entitled to sue and liable to be sued in that Court.

Third. Because, inasmuch as the Appellant replied to the Respondent's third plea, and tendered an issue thereon, it was not competent to the Appellant to object, and she was estopped from objecting that the matters in the third plea pleaded, and the Statutes on which such matters were and are founded, were not nor are applicable to India.

Fourth. Because any judgment given for the Appellant on the plaint would be erroneous and bad in law, inasmuch as there was gross and manifest error in the Record and proceedings in this, to wit, that [11] although the Appellant by her plaint complained that the Respondent wrongfully converted to his use "certain goods and chattels, to wit, two hundred chests of opium," yet she nowhere stated the value of such opium or chests, or of any part of it, or if it was of any value, and consequently no damages could be given against the Respondent in respect of such alleged wrongful conversion.

The appeal was twice argued (Dec. 5, 6, and 7, 1851); in the first instance \* by

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\* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), and the Right Hon. Sir Edward Ryan.

Mr. Peacock, Q.C., and Mr. Leith, for the Appellant; and Sir Frederick Thesiger, Q.C., Mr. Whateley, Q.C., and Mr. Bayley, for the Respondent.

The case stood over for consideration. As the Committee who heard the appeal did not agree in opinion, the case was directed to be re-argued by one Counsel on each side, and additional members of the Committee attended the hearing (Nov. 26 and 27, 1852).\*

The appeal was re-argued by Mr. Leith for the Appellant; and Mr. Whateley, Q.C., for the Respondent.

The points relied upon in the arguments are distinctly stated and commented upon in the judgment.

On the question of the application generally of Eng-[12]-ish Statutes to India, *The Mayor of Lyons v. The East India Company* (1 Moore's P.C. Cases, 175), *Ramchurn Chuckerbutty v. Radamohun Chuckerbutty* (Morton's Decisions of Sup. Court, 353), *D'Onto v. Da Costa* (Morton's Dec. S.C. 356), *Ramloll Thackoorseydass v. Soojumnul Dhondmull* (6 Moore's P.C. Cases, 330), *Attorney-General v. Stewart* (2 Mer. 143), 1 Smolult and Ryan's Rules and Orders, p. v., were cited; and, upon the extension to India, of the Statute of Limitations, 21 Jac. I., c. 16, *The East India Company v. Oditchurn Paul* (7 Moore's P.C. Cases, 85), *Gyanchund Shaw v. Mirza Mahomed Cazim Ally Khan* (Morton's Dec. S.C. 337), *Attaram Sircar v. Baillie* (ib. 336), *Verelst v. Levett* (ib. 340), *Kistnoochunder Sircar v. Ramdhone Nundy* (ib. 345), *Trelochun Chatterjee v. Phillips* (ib. 341), *Mohun Persad Takoor v. Loll Beharry Takoor* (ib. 342), *Williams v. Jones* (13 East, 439). Act, No. 14, of 1840 (introducing into India the 9 Geo. IV., c. 14) (Theobald's Acts of the Legislative Council of India, p. 390).

And, assuming the Statute extended to India, whether it applied to an action of trover in the Supreme Court at Bombay by Hindoos. The Court being bound by the Statutes, 21 Geo. III., c. 70, s. 17; 37 Geo. III., c. 142, s. 13; 4 Geo. IV., c. 71, secs. 7 and 9; 3 and 4 Will. IV., c. 85; and Bombay Charter, 8th of Dec., 1823, secs. 29 and 32, to decide the question, according to the Hindoo law. By which law the lowest limitation of suits is ten years. 1 Colebrooke's Dig., ch. cxlii.: 1 Strange's Hindoo Law, 308, 2 ib. 465, 477 (2nd edit.); 2 W. Macnaghten's Principles and Precedents of [13] Hindoo Law, 269; *Mahadan Dutt v. Mutteechund* (Morton's Dec. S.C. 344); Bengal Regulations, III. of 1793, s. 14, and II. of 1805, s. 3, cl. 3; Bombay Reg. V. of 1827, ch. 1, s. 3, cl. 1; Bombay Code, 186.

And, upon the question of the application of the *lex fori*, whether the English or Hindoo law of limitations was the rule, the following authorities were referred to: *The British Linen Company v. Drummond* (10 Barn. and Cr. 903), *Higgins v. Scott* (2 Barn. and Ad. 413), *De la Vega v. Vianna* (1 Barn. and Ad. 284), *Donn v. Lippmann* (5 Clk. and Fin. 1), *Huber v. Stiener* (2 Bing. N.C. 202; S.C. 2 Dowl. Prac. Cases, 781), *Johnstone v. Beattie* (10 Clk. and Fin. 42), *Trimbey v. Vignier* (1 Bing. N.C. 151), *Bury v. Goldner* (1 Dowl. and Lown. 834), *Beerchund Podar v. Ramanath Tagore* (1 Taylor and Bell's S.C. Reps. 131), *Sree Mutty Moha Ramee Comulcoonnry v. Russickchunder Naoghly* (Bignell's Reps. 13), Story's Conf. of Laws, ch. xiv. secs. 556-7, 577, 579 (2 edit.), 1 Burge's Comm. on Col. and For. Law, ch. i. pp. 24 and 27, Story "On Bills of Exchange," ch. v. s. 146 (edit. 1843).

Upon the construction of the words of the exception in the Statutes, 21 Jac. I., c. 16, s. 7, and 4 Anne, c. 16, s. 19, "beyond the seas," being synonymous in legal import to the words "out of the realm," used in the previous Statutes of Limitation, 1 Rich. III., c. 7, s. 3, 4 Hen. VII., c. 24, 32 Hen. VIII., c. 2, s. 9, *King v. Walker* (1 W. Bla. 283), *Stowel v. Lord Zouch* (1 Plowden's Rep. 376), *Lane v. Bennett* (1 Mee. and Wels. 70), *Nightingale v. Adams* (1 Show. 91), *Battersby v. Kirk* (2 Bing. N.C. 584), [14] *Verelst v. Levett* (Morton's Dec. 340), Dwarries "On Statutes," 557, 669 (2nd edit.), 3 Burge's Comm. on Col. and For. Law, ch. x. p. 117, Co. Litt. 260 a, 260 b, 261 a, 261 b, Statutes, 32 Hen. VIII., c. 2, 1 Mar., Sess. 2, c. 5, 4 Anne, c. 16, s. 19, and 3 and 4 Will. IV., c. 27, were referred to.

\* The Committee present at the second argument were, Lord Truro, Lord Cranworth, the Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir George Turner (Vice-Chancellor), the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



And, upon the fact pleaded in the replication, of the Plaintiff being, at the time when the cause of action accrued, a resident at Malwa, an independent State without the territories of the East India Company, within the saving of the 7th section, *Smith v. Hill* (1 Wils. 134), *Perry v. Jackson* (4 Term. 516), *Williams v. Jones* (13 East, 439), *Strithorst v. Graeme* (2 W. Bla. 723; S.C. 3 Wils. 145).

As to the constructive inhabitaney of the Appellant at Bombay, by carrying on business there by a *gomastah*, who was amenable to the jurisdiction of the Supreme Court, Bombay Reg. III. of 1827, c. 1, s. 3, cls. 1 and 2, *Thomson v. Davenport* (9 B. and C. 78, and 2 Smith's Leading Cases, 212, where all the authorities on this point are collected), were cited.

On the objection to the pleadings. That it was necessary to aver that the parties were Hindoos, to entitle the Plaintiff to insist upon the Hindoo law of limitations being applied, *Mahadan Dutt v. Mutteechund* (Morton's Dec. 344), *Mohun Persad Takoor v. Loll Beharry Takoor* (Morton's Dec. 342). That there was error upon the record, the plaint omitting to aver the value of the opium converted, and consequently that no damages could be given in respect of such conversion, *The Mayor of Reading v. Clarke* (4 Barn. and Ald. 268), *Arbouin v. Anderson* (1 Q.B. Rep. 498), *Bar-[15]-ling v. Gurney* (2 Crompt. and Mee. 226; S.C. 4 Tyr. 2), Stephen "On Pleading," p. 332 (5th edit.). That the objection that the parties were Hindoos could not be now raised, as it was not contained in the points intended to be made upon the argument upon the demurrer to the replication, *Arbouin v. Anderson* (1 Q.B. Rep. 498), Stephen "On Pleading," p. 154, 2 Smoltt and Ryan's Rules and Orders, p. 69, were severally cited.

Judgment was reserved, and now delivered (Dec. 12, 1853) by

Sir John Jervis.—This is an appeal from a judgment pronounced for the Respondent by the Supreme Court of Bombay, upon a demurrer to the rejoinder.

The plaint is in the ordinary form in trover, and describes the Plaintiff and Defendants to be Hindoos, and the Defendants to be merchants trading in Bombay.

The Defendants pleaded the English Statute of Limitations, 21 James I., c. 16, in the ordinary form.

The Plaintiff replied that, during the period of prescription, she had resided in parts without the territories of the East India Company, and without the jurisdiction of the Court.

The Defendant, the present Respondent (the other Defendant died before replication), rejoined, that the Plaintiff had, during the period aforesaid, carried on trade in Bombay by an agent, and that the goods, at the time of the alleged conversion, were in Bombay, and were the goods of the Plaintiff's Bombay firm.

The Plaintiff demurred to this rejoinder, and after argument the demurrer was overruled, and judgment pronounced for the Defendant.

[16] By the notes of Chief Justice Perry, of the reasons for overruling the demurrer, it appears, that the only question argued before the Court was the validity of the rejoinder.

The questions raised during the argument before this Committee were,

First. Whether the English Statute of Limitations, 21 James I., c. 16, applies to those parts of India which are subject to the government of the East India Company.

Second. If the Statute does apply, whether, as it appears by the record that the parties are Hindoos, the plea of the Statute of Limitations is a good plea.

Third. Whether the replication sets forth matter which shows the Plaintiff to have resided, during the period of limitation, in parts "beyond the seas," within the meaning of the saving in the 7th section of the Statute.

Fourth. Whether the rejoinder presents an answer in law to the replication.

During the argument of the objection to the plea, upon the ground of its being inadmissible in a suit between Hindoos, a doubt was suggested, whether the fact that the parties are Hindoos, sufficiently appears upon the record to give rise to the objection. Upon consideration, the Committee is satisfied that the fact does sufficiently appear.

The Charter, which applies to the Court of Bombay, requires that regard should be had to the religion, manners, and usages of the natives of India, in the issuing and execution of process, and, therefore, to enable the proper process and service

to be adopted, the plaint which precedes the process is required to state if the parties are Mahomedans or Gentoos, and, [17] in practice, the allegation in the plaint is regarded throughout the cause as a sufficient averment of the fact for all judicial purposes.

It does not appear that any objection was urged in the Court below upon this point, which is satisfactorily accounted for by the notoriety of the practice to the effect stated.

The first point to be considered is, whether the parts of India, under the government of the East India Company, are subject to the application of the Statute, 21 James I., c. 16.

This question appears to have arisen in the year 1811, in the case of *Williams v. Jones* (13 East, 439), but no judgment was then pronounced upon it. In that case, the cause of action had arisen in India. The action was commenced in the Court of King's Bench, and the Defendant pleaded the Statute of Limitations, to which the Plaintiff replied the Statute of 4 Anne, c. 16, s. 19, that when the causes of action accrued, and since, until within six years of the commencement of the action, the Defendant was beyond seas. The Defendant rejoined, and pleaded the existence of the Supreme Court at Calcutta, as established by the Charter, under the 13 Geo. III., c. 63, having a like jurisdiction as the Judges of the Court of King's Bench, within Great Britain, and that at the time and more than six years after the cause of action accrued, both Plaintiff and Defendant resided within the jurisdiction of that Court, and were subject thereto, and that no action had been commenced. Upon the part of the Plaintiff, it was contended that, by the very terms of the Statute, it could not apply to India, as the exceptions in favour of parties being beyond seas could not apply to India, the seas meant [18] in the Statute being the four seas of England; and further, that even if the Statute did extend to India, either without the exception or with a different sense to be put upon it, still the jurisdiction of the Court of King's Bench was not excluded. The case was decided upon the ground, that at all events the jurisdiction of the Court of King's Bench was not excluded; and Lord Ellenborough said, assuming that the Statute and Charter referred to had given jurisdiction to the Indian Courts, and that the Courts had adopted the Statutes of Limitation, still those Statutes could only have the effect of barring the remedy in those Courts, but did not extinguish the right.

The extent of the authority of this case is merely that Lord Ellenborough did not express any doubt of the competency of the Courts in India to adopt the Statute.

It is abundantly clear, that since the year 1811 the Statute has been adopted in India, and made the foundation of judgments by the Supreme Courts there, and that adoption has been recognised and acted upon by this jurisdiction, in the case of *The East India Company v. Oditchurn Paul*, reported in the 5th volume of Moore's Indian Appeal Cases, page 43, in which case the Statute was pleaded on the part of the East India Company, whose agents could not but be fully informed whether the Statute was acted upon in the Courts in India. The recognition and adoption by this jurisdiction of the plea in that case, is, of course, of the greatest weight upon the present occasion.

The case was an action of assumpsit, brought to recover damages for the breach of a contract, in not delivering a quantity of salt. The East India Com-[19]-pany pleaded, among other pleas, that the cause of action did not arise *infra sex annos*. The Plaintiff took issue upon that plea. The cause was afterwards tried before two of the Judges, who, upon the evidence there given, held, that the cause of action did accrue within six years, and entered the verdict for the Plaintiff, upon the issue joined upon that plea. A motion was afterwards made for a new trial, which was refused, and the East India Company appealed against the rule refusing the new trial, and contended that the evidence proved the cause of action to have arisen more than six years before the commencement of the action.

No question was raised by the parties during the argument of that case, as to the application of the Statute to India; but Lord Campbell inquired of the Bar, if the Statute, 21 James I., c. 16, extended to India, and was answered by the then Attorney-General, of counsel for the East India Company, that it was introduced into India previously to the Charter, and that statement was not controverted by the counsel for Respondent, of whom Mr. Leith was one, a gentleman long eminent as



a practitioner at the Indian Bar, and consequently well acquainted with the practice. The Judicial Committee considered, that the plea of the Statute of Limitations was not in that case entitled to favour, and would have been astute to discover any ground upon which the verdict which had been entered for the Plaintiff (the Respondent) could be supported. But the Committee held, that the facts established that the cause of action had arisen more than six years before the commencement of the action, and made the rule absolute for setting aside the former verdict for the Respondent, and for a [20] new trial; thus upholding the plea against the apparent merits of the case.

This Committee is satisfied that the Statute of Limitations has been adopted and acted upon by the Courts in India, and such adoption has been recognised and acted upon by this jurisdiction, and the Committee considers that such application of the Statute ought not now to be questioned, whatever doubts might have originally existed on the subject.

The Statute being applicable to India, it becomes necessary to consider, whether a residence in India, but out of the territories under the government of the East India Company, is, in legal import, a residence "beyond the seas" within the meaning of the Statute, 21 James I., c. 16, sec. 7.

These words "beyond the seas" are of extensive application in the law, many ancient rights being saved by the Common Law, to persons "beyond the seas"; it is, therefore, of considerable importance to ascertain what has been deemed to be the legal import and meaning of them, because, if it shall appear that they have long been used, in a sense which may not improperly be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature in that sense, long prior to the Statute, 21 James I., c. 16, the rule of construction of Statutes will require, that the words in the Statute should be construed according to the sense in which they had been so previously used, although that sense may vary from the strict literal meaning of them.

The Statute, 21 James I., c. 16, was the first Statute which limited the period in which personal actions should be brought, but that Statute seems to [21] be strictly in *pari materia* with the 32 Henry VIII., c. 2, which limited the period during which real actions should be brought, and also with other Statutes, which may be called Statutes of Limitation, such as the Statute of Fines, which limited the period for making entry and taking proceedings to avoid fines. The object of the provisions in all the Statutes referred to is the same, that is, to give effect to the maxim, "*Interest reipublicae ut sit finis litium.*"

The words "beyond the seas," as before stated, were well known to the Common Law, before the enactment of any Statute containing those words: as in the case where a descent was cast after a disseizin, the entry of the disseizor was tolled, unless the disseizee was beyond the seas; and relief from forfeiture, by default, of copyholds, is, in many cases, allowed by reason of the defaulters having been beyond the seas, as in *Underhill v. Kelsey* (3 Cro. Jac. 226).

The question, therefore, is, whether the words "out of the realm," or "out of the lands," or "out of the territories," are synonymous, in legal import, with the words "beyond the seas." To arrive at a correct conclusion, it will be necessary to refer to the various Statutes and authorities.

The first Statute, relevant to this subject, is the Statute, *De donis*, 13 Edw. I., which enacted, that fines in certain cases should be void, and that neither heirs nor reversioners need make any claim, though they should be within England. This enactment seems to have referred to the law of "Continuall Claime," which was subject to a saving in favour of persons "beyond the seas."

[22] The 18 Edw. I., Stat. 4, makes fines binding upon all parties and privies "within the four seas."

Littleton, in section 441, treats of the law before the Statute of Non-claim, 34 Edw. III., c. 16, and says, "So it is proved, that if a stranger that hath right unto the tenements, if he were out of the realme at the time of the fine levied, etc., shall have no dammage, though that hee made not his claim." And Lord Coke, in the Second Inst., p. 337, in reading upon the Statute of 13 Edw. I., says, "Hereby it may be gathered (as the law was), that a fine at the Common Law did not bind a stranger that was within age, in prison or beyond the seas." Further, Littleton, in chapter

vii., on "Continuall Claime," section 439, says, in reference to excuse for "Continuall Claime," "In the same manner it seemeth, that where a man is out of the realme, and the disseizor dieth seized, that such discent shall not hurt the disseizee, but for that hee could not make continuall claime, it seems to them, that when he commeth into England he may enter."

It will be observed, that in this section, Littleton uses the words, "out of the realme," and "commeth into England," in reference to rights which had been preserved to persons who should, in technical language, be "beyond the seas." And Lord Coke, in commenting upon this section, (260 b.) says, "*Hors du royaume (id est), extra regnum*; as much as to say, as out of the power of the King of England as of his crowne of England; for, if a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the King of England, as of his crowne of England. And yet [23] *altum mare* is out of the jurisdiction of the common law." He afterwards says, "And note, Littleton saith not, beyond the sea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by construction to be within the realme of England, or the dominions of the same."

In the above statement of the section in Littleton, certain words have been omitted which are in the section, which import that the absence beyond seas should be in the service of the king, but those words are irrelevant and immaterial, as it distinctly appears in subsequent sections and commentaries, and in Bracton, lib. 5, fol. 436, referred to by Lord Coke, "that the being in the king's service is not a qualification attached to the being beyond seas."

In Littleton, section 440, the words "out of the realme" and "within the realme," are used ten times in reference to this saving, by being "beyond the seas," and the comments upon this section, (261 a, 261 b.) which treat at large the proper mode of pleading in reference to this subject, frequently adopt the expression "out of the realme."

It appears to the Committee that these Statutes and commentaries establish, that the words "being out of England," "out of the realme," and "beyond the seas," were deemed to be synonymous in legal import; and the several Statutes relating to fines have also a bearing upon the question.

The Statute, 1 Rich. III., c. 7, s. 3, binds all parties by the fine, except those "out of this realm of England." And in sec. 6, actions are saved if brought within five years after coming "within this land." The 4 Hen. VII., c. 24, refers to persons "out of the [24] realm." The 23 Eliz., c. 3, s. 3, saves writs of error to recover fines to persons "beyond the seas." The 27 Eliz., c. 9, s. 3, on the same point. The saving is also to persons "beyond the seas." There is a material case reported in Fitzherbert's Abr. under the title of "Continuall Claime et non Claime," and which is cited in *Stowel v. Lord Zouch* (1 Plowden, 376). Fitzherbert is, of course, of the highest authority, and Lord Ellenborough said, that no better authority than Plowden could be cited. The case is thus stated. In the 8th Rich. II., a party pleaded in bar a fine, levied before the Statute of Non-claim, and alleged, that the Plaintiff was, a year and a day after the fine levied, within the four seas, and did not claim. The Plaintiff replied, that he was at that time in Scotland the whole year and a day, without that he was in England. And it was held, that Scotland being another land and another realm by itself, the replication was sufficient.

The right of entry of a disseizee, in the absence of continual claim, being by the Common Law saved by an absence "beyond the seas," this case shows, that Scotland, being out of the realm, was within the saving being "beyond the seas." Further, the case itself referred to a saving in a Statute expressed in the words "beyond the seas." But Fitzherbert, by reporting the case under the head of "Continuall Claime et non Claime," evidently meant, that a residence in Scotland would also be within a Common Law saving expressed in the same words.

Lord Coke's Commentaries, 260 a and 260 b, upon Littleton, sec. 439 and 440, will be found quite confirmatory of the principle of the decision before mentioned.

[25] The Statute of the 32 Hen. VIII., c. 2, is immediately in connection with the 21 James I., c. 16. That Statute first required, that all real actions should be brought within a definite number of years by all persons within the realm, and saved the remedies to other persons within certain periods after coming within the



realm, and it was correctly asserted by Wedderburn, of counsel in the case of *King v. Walker*, hereafter mentioned, that Sir Robert Brooke, a very high authority, in his learned readings upon this Statute, always considered and used the words "out of the realm" as synonymous with the words "beyond the seas." The passage referred to in Brooke will be found in the seventh lecture, page 121, and in the eighth lecture, pages 121 and 123.

In section 2 of the Statute, 21 James I., c. 16, it is enacted, that if any person being entitled to writs in real actions, etc., shall be "beyond the seas," then such persons' rights are saved to them for ten years after coming into this realm; and in section 7, it is enacted, that if persons entitled to bring personal actions shall, when the cause of action accrues, be "beyond the seas," then such persons may sue within the limited period, after they shall have returned from "beyond the seas."

The Statute, 4 Anne, c. 16, saves the right of certain actions in reference to the words "beyond the seas."

There are two decisions upon the Statute of 21 James I., c. 16, to which it is necessary to advert.

The case of *King v. Walker* (1 W. Bla. 286), in which to an action of *assumpsit* the Defendant pleaded *non assumpsit infra sex annos*. The Plaintiff replied, that he had been resident in foreign parts out of the [26] kingdom of England, to wit, at Glasgow, in Scotland. The Defendant demurred. The Court held the replication bad, upon the ground, that by the Act of Union, Scotland became part of the realm of Great Britain, and was no longer "beyond the seas," which words were satisfied only by a party being beyond what constitutes the realm for the time being. Wedderburn, in support of this replication, said, that persons out of the jurisdiction of the Courts of the country, though not literally "beyond the seas," or out of the King's subjection, were yet within the saving of the Statute, and referred to Brooke's reading before mentioned; but Dennison, Justice, said, this is a new experiment, and that the Statutes of Limitation of James and Anne were both express, that the party to be excused must be "beyond the seas," and that he did not understand what the replication meant, by "foreign parts," and that the party must be "beyond the seas," which was the old and true expression; and added, that "before the Union, England was an island of itself; since the Union, Scotland is made part of it." From the observations of Wilmot, Justice, it would seem that the word "Island" is stated by mistake of the reporter, instead of kingdom. Wilmot, Justice, said, "There is no such kingdom as England now. Plaintiff, therefore, while in Scotland, was not out of the realm. Besides, that is not now the phrase: the Legislature, by altering it to beyond the seas, at such a critical juncture, seems to have pointed at this very case of dwelling in Scotland."

The alteration here spoken of, perhaps referred to the adoption of the words "beyond the seas" in this Statute, while the words in the 32 Hen. VIII., c. 2, were "out of the realm."

[27] The experiment referred to by Mr. Justice Dennison was the attempt to make the words, "out of the jurisdiction of the Court," synonymous with the words "beyond the seas."

The substance of the determination is, that the words "beyond the seas," within the meaning of the saving clause, could only be satisfied by the party being out of what should constitute the realm for the time being, and that Scotland, at the time of the plea being part of the realm, was, therefore, not within the saving.

The decision so understood is consistent with, and to the same effect as, the case reported in Fitzherbert, and cited in Plowden, and with the doctrine stated in Lord Coke's Commentaries, 260 b; inasmuch as in the time of Richard II., Scotland was "out of the realm," and, therefore, might be well deemed to be "beyond the seas," within the Statute; and at the time of the case of *King v. Walker*, Scotland had become part of the realm of Great Britain, and, therefore, had ceased to be "beyond the seas," within the meaning of the Statute. After the Union with Scotland, difficulties arose in regard to the effect of writs of *ne exeat regno*, which, while restraining the parties from going out of the realm, permitted them to go to Scotland, which was out of the jurisdiction of the Court, and it was deemed necessary to alter the writ and the recognition, by extending the restraint to Scotland by name.

The case of *Lane v. Bennett* (1 Mee. and Wels. 70) calls for some remark. The

Plaintiff, in answer to a plea of the Statute of Limitations, replied, the residence of the Defendant in Ireland. Issue was taken upon the replication, and a ver-[28]-dict found for the Plaintiff. A motion was afterwards made by the Defendant to enter judgment for him, *non obstante veredicto*, upon the ground, that Ireland was not now a place "beyond the seas" within the 4 Anne, c. 16, s. 19. The Court discharged that rule upon the authority of a decision by Lord Holt, in a case erroneously cited as the case of *Nightingale v. Adams* (1 Show. 91), but the case intended was an Anonymous case (1 Show. 61), in which Lord Holt is reported to have held upon consideration, upon the Statute of Limitations, 21 James I., c. 16, that Ireland was "beyond the seas" within the meaning of that Statute. Lord Abinger, in delivering judgment in *Lane v. Bennett* [1 M. and W. 71], entered largely into the question of the legal import of the words "beyond the seas," and referred to many of the Statutes before mentioned, and to Littleton and Lord Coke's Commentaries as authorities, that the words "beyond the seas" and "out of the realm," had been used as synonymous in legal meaning, but decided that Ireland continued to be a place "beyond the seas," notwithstanding the Act of Union. The case of *King v. Walker* is mentioned in the judgment by Lord Abinger, as a decision negating that the words "beyond the seas" and "out of the realm" are synonymous, but it may be doubted whether that view of the decision was correct. It would rather seem, as before stated, that the Court held, that the meaning of the expression "beyond the seas" was beyond, or "out of the realm," and that at the time of the replication, Scotland was not "out of the realm," and, therefore, not "beyond the seas," and consequently not within the saving. The judgment also referred to a note in Jenkins's Eight Centuries, Case 18, that since the Union, [29] a husband while in Scotland would not be deemed beyond the seas so as to create the presumption of non-access.

In the case of *Battersby v. Kirk* (2 Bing. N.C. 584), it was also held, that Ireland, for the purpose of that decision, was a place "beyond the seas." The question was, whether goods landed in the Bristol Docks were liable to the dues imposed by the Bristol Dock Acts, upon goods imported from parts beyond the seas. The case underwent an elaborate argument upon the effect and construction of several Statutes relating to the trade, navigation, and various other matters connected with Ireland, all of which are foreign to this case. The judgment turned entirely upon the construction of those Statutes, and with reference to them, goods from Ireland landed in the Bristol Docks were deemed to be subject to the dues imposed upon goods imported from parts beyond the seas. That case, therefore, does not seem to have any application to the present case.

The Committee, therefore, are of opinion that the Statute of Limitations must at this time be deemed to be applicable to India; and that to construe the 7th section literally would be to withhold the benefit of a saving from India, which it was intended by the Legislature should prevail where the Statute was contemplated to operate at all, that is in England, and that it would be contrary to reason and justice to hold, that the Legislature should be deemed to have intended that the Statute should become operative in any place where, by a due construction of the 7th section, the saving could not apply.

A necessity that the words "beyond the seas" should be construed literally, would create a great [30] doubt of the correctness of the decisions which hold the Statute to be applicable to India, but if those words legally construed will give to India all the benefit which the Legislature intended the Statute should bestow, the adoption of the Statute in India, in that case, seems to be free from objection, as the policy of the Statute seems equally applicable to India as to England. And, upon a review of the Text books, Statutes and decisions, we are of opinion, that the words of the Statute, 21 James I., c. 16, "beyond the seas," are in legal import and effect synonymous with the words "out of the territories" and "out of the realm," and that the replication, therefore, discloses a valid answer to the Defendant's plea.

If the words of the replication are equivalent to the words "beyond the seas," then the Plaintiff is within the express provision of the 7th section, and the Statute would be no bar. It is no answer to say, that the party might sue or be sued during the whole time, by reason of a constructive inhabitancy. That might probably give the Court jurisdiction, but will not prevent the express operation of the 7th section. A Plaintiff may be in England for six years, but, nevertheless, if he be in prison when the cause of action arises, during the whole period, he may sue when he comes



out of prison, notwithstanding that he might have commenced an action at any moment whilst he was in prison, if he had so thought fit. The words of the 7th section are express, and the Plaintiff is within them.

The case therefore, as regards this question, stands in this predicament, that if the Statute of James does not operate in India, the plea is bad; and if it does operate, the replication contains a legal answer to it. [31] And, therefore, *quocunque via data*, the appeal upon this point ought to be allowed.

But it has already been stated, that the plea is objected to upon another and distinct ground, namely, that although the Statute of Limitations may be applicable to India, yet that such Statute cannot be pleaded in this cause, in which the Plaintiff and Defendant are Hindoos.

If the recommendation of the Committee, which will be founded upon the opinion before expressed, shall be confirmed and adopted by Her Majesty, the appeal will be allowed irrespective of the objection referred to, but, as that objection has been supported by arguments founded upon the supposed construction of the Charter, and upon an alleged inconsistency in the course of procedure of the Supreme Court with the provisions of the Charter, the Committee have deemed it expedient, with the view of preventing future litigation upon the same question, so far as the expression of its opinion may tend to effect that object, to investigate and consider the merits of the objection more largely than was necessary for the decision of the present case.

The course of procedure in the Supreme Courts necessarily differs from that which prevailed in the Native Courts, and such difference may frequently cause suits to be determined in the Supreme Courts otherwise than the same would have been determined if they had been instituted in the Native Courts; and the question may, therefore, frequently arise, whether such judgments of the Supreme Court ought to be deemed to be inconsistent with the Charter where they are the result, not of the application of any law relating to the "inheritance and succession to lands, [32] rents, and goods, and all matters of contract and dealing" between the parties, but from the difference in the course of procedure only in the respective Courts.

It is necessary, to a due consideration of the question, whether the plea can be allowed consistent with the provisions of the Charter, that the objection against the plea should be stated with precision and accuracy, because it should be observed in the outset that the plea does not raise any question relating to "inheritance and succession to lands, rents, and goods, and to all matters of contract and dealing" between the parties; and that the validity of the plea does not depend upon the application of any law or usage relating to any of those matters, but that the validity of the plea depends upon the question, whether the course of practice, or procedure, as it is called, under the authority of which it is pleaded, is consistent with the Charter.

The substance of the objection to the plea seems to be, that a judgment in favour of the Defendant, founded upon the plea of the Statute of Limitations, would be a determination upon the rights in litigation between Gentoos, by virtue of a different law than that by which the same suit would have been determined in a Native Court, if instituted there. And it is conceded that the plea would not have been available in a Native Court.

The merit of this objection depends upon the construction of the Charter, to which it is, therefore, necessary to refer.

The Charter contains four sections, which relate to the question, the 29th, 37th, 38th, 39th.

The 29th section is the governing section upon this point, and is to the following effect, namely, that in [33] suits between Mahomedans or Gentoos, their inheritance or succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined by the laws and usages of the Mahomedans and Gentoos respectively, or by such laws and usages as the same would have been determined if the suit had been brought in a native Court.

The 37th section requires the Court to frame processes, in criminal as well as in Civil suits, and the rules for the execution of such processes, with an especial attention to the religion, manners, and usages of the inhabitants, and the circumstances of the country, so far as the same could consist with the due execution of the law and the attainment of justice.



There are two other sections in the Charter (the 38th and 39th), which show, that it was not intended that the Charter Court should adopt the course of procedure which prevailed in the Native Courts, but that the suits between Gentoos and between Mahomedans, in such Court, should be by a course of procedure, to be framed by the Charter Court itself.

It will be observed, that although the Charter provides that the law, which would be administered in the Native Courts in the specified cases, should also be adopted in the like cases in the new jurisdiction, yet the form of procedure in the Native Courts was not to be imported into the new Court, but that the new Court was to frame its own course of procedure, having regard to the law by which its decisions were to be governed in suits between Gentoos and between Mahomedans.

Considering the different rules of evidence, modes [34] of purgation and proof, and the numerous other distinctions, in form and substance, necessarily resulting from the different systems of religion and government applicable to the different Courts, it is obvious, that the forms of procedure in the Native Courts could not be imported into the Supreme Court, to be presided over by English Judges: and, accordingly, the duty is imposed upon the Supreme Court to frame rules, orders, and processes, for the conduct and prosecution, in that Court, of the suits referred to. That duty could only be effectually performed by attaching certain consequences, results, or penalties, to the non-observance of, or to a departure from, the ordained rules and course of procedure, some of which consequences might lead to a determination of the suit upon points independent of the merits involved in the cause, or the law applicable to the cause of action, or matters in litigation, and it would be difficult to maintain that a determination of the suit, under such circumstances, would be inconsistent with the Charter.

The Charter, while creating the new Court, provided for two objects. The one object was, that the rights of Gentoos and Mahomedans, in regard to the matters specified in the Charter, should be adjudged in the new jurisdiction, according to the laws by which they would have been determined in a Native Court. The other was, that the course of procedure in the new jurisdiction, by which such law was to be administered, should be consonant with the religious feelings, usages, and manners of the native suitors.

The first object seems to have been attained by placing Gentoo and Mahomedan suitors in the Charter Court in the position in which, by the comity of nations, parties are placed who sue in the Courts of [35] one country, in respect of rights or causes of action which have their origin in a foreign country. In such suits the *lex fori* adjudicates upon the rights and matters in litigation, according to the law of the country where the rights or causes of action arose: and, consistently with that course, the Charter provides, that Gentoos and Mahomedans, who live and conduct their transactions under certain systems of law and government peculiar to them respectively, shall have their rights and causes of action decided upon, in the Supreme Court, by the same law by which they would have been determined in a Native Court.

It was confided to the Court to secure the second object, by establishing rules, orders, and processes for the regulation of causes in the Supreme Court, between Gentoos and between Mahomedans.

Upon the part of the Defendant, it is contended, the plea is valid and warranted by the Charter, notwithstanding that such plea would not have been available if the suit had been instituted in a Native Court.

The arguments in support of the plea are founded upon the legal character of a law of limitation or prescription, and it is insisted, and the Committee are of opinion correctly insisted, that such legal character of the law of prescription has been so much considered and discussed among writers upon jurisprudence, and has been so often the subject of legal decision in the Courts of law of this and other countries, that it is no longer subject to doubt and uncertainty. In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a [36] law relating to procedure having reference only to the *lex fori*.

It is said, in Story's Conflict of Laws (edit. 1841), in the course of section 579,

that "the law of prescription of a particular country, even in a case of contract made in such country, forms no part of the contract itself, but merely acts upon it *ex post facto* in case of a suit; it cannot properly be deemed a right stipulated for, or included in the contract. Even these foreign jurists do not pretend that the prescription of a country, where a contract is made, constitutes a part of the contract."

And, in section 580, in contending against a passage in Baldus, he says, "The question is, whether it is a matter of the original merits, as, for example, a question of the original validity, or interpretation, or discharge of a contract, or whether it is a matter touching the time and mode of remedial justice, which is provided by law to redress grievances, or to prevent wrongs, or to suppress vexatious litigation." And, in a subsequent part of the section, he says, "Considered in their true light, Statutes of limitation or prescription are ordinarily simple regulations of suits and not of rights. They regulate the times in which rights may be asserted in Courts of Justice, and do not purport to act upon those rights." And then he adds, "Pothier very properly treats prescription, not so much as an extinguishment of the debt or claim, as an extinguishment of the right of action therein. And this is precisely the manner in which the subject is contemplated at the common law, as well as by many foreign jurists."

[37] Consistently with this view, while the Courts of almost all civilised countries entertain causes of action which have originated in a foreign country, and adjudicate upon them according to the law of the country in which they arose, yet such Courts respectively proceed according to the prescription of the country in which it exercises its jurisdiction.

In section 576 of Story's Conflict of Laws, the law is thus succinctly expressed: "In regard to Statutes of limitation or prescription of suits, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go *ad litem ordinationem*, and not *ad litem decisionem*, in a just juridical sense. The object of them is to fix certain periods, within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects, or by or against foreigners. And there can be no just reason, and no sound policy, in allowing higher or more extensive privileges to foreigners, than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy."

Then follow many important observations, showing the wisdom and justice of the law of prescription, but which will not aid in the investigation of the question under consideration.

In section 577, Mr. Justice Story proceeds, "It has accordingly become a formula in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, (*lex fori*), otherwise the suits will be barred; and this rule is as fully recognised in foreign jurisprudence as it is in the common law. Not, indeed, that there are no diversities of opinion upon this subject; but the doctrine is established by a decisive current of well-considered authorities." The author then quotes numerous foreign writers on jurisprudence, in confirmation of the law as stated in the text. The author also refers to several cases, in which the Courts of law of this country have acted in conformity with the principles there stated. A summary of those cases will be found in the note to the case of *Mostyn v. Fabrigas* (1 Smith's Leading Cases, 367); and the case of *Huber v. Steiner* there mentioned, and reported in 2 Bing. N.C. 202, is a leading authority upon the subject.

There are two cases which mark distinctly the application of the law as stated in Story. The case of *The British Linen Company v. Drummond*, which was a suit in England, upon a contract made in Scotland, where the prescription is forty years. The Plaintiffs sued in England, where the Defendant pleaded the Statute, 21 James I., c. 16, which was held to be a good plea.

*Huber v. Steiner* was a suit in England, upon a promissory note made in France, where the prescription is shorter than in England. The suit was commenced in England after the expiration of the French prescription, but within six years. The Defendant pleaded the French prescription, but which was held to be a bad plea.

It appears to the Committee, after much consideration, that the plea is an admissible and valid plea in this suit, and that the allowance of it is alike consistent



with the 29th section of the Charter as with the 37th section, the terms of which section have been already stated.

The 37th section of the Charter has been commented upon, as tending to show that no course of [39] procedure in the Charter Court can be valid and consistent with the Charter, which should authorise a judgment in a suit between Gentoos, founded upon any law other than that by which the same suit would have been determined in a Native Court; but, on an attentive perusal of that section, it will be found to refer only to process and its execution, and that no restriction or duty is imposed upon the Supreme Court in regard to the process and the rules and orders for the execution of them, except that they shall be respectively framed with an especial attention to the religion, manners, and usages of the native inhabitants, and accommodating the same to the circumstances of the country, so far as the same could consist with the due execution of law, and the attainment of substantial justice.

This section is merely auxiliary to the 29th section, and does not extend its effect in relation to the question of the validity of the plea; and, supposing a plea could be held to be included in the word "process," there is no ground for saying that it is inconsistent or repugnant to any part of, or any matter contained in, this section.

The fallacy which is imputed to the argument against the plea, is, that it confounds a determination of the suit, with the determination of the right or cause of action in litigation in the suit; whereas it is said, that a judgment for the Defendant upon this plea will be no determination founded upon any law relating to the rights or merits involved in the cause of action, the judgment will be consequential upon what may be deemed to be a default on the part of the Plaintiff in the proceedings in the *lex fori*. The Supreme Court was to frame a course of procedure, and [40] it would be incident to that duty to enforce conformity to such course by attaching certain consequences to default, departure, or disobedience. The time for appearing, for declaring, for pleading, and for taking the several steps in the cause, and the forms of the several proceedings, would all be within the province of the Court to prescribe, and, consequently, within its authority to give a judgment for Plaintiff or Defendant, as the penalty for defaults, disobedience, or departures from the prescribed rules. The Court could not exercise its jurisdiction effectually without such a power.

It may be asked, would the Charter be contravened by a judgment upon a demurrer for imperfect pleading, or a judgment of *non pros* for not declaring, or a judgment by default for not pleading, applying, etc.? In each of which cases, unless the practice of the Charter Court should be in exact conformity with the Native Courts, the suit would be determined by a law other than that by which it would have been determined in a Native Court; but that the Charter would be thereby contravened, it seems difficult to maintain. A judgment for the Defendant upon the plea, that the action was not commenced in due time, seems of the same character as the judgments for default, or departure, before referred to.

The Charter meddles not with a course of procedure in the Supreme Court, or its consequences, which shall not be inconsistent with the native laws relating to the contract, trade, or dealing, out of which the litigation may arise, and which shall not be repugnant to, or in violation of, the religion, manners, and usages of the natives. The determination of the Supreme Court upon the rights arising out of contracts, tradings, [41] or dealings, and their incidents, must be consonant with the law, religion, manners, and usages of the Gentoos, but the allowance of this plea will not constitute a determination relative to any right arising out of the contract, or dealing, to which the cause of action refers, and the course of procedure by which the plea is allowed is not otherwise than consonant to the religion, manners, and usages of the litigant parties.

It remains only to repeat the opinion of the Committee, that the judgment pronounced in the Supreme Court ought to be reversed, that the appeal should be allowed, and the cause be remitted.

b. *Iex fori*; tit. LIMITATIONS (STATUTES OF), A. III. PLACES WHERE STATUTES APPLICABLE, IV. APPLICATION OF STATUTES IN PARTICULAR PROCEEDINGS, 9. *Persons Beyond Seas*; tit. STATUTE, c. CONSTRUCTION GENERALLY, 6. *Technical Words*. S.C. 5 Moo. Ind. App. 234. The High Court of Bombay is now constituted by Letters Patent of Dec. 28, 1865 (Stat. R. and O. Rev. iv. 108), made under the Indian High Courts Act, 1861 (24 and 25 Vict. c. 104). As to applicability of English statute law to India, see note to *Lyons (Mayor of) v. East India Co.*, 1836, 1 Moo. P.C. at p. 299.]

ON PETITION FROM THE COURT OF THE GOVERNOR AND COUNCIL  
AT SIERRA LEONE.

GEORGE OSMOND PATNELLI,—*Appellant*; CHARLES HEDDLE,—  
*Respondent* \* [Feb. 7, 1852].

Leave to appeal granted from an Order of the Governor and Council at Sierra Leone, refusing a new trial, although the amount of the matter at issue was under £400, the appealable value limited by the Charter of Justice; that Court having refused to hear counsel in support of the rule on the merits of the case or the questions of law raised.

This was a petition for leave to appeal from an order of the Court of the Governor and Council of [42] the colony of Sierra Leone, which refused to grant a new trial, or to set aside a verdict of the Recorder's Court in that colony, under the following circumstances.

The Petitioner, Patnelli, brought an action in the Recorder's Court against Heddle. The action was upon a special contract, for recovery of £120, the amount of wages due to the Petitioner as factor of Heddle for one year. The declaration also contained *indebitatus* counts for £300 for the service of the Plaintiff, for work and labour done for the Defendant as clerk, and for work done by the Plaintiff, and for commission due and payable from the Defendant to the Plaintiff; and for work done by the Plaintiff as the factor and agent of the Defendant, in settling and disposing of goods and chattels of the Defendant, and for money found due from the Defendant to the Plaintiff on an account stated. The Defendant pleaded to the declaration, *non assumpsit* to the whole; misconduct, and that the Plaintiff did not account, to the first count; payment to the whole, and a set off to the whole.

These pleas were altogether denied by the Plaintiff, and put in issue.

The action was tried by a jury at the Recorder's Court, before his Honor John Carr, the Chief Justice, and the Honorable Robert Armstrong, one of the assistant Judges of the colony.

At the trial the Plaintiff's counsel, pursuant to notice, called for the production of the Defendant's books of account, which the Court refused to order. Two bills were produced in evidence by the Defendant as a set off against the Plaintiff's claim for wages, almost the whole amount of which, it was proved by one of the witnesses, was for a barter transaction be-[43]-tween the Plaintiff and the Defendant before he entered into the Defendant's service. The Plaintiff's counsel objected to so much of this account being set off against his wages as had reference to the barter transaction; but such objection was overruled by the Court, and the account admitted in evidence. The Plaintiff's counsel produced a receipt for African produce, etc., to the amount of £312 6s. 7d., which was paid to the Defendant on account of this transaction. There was also a charge against the Plaintiff on the private account of £192 8s. 1d., for goods of the Defendant said to have been given on credit by the Plaintiff, which was also objected to, as being no answer to the Plaintiff's claim for wages. The other particulars of set off were for goods entrusted by the Defendant

\* Present: Lord Cranworth, Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.



to the Plaintiff, for sale or otherwise, as his factor. This account being tendered in evidence was also objected to, on the ground that it could not be made the subject of a set-off against the Plaintiff's wages; but the Court overruled such objection, and admitted the account to be received in evidence.

The principal witness who was brought at the trial to impeach the Plaintiff's moral character and to prove the second plea, admitted in cross-examination that he was formerly in the employment of the Plaintiff, and that he never reported the alleged misconduct to the Defendant until he (the witness) had left Plaintiff's service; it also appeared from the evidence of this witness, that the Defendant had kept the Plaintiff in his employment some months after this. The Plaintiff's counsel objected to and impeached such evidence as irrelevant and inadmissible; but the Chief Justice admitted the same, and declared himself perfectly satisfied of the Plaintiff's misconduct, and [44] he finally directed the jury to find a verdict for the Defendant, which they accordingly did.

The Plaintiff then moved in the Recorder's Court for a rule to show cause why the verdict should not be set aside and a new trial had between the parties, as being contrary to law and evidence, upon various grounds, the principal in substance being—that the first count of the declaration in the cause being upon a special contract, did not create any condition precedent on the part of the Plaintiff to his right of recovering his wages in that count mentioned:—that the several sums which were given in evidence at the trial, on the part of the Defendant, under the plea of set-off to the first and second counts, ought not to have been admitted in evidence, but should have been made the subject of a cross-action by the Defendant against the Plaintiff; and that even if the amount of goods given on credit was admissible in evidence, yet as the Plaintiff had fully accounted for all the goods entrusted to him for sale or otherwise, of which the amount said to have been given on credit formed a part, the Chief Justice ought not to have told the jury what he did, namely, that the amount of goods given in credit by the Plaintiff must be deducted out of his wages. That in his charge to the jury the Chief Justice misdirected them, by telling them that before the Plaintiff could have brought this action it was incumbent on him to have rendered a full account of the goods entrusted to him by the Defendant, and that no evidence had been given of that fact; whereas he should have left the evidence before the jury, and directed them to say, whether any accounts as had been asked for by the Defendant had been delivered to him before the action was brought. That the Judge also misdirected [45] the jury by directing them to find a verdict for the Defendant, when he ought to have told the jury that upon the first issue a contract was clearly proved, and that their verdict ought to have been for the Plaintiff on that issue: that with regard to the second issue, they ought also to have found for the Plaintiff: and that with regard to the third and fourth issues, a verdict ought also to have passed for the Plaintiff.

The Court, without taking time to look into the matter and the questions of law raised, immediately refused to grant the rule.

The Petitioner appealed to the Court of the Governor and Council in the Colony against this decision refusing a new trial, and by his petition set forth in substance, the grounds argued upon the motion for a new trial, and prayed that the verdict should be set aside, and a *venire de novo* be issued for a new trial.

On the 9th of October, 1851, this petition was taken into consideration by the Court of the Governor and Council, when, without hearing the Petitioner's counsel in support of the appeal, they ordered that the same should be rejected, there not being sufficient grounds set forth to warrant the interference of the Court.

From this order, refusing to grant a new trial and set aside the verdict of the Recorder's Court, the Petitioner now presented a petition for leave to appeal. The Petitioner submitted, that the mode of proceeding adopted by the Court of the Governor and Council in rejecting his petition of appeal without hearing counsel in his behalf upon the merits of the case, was extremely irregular and informal, and prevented him from regularly and judicially contesting the principles of law laid down by his Honor the Chief Justice [46] in his directions to the jury, and that such refusal amounted to a denial of justice.

Mr. Edmund F. Moore, in support of the petition.—Although the subject-matter of the suit is under the amount prescribed by the Charter of Justice of Sierra Leone (by the charter, dated the 17th October, 1821, when the matter in dispute exceeds



£400 an appeal lies to the Queen in Council), yet, as the ruling of the Judge of the Recorder's Court, that the set-off could be admitted, was erroneous in law, *Le Loir v. Bristow* (4 Camp. 134), *Howlet v. Strickland* (1 Cowp. 56), *Turner v. Mason* (14 Mee. and Wel. 112), and the Governor and Council made the order complained of, without hearing counsel upon the point, such refusal amounts to a denial of justice, and is sufficient cause to entitle the Petitioner to the indulgence of the Committee to admit this appeal.

The Lord Justice Knight Bruce.—Their Lordships, without expressing any opinion upon the questions of law raised, are of opinion, that leave to appeal ought to be granted upon giving the usual security.

[Mews' Dig. tit. COLONY; III. APPEALS, 3. *Leave to Appeal*. As to appeals from the Supreme Court of Sierra Leone, see O. in C. of 26th Feb. 1867 (Stat. R. and O. 1899, p. 1711). As to appeals by special leave in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

[47]

### FROM SIERRA LEONE.

WILLIAM RAINY, *Appellant*: The JUSTICES of SIERRA LEONE.—  
*Respondents* [Feb. 7, 1852,\* and July 1 and 2, 1853 †].

The Judicial Committee have no jurisdiction to entertain an appeal from orders made by a Court of Record in the Colonies, inflicting fines upon a Practitioner for contempts of Court: such Court being the sole judge of what constituted the contempts [8 Moo. P.C. 54].

Upon a reference by the Colonial Office to the Judicial Committee, referring the whole matter of complaint against the Judge concerning the contempts and the infliction of the fines, for their advice and opinion; the Committee advised the Crown to remit part of the fines, which, by an Order in Council, was directed.

The Appellant in this case, an advocate and practitioner of the courts in the colony of Sierra Leone, complained of four orders of the Recorder's Court at Sierra Leone, bearing date the 19th, 20th, and 24th days of September, 1851, imposing upon him several fines, amounting in the whole to £130, for contempts of Court, alleged to have been committed by him while engaged in his professional character of advocate in conducting the cause of *Patnelli v. Heddle* (see *ante* [8 Moo. P.C.], p. 41) in the Recorder's Court, and also of a decision of that Court, dated the 13th of October, 1851, refusing a rule to set aside a writ of *capias* and *fieri* [48] *facias*, under which he was arrested for non-payment of one of the fines imposed upon him by the Court. The case was specially referred by the Secretary of State for the Colonies to the Judicial Committee, for their opinion upon the merits.

In the first instance, the Appellant presented a petition to the Judicial Committee for leave to appeal from such orders, which petition alleged, that he was admitted an advocate and attorney of the Courts in Sierra Leone in the year 1849; that in June, 1851, he was retained, in his character of advocate and attorney, by one Patnelli, to commence and prosecute an action against the Hon. Charles Heddle, a merchant of the colony, a member of Her Majesty's Council, and an assistant Judge of the Courts in the colony, upon a special contract for wages due to Patnelli, as the factor of Heddle; that the Defendant having pleaded to the action, it was tried in the Recorder's Court of Freetown, on the 17th and six following days of September, 1851, before the Chief Justice Carr and the Hon. Robert Armstrong, one of the assistant Judges, and a jury empanelled in the customary manner; that in the course of the trial the Appellant, pursuant to notice given to the Defendant, called for the production of books of accounts and certain other documents having reference to the matter at issue, but which the Defendant refused

\* Present: Lord Cranworth, the Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

† Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

to produce, upon which the Appellant respectfully appealed to the Court to call for and enforce their production, but the Chief Justice took no notice of the application, and desired the Appellant to proceed with the case, which he did, and brought it to a close; that the advocate engaged on the other side [49] having addressed the jury, he began to examine his witnesses, in the course of which he proceeded to put irregular and leading questions to them, whereupon the Appellant objected, but the Chief Justice told him to sit down, which he was compelled to do; that the Appellant, having cross-examined one of the Defendant's witnesses, he was re-examined on fresh matter, to which the Appellant objected, but the Chief Justice, in a manner which the Appellant felt was both uncourteous and arbitrary, desired him to sit down and be silent, which he was compelled to do, to the great injury of his client's case; that shortly after this circumstance had taken place, the books of the Plaintiff were called for, but the Appellant declined to produce them unless the Defendant's books were also produced, whereupon the Chief Justice immediately interposed, and asked the Appellant whether he would produce the books, to which he distinctly stated, that he could not give the other side such an unfair advantage; his Honor continued to put the question, and concluded by saying, "Then do I understand that you refuse to produce the books?" that a repetition of the same matter occurred over and over again in the course of the trial; that the Appellant made an effort to convince the Chief Justice that he was mistaken in his view of the law, and what the justice of the case required, but he was told by the Chief Justice "to hold his tongue, and be silent;" that the Appellant then claimed the right of advocating his client's case, and to submit such objections to the Court as he thought were tenable in law, but the Chief Justice again desired him "to hold his tongue, and be silent." [50] That the Defendant's counsel then proceeded to examine his witnesses, and the Appellant having again interposed and objected to the questions put as being irregular and improper, he was again desired "to be silent, and keep his seat;" but claiming and insisting on his right to interrupt the opposite counsel, and prevent his putting leading questions to the witnesses, he was ordered by the Chief Justice to be fined in the sum of £20, for contempt of Court, although, in the painful and trying position in which he was placed, he had not allowed an improper word to escape him, further than to insist upon his right to be heard; that immediately after this fine was imposed, the Chief Justice, seeming to observe that a great many persons in court felt for and sympathised with the Appellant, remarked in a violent tone, that the Appellant was acting in such a manner as to induce persons to believe that justice was not likely to be done to his client (which the Appellant felt was the fact, though he himself had said nothing indicative thereof); but upon the Chief Justice so remarking, he could not but assent thereto, whereupon the Chief Justice declared him guilty of a contempt of Court, and ordered him to be fined in the further sum of £50; that the fines having been paid, the trial of the cause proceeded; that the Appellant having, in consequence of the refusal on the part of the Defendant to produce his books, been compelled to prove by written orders and receipts some of the matters contained in them, the Defendant's counsel proposed to produce the books, so originally called for, to displace the case of the Appellant's client, to which the Appellant objected: but the Chief Justice overruled the objection, and refused to permit the Appellant to inspect the De[51]fendant's books and the usual entries therein, having reference to the matters at issue; that the Appellant insisted he had a right to inspect those entries, but the Chief Justice became very violent, and told him he would fine him if he did not sit down, and, being thus coerced, he was under the necessity of taking his seat, to the detriment of his client's case; that the Appellant said, he should tender a bill of exceptions, and immediately after entered into conversation with the Queen's Advocate (Mr. O'Neill) relative to the question of arbitration, when the Court desired him to be silent, on which the Appellant observed that whenever he got up to speak he was interrupted, whereupon the Court fined him £10; that, owing to these circumstances, the Appellant on several occasions excepted to the Chief Justice's ruling, but objections were frequently raised by the Chief Justice that the Appellant's written statements were incorrect and did not agree with his notes; and, in consequence of the frequent observations of the Chief Justice, that the Appellant had tendered bills of exceptions which were incorrect, the Appellant, on the occasion of his excepting to the Chief Justice's refusal to allow him to inspect



the entries in the Defendant's books having reference to the matters at issue, informed the Chief Justice that, as it was a very important objection, he would reduce it into writing at once, and the same was handed to the Chief Justice, who, in a menacing tone, remarked, that "the paper contained incorrect statements, and that the Court would take notice of it;" that, in consequence, the Appellant, on the next day, when an important objection was raised by him, and overruled by the Chief Justice, declined to tender any more bills of exceptions, upon which he was re-[52]-quested to explain what he meant by asserting that he was not allowed to tender any more bills of exceptions, when he drew attention to what had occurred on the previous day, and submitted, that it was tantamount to a refusal; thereupon the Chief Justice fined him £50 for contempt of Court. That the Appellant, not having paid this fine, the Chief Justice caused a writ of *capias* and *feri facias* to be issued for the amount of the fine, upon which he was arrested, but the writ having been issued without a seal, the sheriff discharged him upon an indemnity; that he moved the Recorder's Court for a rule to show cause why the writ should not be set aside as being invalid on the ground of the want of a seal, but the Chief Justice refused the rule, and he was obliged to pay the £50. The Appellant set out and referred to the minutes of the Court made by the clerk of the Court in respect to these transactions, and submitted that he felt deeply aggrieved by these arbitrary and oppressive proceedings not only in a professional and pecuniary way, but, what was far more important to him, by the imputations which had been cast upon his conduct, and the course of proceedings which had been adopted towards him; the effect of the several orders and proceedings precluding him from the fair exercise of his profession in the Recorder's Court, and made, as he submitted, without any just or proper grounds; that the orders and proceedings were wholly unwarranted, harsh, and oppressive, without proper notice given to him or opportunity afforded him to justify and defend himself, and were a violation of the just rights and privileges of the Appellant as an advocate and attorney of the Courts in the Colony of Sierra Leone, and tended to impair and bring into disrepute the administration [53] of justice in that colony; that, until such orders should be formally rescinded by an Order of Her Majesty in Council, the reproach which such orders tended to cast on his character, as an advocate and attorney practising in the Courts in the said Colony, remained unmoved; and he prayed for leave to appeal from these several orders and proceedings of the Judges of the Recorder's Court at Sierra Leone, bearing date respectively the 19th, 20th, and 24th of September, and also from the decision of that Court in refusing the rule to set aside the writ of *capias* and *feri facias* of the 30th of October, 1851; and that notice of his petition might be given to the Chief Justice and to the Honorable Robert Armstrong, the Assistant Judge concerned in the orders and proceedings.

The petition was verified by the affidavit of the Petitioner.

Mr. Edmund F. Moore, in support of the petition, cited *Smith v. The Justices of Sierra Leone* (3 Moore's P.C. Cases, 361), *In re Downie and Arrindell* (3 Moore's P.C. Cases, 414), *Morgan v. Leech* (3 Moore's P.C. Cases, 368), *In re Grant* (7 Moore's P.C. Cases, 141), to show that the Court had jurisdiction to entertain the petition.

Their Lordships took time for consideration, and on the 19th of February, 1852, delivered judgment by

Lord Cranworth.—This petition is presented by William Rainy, a practitioner at the bar of the Courts in the Colony of Sierra Leone, praying for leave to appeal, to enable him to get rid of certain fines which were imposed [54] upon him by the Court in that Colony for contempts of Court.—[His Lordship, after stating the facts from the petition, proceeded.]—Now it is the opinion, not only of the members of the Committee who heard this petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court. It is within the competency of the Court to impose fines for contempt; and, unless there exists a difference in the constitution of the Recorder's Court at Sierra Leone, the same power must be conceded to be inherent in that Court. The Recorder's Court is created by the Charter of Justice, dated the 17th of October, 1821, and is authorised to hear and determine all civil suits, actions, and pleas which may happen within the Colony; and the Charter directs,

that in all cases where the action would, if the parties were resident in England, be tried by a jury, such action shall be tried before a jury in the Court of the Recorder, according to the practice in England. That being the constitution of the Court, in regard to trial by jury, we are of opinion, that it is a Court of Record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders. All we can say is, that we have no jurisdiction to entertain such a petition impugning the propriety of such orders, and [55] praying the remission of the fines. This view is supported by the case of *Smith v. The Justices of Sierra Leone* (3 Moore's P.C. Cases, 361), to which we were referred, in which case the Judicial Committee reversed the orders disbarring a practitioner, but decided that they had no power to remit a fine imposed by a Court of Record for contempt of Court. But, in the circumstances disclosed by this petition, if Her Majesty's Secretary of State think fit to refer the matter to us, we will hear it and advise Her Majesty upon the case.

In consequence of this intimation, the Appellant presented a similar petition to Her Majesty, through the Colonial Office, setting forth the above facts, and praying that such petition might be referred to the Judicial Committee, in order that the several orders and proceedings made by the Judges of the Recorder's Court at Sierra Leone, bearing date respectively the 19th, 20th, and 24th days of September, 1851: and the decision of the Court in refusing the rule to set aside the writ of *capias* and *feri facias* of the 13th of October, 1851, might be investigated and inquired into, and that the same might be wholly rescinded, reversed, and expunged from the minutes of the Court, and that the conduct of the Chief Justice in the trial might be also inquired into; and that notice of the petition might be given to the Chief Justice, and to the Honorable Robert Armstrong, the Assistant Judge.

The matter was specially referred by the Colonial Office for the consideration of the Judicial Committee to advise the Crown.

The Chief Justice and the Assistant Justice were [56] served with a copy of the Petition. They transmitted a joint answer which, after setting out their respective appointments as judges, and the creation and constitution of the Recorder's Court at Sierra Leone (*a*), they stated, that the orders fining the Appellant for contempt of Court were made by them under the following circumstances: That on the second day of the trial in question, the Queen's Advocate opened the Defendant's case, and, upon his proceeding to examine the witnesses for the defence, the Appellant commenced a course of disorderly conduct, and several times rudely and boisterously interrupted the Queen's Advocate and Dougan, an advocate, in the examination of the witnesses, without any justifiable cause. That the Court, considering these interruptions improper and calculated to withdraw the attention of the jury from the facts of the case, besides occasioning confusion in the Court and preventing the Chief Justice from taking down the evidence, desired the Appellant to desist from such a course of proceeding, and to submit, in a proper manner, any objection he had to any question put by the adverse party; but that the admonitions and warnings of the Court produced no effect upon the Appellant. On the contrary, in the afternoon of the same day he became very disorderly, and hardly a question could be put but he rudely rose up to object. From disregarding the orders and injunctions of the Court, when [57] desired to be silent, and desist from those interruptions, the Appellant proceeded to reflect on the bench in language to the following effect: "That greater latitude was allowed to the Queen's advocate than to himself in the examination of witnesses; that the Queen's Advocate had it all his own way"—evidently with the view of leading persons to

(a) The Court of Recorder of Freetown was created by the Charter of Justice, dated the 17th of October, 1821. The Court is empowered to hear and determine all civil suits, actions or pleas which may happen within the colony. The Chief Justice, as Recorder, presides in this Court, and is aided by the Assistant Judges appointed by the Governor, from among the members of Council.



believe that the Court was indisposed to do justice to his client. That the Chief Justice, considering that such conduct could not be permitted in a Court of Justice, consulted with Mr. Armstrong as to the propriety of fining the Appellant, but Mr. Armstrong suggested that it would be better to wait until the next day, as the Appellant then appeared to be greatly excited, to which the Chief Justice assented. That on the following morning not a word of apology, regret, or explanation was offered by the Appellant for his conduct in Court on the previous day. That upon the cause being resumed he again rudely interrupted the Queen's Advocate and Dougan without any justifiable cause, and upon being admonished and desired to be silent, he again, in a disrespectful manner, refused to obey the orders and injunctions of the Court; whereupon, as the repeated warnings and admonitions from the bench had produced no effect, the Respondents felt it to be their duty to impose a fine of £20 on the Appellant for contempt of Court. That after the fine had been imposed, the Appellant continued to behave in a manner tending to obstruct the due course of the trial; and, perceiving the evil consequences of such conduct in a community such as Sierra Leone, the Chief Justice thought it advisable to bring distinctly to the notice of the Appellant the effect and tendency of his conduct, in order that he might alter [58] his bearing and behaviour in the Court, if not intentionally and purposely adopted; the more so, as he had admitted him an attorney of the Court. But, to the astonishment of the Respondents, upon the Chief Justice observing that the conduct of the Appellant was calculated to lead persons to believe that justice was not likely to be done to the Plaintiff, the Appellant, in a manner insolent and disrespectful, and while seated in his chair and with a grinning countenance, immediately replied aloud to the statement from the bench, "I can very well see that." Thereupon the Court called for an explanation or an apology, which the Appellant pertinaciously refused; and the Court, considering that his conduct and bearing had been purposely adopted, and, if unchecked, was calculated to produce the most pernicious consequences in the Colony, felt it to be an imperative duty to impose a further fine of £50 for contempt of Court. They denied the statement of the Appellant that the fine of £20 was imposed on him for objecting to any leading questions put by the opposite counsel, and alleged, that the remark of the Chief Justice was not made in a violent tone, nor made immediately after the fine was imposed. That neither of the Respondents observed persons in Court feeling for or sympathising with the Appellant, and they did not believe that any person who had a proper sense of what was due to a Court of justice could have felt any sympathy for him when the fine was inflicted. That the statements in the petition, in relation to the books of accounts of the parties to the suit, were gross misrepresentations of the conduct of the Court and of the facts as they occurred. That the Court had no power to enforce the production of the Defendant's private [59] books of account, on a notice to produce during the progress of a trial (*Habershon v. Troby*, 3 Esp. 38). That at the opening of the Court on the morning of the 20th of September, the Appellant voluntarily brought into Court the amount of the fines imposed on him the previous day, and paid the same to the clerk of the Court, telling him to count it. That subsequently to the imposition of the last of the two fines, the Appellant declared aloud in the Court "that the Court might fine him as often as it pleased, but that he would get justice elsewhere," and continued to behave in an insolent and disrespectful manner in the Court. That in the afternoon of that day the Appellant commenced an altercation with the Queen's Advocate, alleging that he had offered to settle the action by arbitration, which had been refused, and the Chief Justice, considering it right to put an end to it, there being no question of arbitration before the Court, mildly called out, "Mr. Rainy," with the view of gaining his attention, whereupon the Appellant sharply and abruptly turned round, and, addressing the bench, said, in a rude and insolent manner and with a scornful look, "Whenever I get up to speak I am interrupted; I am speaking to the Queen's Advocate," on which the Court thought it to be their duty to impose a further fine of £10. That on the 24th of September the Appellant stopped in his cross-examination of a witness, and expressed himself to the Court to the effect, "that he was not allowed to tender any more bills of exceptions." As the Court had never refused any bill of exception from him, the Chief Justice requested an explanation, and inquired whether the

bill of exception he referred to was the one he tendered at the opening of the Court yester-[60]-day. The Appellant replied he would not answer the question until he was called upon by a rule to show cause. The question was repeated, and the Appellant, who as an officer of the Court was bound to answer, continued pertinaciously to refuse, and then took up his hat and said, "he was ready to go to gaol and put an end to the trial;" the Respondents then felt it their duty to impose a further fine of £50. That the allegation that the Appellant was not allowed to tender bills of exceptions was wholly gratuitous and unfounded in fact, and after the occurrence to which it had reference (of which an explanation was given) he tendered other bills of exceptions, which were received by the Court. The answer of the Judges then further alleged, that the Appellant had made misrepresentations of what had occurred in Court. That the minutes of the Court, made by the clerk of the Court, to which the Appellant referred in his petition, were distinct from the acts of the Court, and conveyed no idea of the boisterous and disorderly conduct and demeanour of the Appellant. That the issuing the writ without seal, and refusal to grant a rule to set aside the writ of *capias* and *feri facias*, was justified in the circumstances. And they finally submitted that the orders were fully justified by the conduct of the Appellant to the Court, in support of which they referred to *The King v. Davison* (4 Bar. and Ald. 329), Carus Wilson's case (7 Q.B. Rep. 984), 2 Hawkins, 211, note (1), 8th Edit. by Curwood, 2 Strange, 1197, 4 Stephen's Blackstone, pp. 348, 352, *Levy v. Moylen* (1 Lown. Max. and Poll. 307), and prayed that the petition and appeal might be dismissed.

Affidavits were filed on both sides in support of the [61] respective cases of the Appellant and the Respondents, the Judges. These affidavits were made by parties present at the trial of *Patnelli v. Heddle* [8 Moo. P.C.], and were contradictory: on the one hand, the conduct and bearing of the Appellant was stated by some of the witnesses to have been irritating, violent, and disrespectful to the Court; while, on the other hand, it was sworn that the behaviour of the Chief Justice at the trial towards the Appellant was very violent, harsh, and unfeeling, and that the conduct of the Appellant was becoming and proper. The Appellant also filed a further affidavit himself, in reply to the Judges' case, denying the material statements made by them with regard to his demeanour at the trial.

The case now came on for hearing.

Mr. Whateley, Q.C., and Mr. Edmund F. Moore, for the Appellant—Argued, that the infliction of fines amounting to £150 upon the Appellant, in a colony where a practitioner could not realise by his professional exertions more than £500 a year, was a harsh and unjust exercise of the authority of the Court; that, although every respect was due to a Judge in the administration of justice, yet it was equally important that the Judge should respect the character of the Bar, and that they should not be curtailed in the fair exercise of their duties; that there was no such offence committed as properly constituted a contempt of Court, for there was nothing either irregular, improper, or offensive in the conduct of the Appellant towards the Court, in urging his objections to the ruling of the Court upon questions of law. That it was charged by the Petitioner, and not denied, that the Chief Justice had [62] used certain insulting expressions to the Petitioner, such as, "to hold his tongue and be silent," "to be silent and keep his seat;" and that such conduct by a Judge tended to bring Courts of justice into disrepute.

Mr. W. H. Watson, Q.C., and Mr. Lush, for the Judges—Submitted, that the fines were properly imposed by a competent Court for contempts committed by the Petitioner at the trial. *The King v. Davison* (4 Bar. and Ald. 329; see also *The King v. Almon*, Wilmot's Opinions, pp. 243, 256, 263); that what constituted a contempt was a matter which the Court at Sierra Leone were alone competent to judge. Carus Wilson's case (7 Q.B. Rep. 984-6, 1013); that the orders imposing the fines were fully justified by the conduct of the Appellant towards the Court, and to alter or rescind them would impair the authority of the Court in the administration of justice; they further contended, that fines imposed by a Court of Record, like the Recorder's Court at Sierra Leone, for contempts, could not be remitted. *Smith v. The Justices of Sierra Leone* (3 Moore's P.C. Cases, 361); and insisted, that if such fines were remitted, it would be impossible for the Chief Justice to remain in office.

Mr. Whateley, in reply.—This is not a regular appeal impeaching the legality of



orders imposing fines, but a matter specially referred by the Crown to this Committee to advise upon the whole case as to the propriety of the Judges making such orders.

[63] The Right Hon. Dr. Lushington.—It is not customary in cases referred to us like the present, to deliver the opinion of their Lordships until their report has been approved by Her Majesty.

No opinion was given by the Committee, but the report of the Committee on the petition, recommended the reduction of the fines to the sum of £60, which report was approved of by Her Majesty in Council. No order was made as to costs.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 1. *When an appeal lies generally.* See *M'Dermott v. British Guiana (Judges of)*, 1868, L.R. 2 P.C. 362, 5 Moo. P.C. (N.S.) 466; *In re Ramsay*, 1870, L.R. 3 P.C. 434, 7 Moo. P.C. (N.S.) 263; *Surendranath Banerjea v. Bengal (Chief Justice, etc., of)*, 1883, L.R. 10 Ind. App. 180; and cases collected in note to *Smith v. Sierra Leone (Justices of)*, 1841, 3 Moo. P.C. at p. 368.]

#### ON APPEAL FROM THE COURT OF CHANCERY IN THE ISLE OF MAN.

JOHN JOSEPH QUANE,—*Appellant*; MARY ANN QUANE,—*Respondent* \*  
[June 14, 1852].

The customary law of the Isle of Man respecting legitimation by subsequent marriage of the parents, was proclaimed at a Tynwald, held on the 13th of July, 1577, as follows:—"If a man get a maid or young woman with child before marriage, and within a year or two after doth marry her, if she was never slandered or defamed with any other before, that child begotten before marriage shall have his father's corbe and his farme, according to the custom of this Isle." This custom was (among other laws) propounded for the resolution of all doubts therein, to the two Deemsters and Twenty-four Keys of the Island, on the 24th of June, 1594, and was by them confirmed and answered as follows: "If a man get a maid or young woman with child, and then within a year or two after doth marry her, we judge them to be legitimate by our customary laws."

Upon a construction of this custom, held, affirming the judgment of the Court of Chancery of the Isle of Man,—

First. That such custom was not a rule of descent to lands of inheritance descending from father to son, but embraced the case of a female entitled as purchaser under the trusts of a Will;

Second. That the custom applied to a case where more than one child had been born before marriage; and

Third. That a child was legitimate although more than two years had elapsed between the time the woman was gotten with child, and the marriage of the parents.

This was a suit instituted in the Court of Chancery in the Isle of Man. The object of the bill was to have [64] conveyed to the Respondent, as the eldest daughter and heiress-at-law of William Quane, deceased, lands and premises in the Island devised by the Will of Quane's father, in trust, to be conveyed to the eldest daughter of William Quane. The sole question raised in such suit and at issue by the appeal was, whether the Respondent was so entitled, as she was born out of lawful wedlock, William Quane having married her mother subsequent to her birth; and such question involved this consideration, whether, according to the customary law and usage of the Isle of Man, a female whose parents were married more than two

\* Present: Lord Cranworth, Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

years after her birth was legitimated, could take real estate in the Island, in the case of a limitation by purchase.

The circumstances which gave rise to this question were these:—

John Quane, of the Isle of Man, by his Will, dated the 27th of August, 1833, gave, devised, and bequeathed unto Haywood, Hay, and Bacon, his executors, certain real estate in the Island, in trust, among other things, to pay over the whole of the rents, issues, and profits arising therefrom, or such part as the executors, in their discretion, might think necessary and proper, for and towards the maintenance of his son William Quane, for life; and at his decease, in trust, to convey over the same premises to the [65] eldest son of William Quane; and in case of no sons, then to the eldest daughter of William Quane, and her heirs and assigns for ever; and in case of no daughters, in trust, to pay over the rents and profits to Martha Quane, during the lifetime of her husband John Joseph Quane, and on her decease to pay over the rents and profits to John Joseph Quane, for life; and upon the decease of John Joseph Quane, upon further trust, to convey over the premises to the eldest son of John Joseph Quane, and his heirs and assigns for ever. In this Will the Testator in several places used the term "lawfully begotten."

The Testator died in 1834, and Haywood and Hay were appointed, by the Ecclesiastical Court, executors; Bacon, the other executor, having renounced.

In the beginning of the year 1845, William Quane cohabited with the Respondent's mother. Previously to her cohabitation with Quane, the Respondent's mother was of good character. During the time that Quane and the Respondent's mother cohabited together there were issue two children, the Respondent, who was born on the 21st of November, 1845, and another female child, named Janet Jane, who was born more than a year subsequently. On the 4th of November, 1847, Quane married the Respondent's mother. He died in July, 1848, leaving no legitimate children, other than the Respondent and her sister.

John Joseph Quane died in 1839, leaving the Appellant his heir-at-law, who claimed the lands and premises devised by the Testator, as being the eldest son of John Joseph Quane, and heir-at-law of William Quane. The Respondent, on the other hand, claimed the same as being the eldest daughter of William Quane.

It appeared that, among certain old customs of the [66] Isle of Man, given for law, which had never been put in writing, but used and allowed of long time theretofore, was the following, which was proclaimed to be holden for law, at the Tynwald day at St. John's Chapel, on the 13th of July, 1577:—"Alsoe we give for law, that if a man get a maid or young woman with child before marriage, and within a year or two after doth marry her, if she was never slandered or defamed with any other before, that child begotten before marriage shall have his father's corbe and his farme, according to the custom of this isle" (Mills' Statute Laws of the Isle of Man, p. 62; Stowell's Statutes and Ordinances, p. 34; Report of the Commissioners of Enquiry for the Isle of Man, 1792, Appendix (A). No. 22; the *Lex Scripta* of the Isle of Man, pp. 70, 75; and see Wood's Isle of Man, p. 241).

This law was, among other laws of the Isle of Man, propounded for the resolution of all doubts therein to the two Deemsters and Twenty-four Keys of the Isle of Man, by Randolph Stanley, Esq., then Captain of the Isle of Man, on the 24th of June, 1594, at the Tynwald then holden; and the answer of the two Deemsters and Twenty-four Keys, in reference to this law, was as follows:—"If a man get a maid or young woman with child, and then within a yeare or two after doth marry her, we judge them to be legitimate by our customary law" (Mills' Statute Laws of the Isle of Man, p. 67).

On the 4th of December, 1848, the Respondent, by her guardians and next friends, Cleater and Stewart, filed a bill in the Court of Chancery of the Island, against Heywood and Hay, and against the Appellant, then an infant, by Martha Quane and Duff, his guardians, setting forth, amongst other things, the Will of John Quane, the birth of herself [67] and her sister as before mentioned, the marriage of William Quane and her mother, and the death of William Quane, leaving her, the Respondent, his eldest daughter and heiress-at-law, him surviving, and praying, that Heywood and Hay might be ordered to convey to her the several dwelling-houses, lands, and premises devised by the Will of John Quane, according to the trusts, terms, and conditions thereof.



The Defendant, Heywood, put in his answer to the Bill, stating, amongst other things, that he was ready and willing to fulfil and execute the trusts created by the Will of John Quane, and to convey over the several houses, lands, and premises to the Respondent, if she should be adjudged, by competent authority, legally entitled thereto; but that as the Appellant claimed to be heir-at-law of William Quane, and as such entitled to a conveyance of the property, and had applied to him, he submitted that he would not be justified in executing a conveyance without the directions of the Court.

The Appellant, by Duff, one of his guardians, by his answer, stated, that William Quane was a man of very dissolute and depraved habits, and that, some time in the year 1834, he induced one Emma Bell, of the town of Douglas, who then was his servant, to cohabit with him, and continued so to cohabit till 1839, leaving issue; that during that time her sister, Frances Bell, also lived and cohabited with him, and so continued up to the time of her decease, which happened in the year 1843, and that she also had issue of such cohabitation; and the Appellant, by his answer, denied that the mother of the Respondent was a young woman of [68] virtuous habits, stating, that she was well acquainted with the depraved and dissolute habits of William Quane, and of his having cohabited with Emma and Frances Bell; notwithstanding which, immediately upon the decease of Frances Bell, she being single and unmarried, gave birth to two illegitimate children, namely, the Respondent and her sister; and he stated, that he did not know whether such children were children of William Quane, but had understood and believed that such children were never affiliated: and the Defendant further stated, that he had been informed and believed that some time in the year 1847, the Vicar and Wardens of the parish of Braddon having threatened to present William Quane and the Respondent's mother to the Ecclesiastical Court of the Isle of Man, for living in such a state of fornication, the Respondent's mother and Quane, in order to avoid such prosecution, did, on the 4th of November, 1847, intermarry; and he submitted that by such marriage the Respondent and her sister did not become the legitimate children of William Quane and Mary Ann his wife, or entitled to inherit the real property of William Quane; and, in conclusion, he contended and submitted, that he, and not the Respondent, was the heir-at-law of William Quane, and as such was entitled to a conveyance from Heywood and Hay, of the several dwelling-houses and premises devised by the Will of John Quane. The other Defendant, Hay, also put in an answer to the bill.

Both parties entered into evidence. No evidence was adduced by the Defendants, to impeach the character of the Respondent's mother prior to her connection with Quane: on the contrary, it was shown by [69] evidence that up to that time she bore a good character as a virtuous and respectable girl.

The cause was heard at the Chancery Court held at Castle Rushen, on the 11th of July, 1850, when it was ordered and decreed, that the Defendants, Heywood and Hay, should, at the expense of the complainant, and after being paid by her the costs they had been put to in the suit, to be taxed, execute a conveyance of the lands and premises in the bill mentioned and described to and in favour of the complainant, as the eldest daughter of William Quane, deceased, to hold to her, and her heirs and assigns, in terms of the Will.

From this decree the present appeal was brought.

Mr. Campbell, Q.C., and Mr. J. T. Humphrey, in support of the appeal.—The question for decision is, whether the Respondent, who claims as heiress-at-law, according to the law of the Island, being the eldest of two daughters of William Quane, born before his marriage with her mother, is entitled to the estate in question, under the Will of John Quane. We submit, that she is not so entitled, as she does not fulfil the description contained in his Will, of "the eldest daughter of William Quane." Viewing this as a mere question of intention, it is apparent that the Will affords no evidence that the Respondent was intended. The Testator clearly had in contemplation, legitimately procreated children: for in another part of the Will he speaks of children "lawfully begotten." The case insisted upon by the Respondent, in support of her title, of legitimation by the subsequent marriage of her parents, does not apply. That doctrine is founded upon the civil law, which never prevailed in the Island. [70] The feudal law is the law in force in the Isle

of Man. First, we contend, even if a custom formerly existed in the Island, such as alleged by the Respondent, of legitimation by subsequent marriage, it is now obsolete and virtually repealed; and, secondly, assuming it to be a remnant of the feudal law, and to form at the present time part of the law in force in the Island, it would not apply to this case. Its application is confined, strictly as a rule of descent, to lands of inheritance descending from father to son, and in no circumstances could such a custom be construed to extend to a case of limitation by purchase, without violating the express words of this customary law as declared by the Deemsters and Keys in 1577 and 1594. This construction is fortified by a consideration of the peculiar tenure of land in the Island; such tenure being copyhold. Now the first object of the lord was to get a tenant, and the custom relied on was obviously intended for the benefit of the lord alone, in order that, upon the death of the tenant without lawful issue, the tenant's bastard might be let in, that the lands might not go untitled, or the lord be left without a soldier. No female succession was known in the Island at the date of the promulgation of the customary law in question. The very passage used, that he "shall have his father's corbe and his farme," confines it to a son who takes by descent. This is the more apparent, as the father's "corbe," which was to go to the son, consisted of his father's "bewe and arrows, sword and buckler" (Mills' Statute Laws of the Isle of Man, p. 28), his implements of war for the defence of the lord and his property. By the word "corbe" is meant a certain part of the personal estate to which the heir of a deceased person is entitled, and a clear difference is defined by the Mancks law [71] between a man's "corbe" and a woman's "corbe" (Mills' Statute Laws of the Isle of Man, p. 28; and see p. 283, where the law is altered, and a substitution of a firelock for the "corbe" made). The corbes pertaining to a man are those above enumerated, and were given for law in 1419. Another reason is, that a "corbe" cannot be bequeathed (Mills' Statute Laws of the Isle of Man, p. 51). It is a part of the personal estate to which the heir of the deceased is entitled. So when a tenant of farme-lands or quarter-lands dies, the farme-lands or quarter-lands descend to his eldest son (Mills' Statute Laws of the Isle of Man, pp. 107, 117). Putting, however, the proposition of the Respondent at the highest, and assuming that such custom is not limited to descent from father to son, but embraces the case of an eldest daughter claiming by descent or purchase, there being no co-heiresses by the Mancks law; yet another important consideration arises, which shows that the custom relied upon does not reach the circumstances of this case. The marriage of the Respondent's parents was more than two years after her birth. Now the words of the custom are, "within a year or two," which clearly draws the distinction between the begetting and the date of the birth of the child. She was not born within the time prescribed.—[The Lord Justice Knight Bruce: Your argument requires a literal interpretation to be given to these loose words "within a year or two" to apply it to the facts of this case. Do you affirm that the time here limited applies to the time of the begetting of the child, and not merely to the date of the birth?—Yes, it refers to conception. So it is by the law of Scotland (Ersk. Inst. B. I. tit. 6, sec. 52), where the doctrine of legitimation, *per subsequens matrimonii*, prevails. In a question as to [72] the paternity of a child born antecedent to the marriage of the alleged father with the mother, it was decided in *Innes v. Innes* (2 Shaw and Maclean, 417), that there was no presumption that he was the father, and that the fact of paternity must be proved. The Respondent, we submit, does not bring herself within this custom. There is no evidence of paternity. It surely cannot be urged that this custom can apply to make a child legitimate when it is the offspring of a "defamed" woman. The Respondent could only be legitimated by the marriage of her parents within the time enunciated, namely, "a year or two," which was not complied with. Neither did it apply to a case of limitation, as the custom relates only to a right of descent.

The Solicitor-General (Sir W. P. Wood), and Mr. A. Gordon, for the Respondent, were not called upon.

Lord Cranworth.—We need not trouble you, for we think the matter to be absolutely without doubt. In no country does the state of the law exist as contended for by the Appellant. It is a law very common in other countries, that, *per*



*subsequens matrimonium*, illegitimate children stand in the same position as if born during wedlock. Such a law is in force in Scotland, to which the law of the Isle of Man may have been in some degree assimilated. If the law of Scotland is to be the rule to be applied, there can be no doubt whatever of the legitimacy of the Respondent and her sister. What is now relied on by the Appellant is, that a strict construction ought to be placed on a loose expression of a law declared three centuries ago. [73] The words of the law are, "within a year or two." Now it appears that the Governor of the Island, having doubts upon the customary laws in force, puts, among others, a question on this very point, and receives an answer from the Deemsters and Twenty-four Keys, which must, we think, be taken as a correct exposition of the law. The answer is set out in Mills' Statute Laws of the Isle of Man, p. 67, and is in these words: "If a man get a maid with child, or young woman with child, and then within a yeare or two after doth marry her, we judge them to be legitimate by our customary law."

Now we think, without calling into aid the Statutes cited in the argument which the Appellant referred to for illustration of what the law of the Island was, that the Respondent comes within the meaning of the answer. But then it is suggested, that a son could only succeed by descent, and that the custom does not extend to a case of limitation by purchase, as the words used by the Deemsters and Keys are "his corbe," or at any rate the succession was confined to the "corbe." But we are of opinion, that such a construction would be straining the law in a way in which it was never intended to be limited. For instance, the word "them" was obviously intended to apply to children, and to make "them" legitimate, clearly could not be confined to a son.

Then it is urged, that the marriage must be had "within a year or two" which, the Appellant contends, means from the begetting of the child, and not the date of the birth, to make the children legitimate. This would be restricting words in a way not contemplated. The construction put upon the expression "defamed" is untenable; the answer of the Deemsters and Keys means, that the offspring [74] of a deflowered woman are legitimate. We are of opinion that it is not necessary to have recourse to any such nice exposition as is now contended for by the Appellant. Upon the whole, we are of opinion, that the decree of the Court below was right and proper, and that the appeal was unfounded and vexatious, and must be dismissed with costs (a).

[Mews' Dig. tit. ISLE OF MAN; 2. LEGISLATURE, *Laws and Customs*.]

(a) Legitimation per subsequens matrimonii is admitted, with some modifications, by the law of Scotland, France, Spain, Portugal, Germany, and most of the Continental States in Europe, and also by some of the States in America. See 1 Burges' Comms. on Col. and For. Laws, 101; Hubback on Succession, 367; Butler's note (a) to Co. Lit. 245. It is remarkable that this doctrine of the civil law never obtained a footing in England, although it was attempted to be introduced in the reign of Henry III. See the Statute of Merton, 20th Henry III., *Birtwhistle v. Vardill* (7 Clk. and Fin. 929), in which case the law in question is elaborately treated by Lord Chief Justice Tindal.

The following authorities upon this question, for which the reporter is indebted to his friend Mr. A. Gordon, show the countries where this rule of the civil law prevails:—

Scotland.—Erskine's Inst. B. I. tit. 6, § 52.

France.—Code Civil, Art. 331, 332, 333; Merlin's Rep. tit. "Legitimation," sect. ii. § 3; Pothier Traité du Contrat de Mariage, partie v. cap. ii. art. 2, sec. 5; Houard's Dict. de la Coutume de Normandie, verb. "Legitimation," tom. 3, p. 105; Terrien's Commentaries du droit civil, observé au pays et Duché de Normandie, Livre ii. chap. 3, pp. 21, 22.

Portugal.—Paschalis. Institutionum, Juris Civilis, lib. ii. tit. v. § xiv., and lib. iii. tit. viii.; De successionibus ab intestato, § xiv.

Spain.—Instituciones del Derecho Civil de Castilla; Libro Segundo De las Cosas, § iii. (Madrid, 1805.) Johnston's Trans. of the Laws of Spain, p. 129. (London, 1825.)



## [75] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

JOHN VAUX,—*Appellant*; PETRUS SHEFFER and son,—*Respondents* \* [Dec. 16, 1850, and Feb. 18 and 19, 1852].

## THE SHIP "IMMAGANDA SARA CLASINA."

In collision, the rule of the Admiralty Court, where both parties are mutually blameable in not taking necessary measures to prevent accidents, is to apportion equally the damages between the respective owners of the vessels. The owners of an English vessel brought an action for damages against a Foreign vessel, whose owners also brought a cross action against the English vessel. By an arrangement between the parties the two actions were heard as one cause. The Admiralty Court held, that the English vessel was the cause of the damage, and dismissed the Foreign vessel from the action. An appeal from such judgment and complaint of nullity sustained by the Appellate Court, the Judicial Committee being of opinion, that both vessels were in fault, and decreed, in such circumstances, the damage to be equally divided between them, remitting the cause to the Court below, to ascertain the amount of damage, and to divide the same into moieties between the owners of the respective vessels.

This was a cause of collision promoted by the Appellant, the sole owner of the barque *New Forest*, against the ship *Immaganda Sara Clasina*. The action was entered in the sum of £500. A cross action was also entered, in the sum of £2200, on behalf of the Respondents, the owners of [76] the *Immaganda Sara Clasina*, against the barque *New Forest*, but it was agreed between the respective parties that the decision in the cause of Sheffer and son against the *New Forest* should be of the same tenor and effect as in the cause of Vaux against the ship *Immaganda Sara Clasina*.

The collision took place in the Channel on the 19th of January, 1850.

The act on petition, brought in by the owner of the *New Forest*, alleged, that at about half-past seven o'clock p.m. on the 19th of January, 1850, the barque *New Forest*, in the prosecution of her voyage from London to the river La Plata in South America, whither she was bound, was about five leagues from the Isle of Wight, and standing to the W.S.W., close hauled on the starboard tack, with single-reefed topsail, jib, courses, and spanker set, the wind blowing fresh from the N.W., and was going at the rate of about four knots an hour; and that it was not so dark at the time but vessels could be seen one from another at the distance of full a quarter of a mile. That it was in this state of things, Budden, the second mate, being then at the helm of the barque, and the carpenter, cook, and a seamen being forward, and keeping a good look out, the ship *Immaganda Sara Clasina* was seen by the watch standing up channel, apparently under all sail, with the wind several points free, and sailing at the rate of about eight knots an hour, about two points on the barque's weather-bow, and approaching the barque; and that thereupon the carpenter (Adamson) held up a brilliant signal-lantern from the

Denmark.—*Leges Danicæ*, lib. v. cap. ii. § 32, p. 365. (Edit. 1710.)

Sweden.—*Codex Legum Svecicarum*, *Receptus et Approbatus in Comitibus Stockholmensibus*, cap. viii. *De jure hæreditatis*, 1734.

Hungary.—*Epitome Inst. Juris Hungarici*, by Markovici (Buda, 1822), Lib. i. cap. x. "*De Legitimatione et Adoptione*." *Elementa Juris Feudalis*, by Matthias Vucbretics (Buda, 1824), Par. ii. § 87.

America.—*Code of Louisiana*, Art. 219.

\* This appeal was twice argued: first, on the 16th of December, 1850, before Lord Langdale, Mr. Baron Parke, the Right Hon. Sir Herbert Jenner Fust, and the Right Hon. Sir Edward Ryan; and secondly, on the 18th and 19th of February, 1852, before Mr. Baron Parke, Lord Cranworth, the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

fore-rigging on the starboard side, and with the rest of the watch loudly hailed the ship to keep clear of the barque, and which hailing brought up on [77] deck the master and the rest of the crew of the barque. That no answer, however, was returned to such hailing, and that no alteration whatever was made in the course, either in consequence of such hailing or otherwise, until she came within about a cable's length of the barque, when, and then only, her helm was ported; but that it was then too late to prevent a collision between the two vessels; whereupon, in order to ease the blow as much as possible, and save her from total destruction, Adamson called out to Budden to starboard the helm, which order was instantly obeyed, and the barque happily answered her helm; but in less than a minute after the ship ran stem on into her, striking her a heavy blow on the starboard quarter, which cut down the paint streaks, and carried away the bulwarks, stanchions, and quarter-timbers on the starboard side, and damaged the stern of the barque, and also carried away her mizzen-mast and the sails, boom, gaff, and gear belonging thereto, stove in the round-house, and did other very considerable damage to the barque. That the ship, however, kept her course, and refused to lay by the barque, although loudly hailed so to do; and the barque, in consequence of her crippled state, was compelled to be and was hauled to the wind on the port tack, and stood for Southampton, where she arrived, moored, and had her damages repaired. And it was further alleged, that the collision was imputable solely to the negligence or other misconduct of those on board the *Immaganda Sara Clasina*, in not (as it was their duty to have done) bearing away and keeping her clear of the barque, which was close hauled on the starboard tack at the time, and was not in any sort or [78] degree imputable to the barque or any person on board of her.

The answer of Sheffer and son, of Amsterdam, the owners of the *Immaganda Sara Clasina*, alleged that the *Immaganda Sara Clasina* left Batavia on the 31st of August, 1849, bound for Amsterdam. That in the prosecution of her voyage home, on the 15th of January, 1850, at half-past seven P.M., she was steering a course (N.E. true) E.N.E.  $\frac{1}{4}$  E. by compass, the wind being still (W.N.W. true) N.W.  $\frac{1}{4}$  N. by compass, and blowing a topgallant breeze, having only her courses, topsails and maintopgallant sail set, and going at the rate of not more than six knots an hour. That at such time all hands were on deck, as is the invariable custom on board Dutch ships when in the channel between the hours of seven and eight P.M.: that a seaman named Dingster was at the helm, Zoetelief, the master, and Zuyderduin, the mate, were on the quarter-deck, and close to the man at the wheel, and all the rest of the crew were on the main and fore deck, the watch, consisting of ten men, being in the bows, five in the larboard bow and five in the starboard bow, and were keeping a strict and proper look-out: that at the time, the barque *New Forest* was seen at short distance a-head, rather on the larboard bow; that the ship was instantly reported by Jacobus Vully (one of those on the look-out in the larboard bow) who called out "ship a-head": that Zuyderduin instantly ran forward to the larboard bow and saw the *New Forest*, which was then very near, although at a greater distance than a cable's length, but that, from the haze and darkness of the evening, it was at first uncertain, [79] as her masts were in one, whether her stem or stern was towards the ship, viz. whether she was proceeding up or down channel: that the said Zuyderduin (knowing that in either case the ship must give way to the *New Forest*, and that if she were proceeding down channel she must, from the then state of the wind, be on the starboard tack) instantly called out "port, hard-a-port," which order was repeated by Zoetelief to the man at the wheel, who immediately put the ship's helm hard-a-port, and she began to bear away rapidly: and that, as a further precaution, a light was exhibited over the ship's larboard bow in order to warn those on board the *New Forest* that her helm had been ported, and that she was bearing away. That no light whatever was seen, nor was any hailing heard, from on board the *New Forest*. And it was denied that the *Immaganda Sara Clasina* was, or could have been, seen about two points, or at all, on the weather bow of the *New Forest*, as the act on petition alleged. And it was further alleged that by reason of the ship's helm having been put hard-a-port, her course was altered from (N.E. true) E.N.E.  $\frac{1}{4}$  E. by compass to (S.E. true) S.S.E.  $\frac{1}{4}$  S. by compass; but that the crew of the *New Forest* (which was proceeding down channel on the starboard tack) instead of



keeping their course as they could and ought to have done (whereby both vessels would have gone clear of each other), put their vessel's helm to starboard, at the same time that the ship's helm was put to port, and thus brought the *New Forest* across the ship's bows, thereby causing the latter to come into collision with the *New Forest's* starboard quarter. That in consequence of the collision the ship's head and the [80] greater part of her cutwater and head-rails, together with her jib-boom, were carried away, the lower part of her cutwater was forced over to starboard to an angle of forty-five degrees, and she sustained other considerable damage. And it was denied that the ship kept her course and refused to lay by the barque, although loudly hailed to do so, as alleged by the act on petition: on the contrary, the answer expressly alleged that the barque *Immaganda Sara Clasina* lay-to until daylight, not however in consequence of the hailing (if any) from the *New Forest*, as no hailing whatever was heard, but by reason of her damaged state, and to enable her crew to clear away the wreck and otherwise, as necessary for the preservation of their ship and cargo. And it was further alleged, that at daylight the Needles Rocks, at west end of the Isle of Wight, were observed distant about twelve miles, and it having been ascertained that the ship had been very seriously injured by the collision, and that it would be unsafe for her to proceed on her voyage without undergoing repairs, a pilot, and subsequently a steam-tug, was engaged to take the ship into Portsmouth harbour, where she arrived at about half-past two P.M. of the 20th. And it was denied, that the collision was in any manner imputable to the negligence or other misconduct of those on board the *Immaganda Sara Clasina*, as alleged by the act on petition: on the contrary, it expressly alleged that no blame whatever was attributable to the *Immaganda Sara Clasina*, or to her master or any of her crew, who did all in their power to prevent a collision with any vessel by keeping a good and proper look-out, and who, on the barque *New Forest* being first seen [81] and reported, agreeable to the recognised rule of navigation for vessels in that respect, ported her helm and showed a light, but that the collision was wholly and entirely attributable to the carelessness, or the want of skill, and unseamanlike conduct on the part of those, or some of those, on board the barque *New Forest*, who from want of a good look-out, or otherwise, instead of keeping their course, as they could and ought to have done, starboarded their vessel's helm, and thus occasioned the collision as aforesaid.

The evidence was conflicting. On the part of the owners of the *New Forest*, the protest and affidavit of Laing the master and commander was put in, and affidavits of Budden the second mate, Adamson the carpenter, McKellon the cook, and Dennis a seaman. In the protest it was stated, that the *New Forest* saw the *Immaganda Sara Clasina* some 500 yards off, and hailed her, but that the ship continued her course until within about a cable's length, when the helm of the ship was ported; when seeing that a collision was then inevitable, the helm of the *New Forest* was starboarded in order to ease the blow, and prevent otherwise inevitable destruction. That Budden and Adamson were on deck the whole time, and hailed the ship, but no answer was returned to such hailing, but that it brought the master and the rest of the crew of the *New Forest* on deck. On the part of the owners of the *Immaganda Sara Clasina*, the witnesses, consisting of Zoetelief the master, and others of the crew, swore that they kept a good look-out on deck, that the night was dark, and that when they saw the *New Forest* she was at about a cable's distance, or, as the master said, 500 yards, [82] when they immediately ported their helm, which would have avoided the collision, if the *New Forest* had not altered her course by starboarding.

The Judge of the Admiralty (the Right Hon. Dr. Lushington) was assisted by two of the Trinity Masters, and by his decree, dated the 14th of May, 1850, was of opinion, that the *New Forest* was alone to blame. The material part of his judgment was as follows:—

"The Trinity Masters and myself all concur in opinion, that this measure of starboarding the helm of the barque was erroneous, and not justified by the circumstances of the case, even upon the statement of the owner of the barque himself. The barque ought to have kept her course or ported her helm, in which case, even at the distance stated by the barque when the ship first ported, in all probability no collision would have taken place: the barque, therefore, is to blame.



"But there is another question, namely, whether the ship was also to blame; whether, though she pursued the right measure in porting her helm, it was not done too late, either in consequence of an insufficient look-out, or from some other cause.

"Now, I must say, that the Court is greatly indebted to the Trinity Masters for the very strict attention they paid to this case, and for the candour with which they delivered their opinion. It has happened, as must occasionally occur where honourable men have to form opinions upon difficult questions, that they do not agree. One gentleman is of opinion that there was an unnecessary and blameable delay in porting the helm of the ship; the other thinks that no such delay is proved. My first im-[83]-pression (I think it right to state it), was, that there must have been some negligence or delay on the part of the ship; but, having very carefully and painfully reconsidered the case, I have satisfied my mind that there is no adequate proof of any culpable delay on the part of the ship. I must, therefore, pronounce that the barque alone was to blame for the collision. I think that the collision arose from the mistake of Adamson in ordering the barque's helm to be starboarded, and that the ship did port her helm in time to have prevented a collision, if the helm of the barque had not been starboarded. The ship came round from N.E. to S.E., and also exhibited a light on the larboard bow. I must, therefore, pronounce, that the consequences of the collision must fall upon the *New Forest*."

From this decree the owner of the *New Forest* appealed.

By an act of the Court, bearing date the 28th of May, 1850, before a surrogate of the Committee, both proctors consented and agreed that the Order in Council of Her Majesty made respecting the issue of the appeal, should be of the same tenor and effect as regarded the interests of their respective parties as the Order in Council of Her Majesty to be made on the appeal of Vaux from the interlocutory decree of the Court below pronounced in the cause against the ship *Immaganda Sara Clasina*.

The appeal was argued (Dec. 16, 1850), in the first instance, by Dr. Addams and Dr. Twiss for the Appellant; and Sir Frederick Thesiger, Q.C., and Dr. Jenner, for the Respondents.

[84] The arguments turned entirely upon the evidence imputing neglect to the respective masters of the vessels as the cause of the collision. Upon the question, whether the rule of the Trinity House ought not to have been observed, or whether such rule, if a collision could be avoided, ought not to yield to circumstances, *The Columbine* (2 W. Rob. 27), *The Iron Duke* (2 W. Rob. 377), and *The General Steam Navigation Co. v. Tonkin* (4 Moore's P.C. Cases, 314) were cited.

The case, after standing over for judgment, was directed to be re-argued, and two sailing masters of the Royal Navy were summoned to attend the Judicial Committee on the hearing.

Accordingly, the case was re-argued (Feb. 18, 1852) by same counsel. At the conclusion of the argument,

Lord Cranworth intimated that their Lordships would consider their judgment, as they thought that the case was not free from doubt. His Lordship said that the Trinity Masters, in the Court below, were divided in opinion, one of them thinking that there was an unnecessary and blameable delay in porting the helm of the *Immaganda Sara Clasina*. The other thinking that no such delay was proved, and the learned Judge being of opinion, that no adequate proof of culpable delay on the part of the ship was established, pronounced against the barque. It is unnecessary, his Lordship continued, to say, what would have been our opinion, in this case, if we were to be guided by the opinions of the Trinity Masters alone; but we have had the advantage of the advice of the sailing masters sum-[85]-moned to assist us, and at present we entertain a very strong opinion that neither party was right, but that both were wrong. The rules of the Trinity House are not imperative, and must yield to circumstances, if a collision can be avoided by a departure from those rules. In consequence of the view we entertain, that both parties are to blame, a question arises whether, according to the rule of the Admiralty Court, the damage ought to be divided between the respective owners, as each vessel was to blame. In these circumstances, we think that the parties ought to have an opportunity of arguing that point, and we will hear one counsel on each side upon that point. Our

reason for allowing further argument is, that this point was not before the Court below, and of course not here upon appeal from such finding.

Sir Frederick Thesiger, Q.C., was then heard for the owners of the *Immaganda Sara Clasina* upon this point.—No blame is attributable to us. The evidence shows that the *New Forest* was wrong. According to the general laws of navigation, a vessel on the larboard tack is to give way to a vessel on the starboard tack. The doctrine of the Admiralty Court is clear, that if there is a probability of a collision, a vessel on the larboard tack, although close hauled, is bound to give way to a vessel on the starboard tack. *The Celt* (3 Hagg. Adm. Rep. 321), *The Ann and Mary* (2 W. Rob. 189), *The Traveller* (2 W. Rob. 197), *The Sappho* (9 Jurist, 560). The damage being occasioned by the sole fault of the *New Forest* in starboarding, instead of keeping her course, the [86] rule of equal division of damage does not arise. It is not a case in which such a rule ought to be applied.

Dr. Addams, for the owner of the *New Forest*.—The evidence shows that the blame was solely attributable to the *Immaganda Sara Clasina*; but, if it should be considered that the collision was inevitable, and that both parties were respectively culpable, then the rule of the Admiralty Court is, that the loss is to be equally apportioned. *The Seringapatam* (3 W. Rob. 38), *Hay v. Le Neve* (2 Shaw's App. Cases, 395). So at Common Law. *De Vaur v. Salvador* (4 Ad. and Ell. 420), Abbott "On Shipping," p. 202 (6th Edit. by Shee).

Lord Cranworth.—This case was argued before us yesterday, when the matter stood over for further argument in consequence of the opinions we received from the sailing masters that, under the circumstances, it was not proper for the *Immaganda Sara Clasina* to have ported, but that she ought to have tacked in her course. But it has been suggested, and we must confess with very great weight, that it is very difficult, when dealing with a question like the present, to say who caused the collision, as both parties appear to have endeavoured to avoid it, and by so doing to have been in some measure to blame. In the Court below it was considered by the learned Judge that it was the duty of the *Immaganda Sara Clasina* to have given way, and the *New Forest* to have kept her course. [87] This is no doubt perfectly correct according to the established rules of navigation laid down by the Trinity House, and we have considered all that, and felt that, unless absolutely necessary to prevent a collision, those rules ought to be followed.

As the matter stands upon the evidence, we have come to the conclusion, that it was not necessary for the *New Forest* to have diverted her course, and she did wrong in diverging from it; but, we also think that the *Immaganda Sara Clasina* ought immediately, on such diversion being made by the *New Forest*, to have ported her helm, and that the master did not port so soon as he ought to have done.

That being so, the question is, whether the collision resulted from that neglect, or was the result of the misconduct of both sides. We have come to the conclusion, that there was negligence on both sides, and this is the view taken by the sailing masters: that the master of the *New Forest* did not change his course the moment he saw the *Immaganda Sara Clasina* port her helm. It is in evidence that he ran forward and then ported her helm, but it was too late then to avoid the collision. Now the difference of a single second in such circumstances might have prevented the collision: and such porting probably induced the *New Forest* to divert her course, which was clearly wrong.

Upon the whole, therefore, we are of opinion, that both vessels were to blame, and that the damages must be divided between them, according to the rule in such cases, provided in the Admiralty Courts. We are not satisfied that the *Immaganda Sara Clasina* was not going at a greater speed than she ought to have been going. There will be no costs.

[88] The following report and Order in Council was made upon the appeal:—

The Lords of the Committee, in obedience to your Majesty's general Order of reference took the petition into consideration, and in pursuance of the agreement and consent before recited, do agree humbly to report to your Majesty their opinion in favour of the appeal, and complaint of nullity, made on behalf of Vaux, that the decree or sentence of the Judge of the Court below, appealed from, ought to be reversed: and in the principal cause, that the sentence in question thereon ought to



be pronounced to have been owing to the neglect or default of the master, officers, and crew of the ship or vessel, the *Immaganda Sara Clasina*, and the master, officers, and crew of the barque or vessel *New Forest*; and that the damage done to the barque or vessel *New Forest* ought to be borne equally by the owners of the ship or vessel *Immaganda Sara Clasina*, and the owners of the barque or vessel *New Forest*; and that the moiety only of the damage pronounced for in the cause ought to be pronounced for; and that Petrus Wilmond and Cornelius Van Wellege Dingvenz (trading under the firm of Sheffer, otherwise Sheffer and Son), and the bail given on behalf of Messrs. Petrus Sheffer and Son, in the Court below, to answer the action only, ought to be condemned in a moiety of the damage pronounced for; and that the same ought to be referred, together with all accounts or vouchers brought in, or hereafter to be brought in, relative thereto, to the registrar of the Court below, assisted by merchants, to report the amount thereof; and, subject to the tenor or recommendation of such, [89] their Lordships ordered the cause to be remitted, with all its incidents, to the Judge from whom the same was brought."

Her Majesty, having taken the report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of what was therein recommended; and to order, as it was thereby ordered, that the same be duly and punctually complied with and carried into execution: whereof all persons whom it may concern were to take notice and govern themselves accordingly.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 6. *Division of loss*: 11. *The Regulations*; a. *Generally*. S.C., below, 7 N. of C. 582. See *The Linda*, 1857, 4 Jur. N.S. 147; *The Aurora*, 1861, Lush., 327, and now the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60), s. 419 (4); and note to *Valentine v. Cleugh*, 1854, 8 Moo. P.C. at p. 178. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict. c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict. c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was excepted as to prize, transferred to the Court of Appeal.]

#### [90] ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

MUSADEE MAHOMED CAZUM SHERAZEE.—*Appellant*; MEERZA ALLY MAHOMED SHOOSTRY, and BEBEE MARIAM BEGUM,—*Respondents* \*  
[April 2, 1852; Feb. 9, 10, and 11, 1854].

A deed of sale conveying real estate the property of a Defendant in a suit then pending in the Supreme Court at Bombay. Held, in the absence of satisfactory evidence of a *bona fide* consideration having been paid by the vendee, to be fraudulent and void, as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration.

Held, also, that a party in possession under such a deed was not entitled to any allowance for sums expended by him for improvements upon the estate.

A sequestrator in possession is not to be disturbed by a claimant, without leave of the Court. The usual mode is to apply for permission to bring an action of ejectment, or to examine, *pro interesse suo* [8 Moo. P.C. 108].

Under a writ of sequestration the sheriff seized a moiety of an estate in the possession of A; A presented a petition to the Court, entitled in a cause then pending, claiming the land under a deed of sale executed by the Defendant, *pendente lite*, praying to be put in possession, and to be allowed to go before the Master and examine witnesses, *pro interesse suo*. Proceedings were taken under this petition before the Master, but afterwards it was agreed by consent, that the matter of the petition should be tried by the Court, and the witnesses examined *viva voce* by the Court at the hearing of the cause in

\* Present:—The Right Hon. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan



which the petition was entitled. Held, that there was nothing irregular in such a mode of proceeding.

By the constitution of the Supreme Courts in India, the Judges for the purpose of the trial of an action, sit as a jury as well as Judges, and the same weight is to be given to a decision of the Judges, in such circumstances, as to the verdict of a jury in this country in which the Judge who tries the cause makes no objection [8 Moo. P.C. 110, 112, 113].

*Semble.* This Court will not disturb a judgment of a Court in India upon a question of the credibility of witnesses; unless it is manifestly clear from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence [8 Moo. P.C. 112].

This was an appeal from an order made in a cause, in which the Respondents were Plaintiffs, and Aga [91] Mahomed Rahim Sherazee and others Defendants, dismissing a petition of the Appellant, who had petitioned in the cause, and prayed that certain property, seized under a writ of sequestration issued in that cause, as the property of the Defendant, Aga Mahomed Rahim Sherazee, should be relinquished by the sequestrator, or that the Appellant should be examined, *pro interesse suo*.

The principal question raised by the appeal was, whether a deed of sale, dated the 30th of December, 1845, made by Aga Mahomed Rahim Sherazee, conveying to the Appellant a moiety of a dock called Magazon dock, together with a moiety of the buildings thereto belonging, was a *bona fide* conveyance for a valuable consideration, or whether it was not collusive between the parties, and intended to defraud the creditors of Aga Mahomed Rahim Sherazee.

The facts which gave rise to the appeal were these:—

On the 2nd of February, 1847, a writ of sequestration was issued in the above cause, commanding the Sheriff of Bombay to enter upon and sequester all the houses, lands, tenements, and the rents, issues, and profits thereof, and all the personal estate, debts, and effects of the Defendant, Aga Mahomed Rahim Sherazee, until he should perform an order made on the 7th of January, 1847, in that cause, for the payment of Rs. 100,000, being the amount of the first instalment directed by the decree made in same cause on the 25th of November, 1846, to be paid by [92] him to the Accountant-General of the Supreme Court. On the 4th of March, 1847, another writ of sequestration was issued in the same terms, to enforce the payment of the further sum of Rs. 100,000.

On the 27th of March, 1847, the Sheriff certified to the Court, that he had sequestered the Mazagon docks, by virtue of these two writs of sequestration.

On the 8th of April, 1847, the Appellant filed a petition in the cause, alleging that he had, for many years before and since the year 1840, had commercial dealings with the Defendant, Aga Mahomed Rahim Sherazee, to a large amount, in the course of which balances had been from time to time, and in the Dewallee of each year, ascertained and stated, and that the last of such annual statements of account occurred on the 30th of October, 1845, on which occasion Aga Mahomed Rahim Sherazee was found to be indebted to the Appellant in the sum of Rs. 172,900. 2q. 88r., which Aga Mahomed Rahim Sherazee acknowledged, by placing his signature at the foot of such account in the book of the Appellant, and that the Appellant after such adjustment pressed him for payment; but being unable to discharge the same, he proposed to sell and convey to the Appellant one moiety of the ground, buildings, and premises belonging to him, situate at Mazagon, and called the Mazagon docks, which proposal the Appellant entertained, and it was agreed between the Appellant and Aga Mahomed Rahim Sherazee, that the Appellant should purchase a moiety of the premises for the sum of Rs. 324,500; and accordingly, in the month of December following such last-mentioned adjustment, the Appellant [93] paid, from time to time, large sums of money to Aga Mahomed Rahim Sherazee, which on the 30th day of that month amounted, inclusive of the balance of Rs. 172,900. 2q. 88r., due to the Appellant, to the sum of Rs. 324,500, whereupon Aga Mahomed Rahim Sherazee, pursuant to such agreement, and in consideration of the sum of Rs. 324,500 by the indenture, dated the 30th of December, 1845, and made between Aga Mahomed Rahim Sherazee, of the one part, and the Appellant of the other part, abso-

lutely sold and released to the Appellant, his heirs, executors, administrators, and assigns, an undivided moiety of him, Aga Mahomed Rahim Sherazee, of the property therein described and called the Mazagon dock, in the Island of Bombay, and that the Appellant entered into possession and became interested in the said premises jointly and in equal shares with Aga Mahomed Rahim Sherazee, and the petition prayed that the Sheriff of Bombay might be ordered to withdraw the writs of sequestration, and relinquish one moiety of the dock to the Appellant, and that, if the Court should think fit, the Respondents (the Plaintiffs in the suit) might be directed to exhibit interrogatories in the Office of the Master of the Court, for the examination of the Appellant, and for the discovery of his interest in the dock, or that such other order should be made as might be fit. The Appellant at the same time filed an affidavit of himself, reiterating the allegations contained in his petition.

On the 8th of April, 1847, the petition came on to be heard, when it was ordered, that the Appellant should come in and be examined, *pro interesse suo*, in the moiety of the Mazagon dock, and that the Re-[94]-spondents should file interrogatories for that purpose, before the Master, and if the Respondents should think fit to reply to the examination of the Appellant put in by him in answer to such interrogatories, either party should be at liberty to examine witnesses, *viva voce*, before the Master, touching the Appellant's claim, and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Appellant had made out a title to the moiety of the dock and premises, or any and what part thereof, and the Master was to be at liberty to state any special circumstances, and the parties were to be at liberty to apply to the Court as they might be advised.

An interrogatory was accordingly exhibited by the Respondents before the Master, for the examination of the Appellant, and on the 21st of June, 1847, the Appellant filed his answer and examination, stating, amongst other things, that he was the *bona fide* owner of, and was entitled for his absolute and exclusive use and benefit to, one undivided moiety of the Mazagon dock, and he set forth a long statement of his business transactions with Aga Mahomed Rahim Sherazee, and filed a schedule showing the balance alleged to be due to him.

The Respondents, by leave of the Court, afterwards exhibited a further interrogatory for the examination of the Appellant, and the Appellant filed his answer to the further interrogatory, stating the payments made by him to Aga Mahomed Rahim Sherazee, in the months of March, April, and May, 1843. The Respondents filed a replication to the Appellant's examination, and on the 4th of September, 1848, an order [95] was made, by consent of the Appellant and Respondents, that so much of the order of the 8th of April, 1847, as directed that, if the Respondents should think fit to reply to the examination of the Appellant, put in by him, in answer to the interrogatories in that order mentioned, then that either party was to be at liberty to examine witnesses, *viva voce*, before the Master, touching the Appellant's claim, and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Appellant had made out a title to the moiety of the dock and premises, or any and what part thereof should be discharged, and that the matter of the Appellant's petition should be set down for hearing on the first day of the then next ensuing November term, and that the witnesses on both sides should be examined, *viva voce*, before the Court at the hearing.

The petition came on to be heard, pursuant to the preceding order, and witnesses were examined on behalf of the Appellant and the Respondents, from whose evidence the following circumstances appeared: that the suit in which the sequestrations issued had been for some years pending against Aga Mahomed Rahim Sherazee, and that he was finally charged by the Master in Equity, to whom the cause had been referred, with the sum of seven or eight lacs of rupees, from which amount he endeavoured to discharge himself without success; that, on the 9th of April, 1845, he delivered to the Master in Equity a list of items in his discharge, which he abandoned, leaving him liable to a decree for payment of two-thirds of a considerable amount of the charge, which exceeded ten lacs of rupees, with a large arrear of interest thereon. [96] That from the time of this proceeding it became evident, and was known to every one, that Aga Mahomed Rahim Sherazee must ultimately become liable to pay a considerable sum of money, which could not be less than several lacs of rupees. That on the 21st of November, 1846, a final decree was made in the cause against Aga Mahomed Rahim Sherazee, ordering him to pay into Court, to



the credit of the cause, 11 lacs of rupees, by instalments. It further appeared that, on the 30th of December, 1845, the deed conveying the moiety of the Mazagon docks to the Appellant was executed by Aga Mahomed Rahim Sherazee, in the presence of Burn, an attorney of the Supreme Court at Bombay, for which he was paid his costs by Aga Mahomed Rahim Sherazee, whom he considered his client; another attorney being employed by Aga Mahomed Rahim Sherazee in the suit. That Aga Mahomed Rahim Sherazee continued in possession of the docks as an ostensible owner, negotiating with persons who were engaged in improving and enlarging them, and superintending the conduct of all business in them; but evidence was adduced by the Appellant to show, that one Hajee Mahomed Ruzza, a nephew of the Appellant, attended at the dock in 1846, and conducted business there, and kept accounts on behalf of the Appellant. It also appeared, that for several years previous to the alleged sale, the Appellant had had commercial dealings with Aga Mahomed Rahim Sherazee to small extent, on account of which the latter was indebted, at the close of the native year, ending 1842, in the sum of Rs. 10,947, and in the following year, in the sum of Rs. 18,172. No evidence was adduced by the Appellant to explain how his transactions with Aga Mahomed [97] Rahim Sherazee suddenly increased from dealings of comparatively small amount, to the alleged payment by the Appellant to Aga Mahomed Rahim Sherazee, between the 31st of March and the 6th of May, 1845, of several sums amounting to Rs. 127,708, as shown in the schedule to the Appellant's second examination: nor was any proof given of the payment of those sums, beyond the evidence of a native clerk of the Appellant, named Jairam Eswar, who deposed in general terms, (reading from the Appellant's account book,) that the major part of the sums had been paid, some by himself, and some by one Narron, and some by one Tulseydass, who were not called as witnesses, and chiefly into the hands of Meerza Mootalib, the son-in-law of Aga Mahomed Rahim Sherazee. Nor was any evidence, except that of Aga Mahomed Rahim Sherazee himself, adduced on behalf of the Appellant to show the payment between the 13th and 29th of December, 1845, of the several sums in cash, amounting to Rs. 149,743. 3 qrs. 9 reas, set forth in the schedule to the Appellant's first examination, and alleged to have been the balance of the consideration money for the purchase of the moiety of the docks claimed by the Appellant. Aga Mahomed Rahim Sherazee, however, in his evidence for the Appellant, stated, that after the bargain for the purchase was completed, the money was gradually paid to Meerza Mootalib, and when the whole consideration was paid, he executed the deed of conveyance to the Appellant; that during December, 1845, Mootalib brought him no money, and that Mootalib was in the habit of receiving it and paying it to different persons to whom he, Aga Mahomed Rahim Sherazee, was indebted. But when [98] cross-examined on behalf of the Respondents respecting Mootalib, he thus replied:—"I saw Meerza Mootalib about a month ago, and I have not seen him since. He never told me when he went away—I had not curiosity to ask my son-in-law where he was going. His family is here (Bombay)—they are all living in Mahomed Jaffer's house. My family is living there also." Several other witnesses were examined on behalf of the Appellant respecting two or three items in the account, of comparatively inconsiderable amount, but without making it clearly appear how Aga Mahomed Rahim Sherazee was *bona fide* indebted to the Appellant in respect of those items.

After a hearing which lasted several days, the Court, on the 14th of November, 1848, ordered that the Appellant's petition should be dismissed with costs. The judgment of the Court was delivered by the Chief Justice (Sir Erskine Perry) as follows (reported, *nom.* Mushedy Kazim's claim; "Oriental Cases," by Perry, p. 35):

"This trial has lasted so many days, and has made us so familiar with the facts, that the conclusions in our minds are altogether clear and distinct, and it is unnecessary to defer giving judgment in order to put them in better language, or in more logical order. The question to be determined in this case is, whether the conveyance of a moiety of Aga Mahomed Rahim's dockyard, in December, 1845, to Mushadee Cazum, was a *bona fide* sale, or whether it was a simulated transaction between the parties for the purpose of defeating Rahim's creditors, and particularly his old opponent Meerza Ally. In order to be in a condition to form an accurate judgment on this question, it is necessary to have a distinct picture before [99] our eyes of the position of the principal actors in the transaction at the period when it



occurred. And for this purpose it is only necessary, so far as the profession here is concerned, before whom this suit has been travelling its slow course during the whole of the career of nearly every practitioner now at the bar, to point out, that in November, 1845, the suit against Aga Rahim had reached its *dénouement*. That in November, 1845, a decree against Aga Mahomed Rahim for very many lacs of rupees was about to be given; that in the same month he was charged before this Court with an attempt to abscond, and to withdraw all his moveable property from the jurisdiction, in order to defeat the decree; that the Court believed the charge and ordered his arrest, although the Aga gave the Court to understand that it was wholly untrue, and that he was a man of very large property, and equal and willing to satisfy the claim of his creditor in the case. It is also necessary to observe that when this decree came on subsequently to be enforced, all the property which the Aga previously had sworn to, disappeared, and when execution issued against the greatest Mogul merchant of Bombay, one who had been the host of previous Governors, Judges, and all the society of the Island, who had been for many years the agent for the great Mussulman princes of Western Asia, and whose large possessions in landed property, in ships, and other substantial *indicia* of wealth were patent to the eyes of all, not one single rupee was forthcoming, or voluntarily paid by him in satisfaction of the claim of the young man whose property had been in his hands for years, and which had been the foundation of all his prosperity.

[100] "On legal inquiry, it turns out that the landed and other property, which was well known to belong to Aga Mahomed Rahim, has all been conveyed to other parties, and the question, therefore, arises on every such conveyance, whether there was really a *bona fide* transfer of property for good consideration, or whether a deep-laid scheme was concocted, for the purpose of defeating the course of law, for cheating the claimant, whom he had been keeping at arms' length for a course of years by harassing litigation, and by using those provisions in the English law, which are intended for the relief of honest but unfortunate debtors, to withdraw all his property which could be realised from without the jurisdiction of the Court, and himself finally, as soon as he should have got his discharge under the Insolvent Act.

"This being the statement of the question before the Court, it is obvious that any claimant to property, conveyed by Aga Mahomed Rahim at the period of his difficulties, labours under the *onus* of having to maintain a case which is open to the gravest suspicions. The probabilities are all against the genuineness of such a transaction, for it does not require a very long experience in this Court, to be aware that fraudulent conveyances, tortuous courses, skilful deep-laid schemes, and most unblushing perjury, are constantly resorted to by persons in difficulties, whereas the same prudence in *bona fide* transactions, and the same care to make good bargains, and not to part with hard cash, till a valid equivalent is obtained, are undoubtedly to be found amongst the natives of India to quite as great an extent as with any nation in the world.

"The conclusion which I desire to draw from this [101] observation is, that as the Plaintiff's case is necessarily tainted with suspicion, it lies upon him, if the transaction be really a genuine one, to bring more than an ordinary amount of evidence to support it, and to rebut, by unimpeachable testimony, the *prima facie* incredibility which accompanies his tale. The large sum of money involved in this case (at least four lacs according to the Plaintiff, but probably not amounting, even with the arrears of rent, to more than two) affords quite sufficient motive to the Plaintiff to make every exertion to bring forward all the evidence which is capable of being given; and I have no doubt whatever in my own mind that the Plaintiff has brought forward all the evidence which was calculated to support his claim.

"Having thus stated the question for inquiry, and the position of the parties at the period of the transaction, and having pointed out how extremely suspicious a case the Plaintiff was coming forward to support, and the consequent burden upon him of furnishing the Court with a mass of irrefragable evidence, I make no hesitation in avowing, that directly I heard the speech of the learned counsel for the Plaintiff, and ascertained that a case, in itself suspicious, was accompanied with the most improbable details, and that these details had absolutely no witnesses at all to prove them, I felt no doubt whatever that the Defendant was entitled to a verdict, and that the conveyance was altogether simulated and fraudulent; indeed, the

impression on both our minds was so strong, that if it had not been intimated that an appeal to the Privy Council was intended, we should have probably thought it necessary for the ends of justice to have cut the matter short, by pro-[102]-nouncing our conclusions at once, that a tale so improbable, and supported by no evidence, ought not to be allowed to take up any further time of a court of justice; but as the impressions on our minds were formed on previous facts connected with the suit, the knowledge of which was necessary to enable any tribunal to form an accurate judgment, but which would not appear to the Privy Council, unless given in evidence, it was essential to undergo the tedious inquiry of getting these different facts, so well known to all of us, on the records of the Court in this particular suit.

"These facts being now recorded, it is sufficient to say of them, that all those which make for the Plaintiff (except perhaps one) are neutral or irrelevant, or capable of easy explanation; that several facts are proved, which throw the gravest suspicion on the Plaintiff's title, and above all, that proof of those facts which were essential to the Plaintiff's claim is altogether wanting."

No appeal having been made from this judgment and order of the Supreme Court, further proceedings were taken by the sequestrator, under the direction of the Court, and the docks were sold.

Musadee Mahomed Cazum Sherazee afterwards presented a petition to the Queen in Council, praying for leave to appeal from the Order of the Supreme Court, dated the 14th of November, 1848, which their Lordships, after hearing counsel, granted upon certain terms there specified. (For report of the case upon this petition, see 7 Moore's P.C. Cases, p. 391.)

These terms having been complied with, the appeal now came on for hearing (24th April, 1852).

[103] Mr. Lloyd, Q.C., and Mr. Forsyth, for the Appellant.—First. The evidence adduced by the Appellant sufficiently established that he was owner of an undivided moiety of the Mazagon docks and premises. He was in possession as a *bona fide* purchaser for a valuable consideration, under the conveyance executed, in 1845, by Aga Mahomed Rahim Sherazee. The seizure, therefore, by the Sheriff of this property under writs of sequestration against the property of Aga Mahomed Rahim Sherazee, was irregularly executed as against this moiety. The Court below viewed the case as a colourable sale without any consideration money having been paid by the Appellant to the vendor. The evidence, however, disproves such a conclusion. It was proved that he had ample means to effect the purchase by paying the balance, after deducting the debt due to him at that time by Aga Mahomed Rahim Sherazee, and that after the agreement for the purchase had been made, he paid over the balance. It may be true, that, at the time when he purchased the moiety, he was aware of the existence of the suit by the residuary legatees of Mahomed Ally Khan against Aga Mahomed Shoostry, his executor, for an administration of his estate, yet, as he was ignorant of the state of the proceedings therein, whether or not any sum was found due by him to the estate of the testator, it could not affect his title as a *bona fide* purchaser. Even if he had notice that the Master had found that he was indebted to the estate, we submit, that that circumstance would in no respect have affected his right as a purchaser for a *bona fide* consideration. A sale of property for a good consideration is not, either at common law, or under the [104] Statute, 13 Eliz., c. 5, (made perpetual by 29 Eliz., c. 5,) fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor. *Wood v. Dixie* (7 Q.B. Rep. 892), *Twyne's case* (3 Coke, 80 b. 81 a.; and see note, 1 Smith's L. Cases, p. 10, where all the authorities on this question are collected), *Cadogan v. Kennett* (2 Cowp. 432, 434), *Riches v. Evans* (9 Car. and Pay. 640). The learned Judge says, in his judgment, "that directly he heard the speech of the counsel for the Plaintiff, and ascertained that a case in itself suspicious, was accompanied with most improbable details, and that these details had absolutely no witnesses at all to prove them, I felt no doubt whatever that the Defendant was entitled to a verdict, and that the conveyance was altogether simulated and fraudulent." Now it is clear, from these expressions, that the Appellant had to contend with unusual disadvantages in establishing his title to the property in question. The mind of the Judge was unfavourably disposed towards the case anterior to the Appellant's proofs and evidence being adduced. The adverse presumption of fraud which the Appellant had to combat from the beginning, was derived, not from the case of the Appellant himself, but from facts which it is said had been



established or were apparent in a suit, to which he was no party, and to the issues involved in which he was an entire stranger, and which he never had an opportunity of contesting. The whole proceedings are irregular. The Court ought to have directed an action of ejectment to try the validity of the conveyance.

Second. The order cannot stand, for if the Court [105] below entertained so much doubt upon the evidence as to decline giving effect to the deed of purchase, yet the property ought, at all events, to have been treated as a security for the debt due to the Appellant, with interest. Assuming, therefore, that in a proceeding as the present it was competent to the Court, and proper, to set aside the deed for fraud, still, as the conveyance was rescinded, the ordinary rule of a Court of Equity ought to have been applied, and it ought to have directed that the Appellant should be paid the amount really due to him, and also the whole of his expenditure made by him in substantial improvements. *Hamblyn v. Ley* (3 Swans. 301, n.).

The Solicitor-General (Sir R. Bethell), and Mr. Ayrton, for the Respondents.—It is evident that the conveyance under which the Appellant claimed, was executed collusively, with the intention to delay, or defraud, the Respondents from enforcing any decree that might be pronounced against Aga Mahomed Rahim Sherazee, in the suit then pending against him by the Respondents. Such conveyance was, therefore, fraudulent and void. The deed was not proved to be a *bona fide* conveyance for a valuable consideration, so as to be valid in equity against the writs of sequestration under which the property was sequestered. *Coulston v. Gardiner* (3 Swans. n. 279). Mushedy Kazim's claim ("Oriental Cases," by Perry, p. 35). The objection now urged by the Appellant, that the order cannot stand, is founded on [106] the sole ground, that the Court below improperly discredited the testimony of witnesses. Such objection is untenable, as this Court, upon a mere question of evidence, will not reverse a decision upon that ground alone. *Santacana v. Ardevol* (1 Knapp's P.C. Cases, 269). The Appellant was under the obligation of satisfactorily proving that his purchase of the property was *bona fide*, but this obligation was not discharged by the evidence he adduced. Lastly, there was no irregularity in the proceedings; if a sequestrator obtains possession of property, as belonging to the party against whom the process issued, and such property is claimed by a third person, the mode of trying the right is in the discretion of the Court. *Empringham v. Short* (3 Hare, 461).

The Right Hon. T. Pemberton Leigh (15th Feb., 1854).—In this case, on the 2nd of February, 1847, a writ of sequestration was issued by the Supreme Court of Judicature at Bombay, on the equity side of that Court, in a cause in which one Meerza Ally Mahomed Shoostry and Bebee Mariam Begum were Plaintiffs, and Aga Mahomed Rahim Sherazee and others, Defendants, for the payment of Rs. 100,000. On the 4th of March following, a second writ of sequestration also issued for the non-payment of a like sum of Rs. 100,000; and on the 27th of March, the sheriff, to whom these writs were addressed, made his return to the Court, by which he certified, that on the 18th of March instant he had seized and sequestered the Maza-gon docks, under and by virtue of those two writs of sequestration. Now the terms of the writ [107] of sequestration, addressed to the sheriff, were these: he was commanded "to enter upon, take, and sequester all the houses, lands, and tenements, and the rents, issues, and profits thereof, and also all the personal estate, debts, and effects of the said Aga Mahomed Rahim Sherazee, in your bailiwick, and to hold the same in your possession until the said Aga Mahomed Rahim Sherazee shall pay the said sum of Rs. 100,000." Now, under the terms of this writ, what the sheriff had to do was to receive the rents, issues, and profits of this property, which was at that time in the possession of the Peninsular and Oriental Steam Navigation Company, as tenants, and to pay the amount of these rents into Court; so that any disposition of such rents, when paid in, would be the subject of a further application to the Court. All that the writ commanded, was a direction to the sheriff to retain the property of Aga Mahomed Rahim Sherazee in his possession until the further order of the Court.

In this state of circumstances, it appears to us that, according to the rules of a Court of Equity, no proceedings could be taken against the sequestrator except by leave of the Court. If a person has a legal title to property seized by an ordinary



trespasser, he can bring his action of ejectment to recover possession of such property; but where the property is in the custody of the Court, as when in the possession of a Receiver, the course pursued in our Courts, if it appears there is a legal title, has been to permit an action of ejectment to be brought, to put the matter in the most convenient course of determination. That course was adopted by Lord Eldon, in the case of *Angel v. Smith* (9 Ves. 335), where, after much [108] discussion, he permitted an action of ejectment to be brought against a Receiver. In *Brooks v. Greathed* (1 Jac. and Wal. 176), the Master of the Rolls says, "It was settled in *Angel v. Smith*, when the rule was laid down both with respect to Receivers and Sequestrators, that their possession is not to be disturbed without leave. But when a party is prejudiced by having a Receiver put in his way, the course has either been to give him leave to bring an action of ejectment, or permit him to be examined, *pro interesse suo*." In this case, the Appellant set up a title to property that had been seized by the sheriff, or, at least, to one moiety of property so seized, and he presented a petition to the Court, on the 8th of April, 1847, praying that the sheriff might be ordered to withdraw the writs of sequestration and relinquish one moiety of the property, that is, the dock and premises, to the Appellant; thus, in truth, asking the same relief which he would have obtained if he had brought his action of ejectment, and had succeeded in that action; and he further prayed, that if the Court should think fit, the Respondents (the Complainants in the suit) might be directed to exhibit interrogatories in the office of the Master of the Court, for the examination of the Appellant and for the discovery of his interest in the premises, or that such other order should be made as might be fit. Now, instead of bringing this petition on to a hearing, in which case, inasmuch as his title appeared, on his own showing, to be a mere legal title, he would merely have obtained liberty to bring an action of ejectment, he took an *ex parte* order of another sort, on the same day as that on which the petition was presented. The terms of the order were: That [109] the Appellant should come in and be examined, *pro interesse suo*, in the moiety of the Mazagon docks and premises in the petition mentioned; and that the Respondents should file interrogatories for that purpose in a week, before the Master, and if the Respondents should think fit to reply to the examination of the Appellant, put in by him in answer to such interrogatories, either party should be at liberty to examine witnesses, *viva voce*, before the Master, touching the Appellant's claim; and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Appellant had made out a title to the moiety of the dock and premises, or any and what part thereof; and the Master was to be at liberty to state any special circumstances, and the parties were to be at liberty to apply to the Court as they might be advised. Under this order the Petitioner went in to be examined. Interrogatories were filed for his examination, and he put in his answers to those interrogatories. From that examination it appeared, that he claimed a right to this property by what seemed to be a good legal title, viz. by purchase for a valuable consideration, paid when the conveyance was executed, and under which he was in possession of the property at the time of the seizure, he having received the rents and made a considerable expenditure on the premises. On the other hand, it appeared, upon this examination, that the statements of the Petitioner were open to great suspicion. The sale, to the last degree, was improbable, depending upon his own statement; while there were circumstances from which the Court might be led to conclude that the title so set up was only simulated, and that no [110] real interest was vested in him. This being so, the Respondents filed a replication and examination. According to the terms of the order, they might have proceeded to the examination of witnesses before the Master, who would have made his report, and if the Respondents had been dissatisfied with that report, they might have excepted, and the case would have come before the Court on the exceptions, and a trial at law ordered to settle the question of title. In this state of things the parties appear to have come to an arrangement which seems to have been extremely reasonable and proper. If a trial had taken place, that trial would have taken place before the two Judges of the Court sitting on the plea side of the Court as a jury, and, at the same time, as Judges, for the purpose of delivering the verdict in the trial, in the form either of an action of ejectment, or an issue. If they had pursued the order, according to the terms of it, instead of

adopting the course they did, they would have gone before the Master, attendant with all the expense and delay of an examination, report, and order, and then the Master would have reported on that examination, and it would, in all probability, have resulted in an order to try at law that question; to avoid which, on the 4th of September, 1848, an order was made, by consent, in these terms: "It is ordered, that so much of the order made in the above matter by this Honourable Court, on the 8th day of April, 1847, as directs, that if the said Meerza Ally Mahomed Shoostry and Bebee Mariam Begum should think fit to reply to the examination of the Petitioner, put in by him in answer to the interrogatories in the order mentioned, then that either party was to be at liberty to examine witnesses, [111] *viva voce*, before the Master, touching the Petitioner's claim; and that the Master should look into the examination and evidence of such witnesses, if any, and certify to the Court whether the Petitioner had made out a title to the moiety of the ground, buildings, dock, and premises, or any and what part thereof, be, and it is hereby discharged; and it is further ordered, that the matter of the petition be set down on the board of causes for hearing on the first day of the next ensuing November term, and that the witnesses on both sides be examined *viva voce* before the Court at the hearing." Now the question is, whether this is not intended to be substituted for a trial at law, on the plea side of the Court—the trying an action of ejectment, in substance, upon this petition, which prayed precisely the same relief that would have been had in an action of ejectment, and substituting these proceedings for such trial. That it was so, appears to us to be clear. In the first place, when the evidence is taken before the Court at this trial, all the documents that are produced are entered in the plea side of the Court, and signed by the officer, not as Registrar, but as Prothonotary; and, when the Judges are disposing of the case, Chief Justice Perry says, "I felt no doubt whatever that the Defendant was entitled to a verdict." Well, then, supposing that to be the case, the question was in fact tried in the most convenient form for the purpose of the action, viz. to restore to the Petitioner that possession which alone he claimed by this petition. Upon that petition, witnesses were examined at great length; and the Court came to the conclusion that this transaction of the alleged purchase was a mere simulated and fraudulent transaction; that no [112] money had ever been paid; that no possession had ever been delivered; but that, in truth, the alleged purchase and possession had been simulated for the purpose of defeating the sequestration and the claim of creditors in the suit which was then pending, and in which it was probable, or, rather, in which it was certain, that a very large balance would be found to be due from the estate. Being of that opinion, the Judges necessarily, and naturally, and properly, concluded that the deed, if it were a deed executed under those circumstances, was fraudulent as against creditors; and that the Plaintiff in an action of ejectment (the Petitioner standing in the position of a Plaintiff in an action of ejectment) must fail, and that the petition must be dismissed.

If they were right in law, the question is, whether they were right in fact. And upon that question the course which this Court always takes, in appeals from the inferior Courts of India, where the Judges are so much more familiar with the circumstances of the parties, the nature of the case, and the probabilities or improbabilities attached to certain states of circumstances, and the credibility of the witnesses, is, that although we by no means consider it conclusive, still great weight is to be given to their opinion, and this Court is not in the habit of distrusting a judgment founded upon a decision of those questions, unless their Lordships entertain a clear and strong opinion upon it. But where a judgment has been pronounced, and a verdict found, and that judgment pronounced by the Judges of the Supreme Court, sitting as a Court for the purpose of the trial of an action, their Lordships will give, at least, the same weight to that decision as is given in this country, to the verdict [113] of a jury, to which the Judge who tries the cause makes no objection; and, where there are no reasonable grounds to suppose that the jury have come to a wrong conclusion, it is not sufficient to say that the judge might, probably, if the case was *res integra*, have come to a different conclusion. We are far from saying here, if the case had been *res integra*, that we should have come to a different conclusion from that which the Judges of the Court below have come to, and we think their order was perfectly right.



But then it is said, supposing this transaction to be fraudulent and void against creditors, still the party is entitled to the sums which he had been allowed to lay out upon the repairs of the property. Now there is a case, *Hamblyn v. Ley*, (3 Swan., 301 note,) where a voluntary deed had been executed, under circumstances much resembling the present case, the deed having been executed for the purpose of defeating a sequestration. Lord Hardwicke set aside that deed, and made an allowance to the parties for what had been expended, both in the payment of interest on the mortgage, and for taxes and repairs. But, in the first place, that was a case in which only equitable relief could be administered, because it was a case of an equity of redemption; and in the next place, it was clear that there had been an actual possession, and a receipt of rents and profits. If in this case the parties had prosecuted the matter before the Master, and it had appeared to the Master, that this deed was good at law, but void in equity, then probably there might have been an account of the profits and of those sums that had been laid out in improvements. But the course that has been here taken [114] rendered such an account impossible. No such account could have been directed in an action of ejectment brought for the recovery of the possession of the property, and, this being a mere legal title in which the Court was of opinion that there was no estate or interest in the Plaintiff against creditors, upon both grounds, it seems impossible that any such allowance could have been made; no claim for such allowance was made, nor was any demand of the kind brought before the Court below; and, even if it had been, in the view that the Judges took, it would have made no difference, because they considered the whole transaction, from the beginning to the end, as void. They considered that the possession never ought to have been changed. Mr. Justice Yardley, in referring to the grounds on which he proceeded, says, "To the best of my recollection, aided by the notes I took at the hearing, the petition was dismissed because we thought that the conveyance of a moiety of the Mazagon dock-yard by Aga Mahomed Rahim Sherazee to the Petitioner, was merely colourable, and that the accounts, by which it was attempted to show that a large balance was due at the time, or immediately before the execution of the conveyance, from Aga Mahomed Rahim Sherazee to the Petitioner, were fictitious; and that the Petitioner entirely failed to prove to our satisfaction that the payments making up the residue of the alleged purchase-money, had been actually made, and that the possession of the dockyard only nominally passed to the Petitioner, Aga Mahomed Rahim Sherazee still continuing to be the real owner of it, and still continuing to exercise exclusive dominion over it, and that this was part of a concerted design by Aga Mahomed Rahim Sherazee [115] and his friends, of whom the Petitioner was one, to make away with all the property and effects of the said Aga Mahomed Rahim Sherazee in order to deprive Meerza Ally Mahomed Shoostry of the fruits of a decree."

It appears to their Lordships, upon every view of this case, that the Order pronounced by the Court below was perfectly right, and that it is their duty to recommend Her Majesty to affirm such Order, with costs.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL: 5. *Principles on which Privy Council acts.* See *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*, 1843, 3 Moo. Ind. App. 239. S.C. 5 Moo. Ind. App. 187, 196.]

#### ON PETITION FROM MADRAS.

IN RE RAJAH VASSAREDDY LUTCHMEPUTTY NAIDOO \* [June 16, and July 5, 1852].

In suits before the Sudder Dewanny Adawlut at Madras, that Court decided in favour of A.; and pending appeals to England by B. and others, put A. into possession of the disputed estates, which were of great value, without taking from him the security required by Mad. Reg. VIII. of 1818, sec. 4. The

\* Present: Lord Cranworth, Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



Judicial Committee of the Privy Council reversed the decree of the Sudder Dewanny Adawlut, and directed that Court to put B. into possession of the estates. Pending the appeals, the Board of Revenue took possession, sold a portion of the estates for satisfaction of arrears of revenue, and became themselves purchasers. The Sudder Dewanny Court declined to interfere to carry into execution the Order in Council confirming the report of the Judicial Committee, on the ground, that the estates were then in the possession of the Madras Government. Upon a Petition by B. to the Judicial Committee, complaining of such refusal, a peremptory order was issued, commanding the Sudder Dewanny Adawlut forthwith to carry into execution the Order in Council made on the appeals, and to direct the Collectors of the districts in which the estates were situate to put B. into possession, according to the terms of the Order in Council.

The application being *ex parte* was postponed for notice to be given to the East India Company and the Board of Control, of the petition and proceedings [8 Moo. P.C. 129].

This was an application upon petition, by Lutchmeputty Naidoo, for a peremptory order addressed to the Judges of the Sudder Dewanny Adawlut at Madras, commanding them to carry into execution an order of [116] Her Majesty in Council, confirming a report of the Judicial Committee of the Privy Council, made in the joint appeal of "*Rungama v. Atchama*," and "*Atchama v. Ramanadha*" (see case reported, 4 Moore's Ind. App. Cases, 1), and praying, that the Petitioner might be put into possession of the lands and other property, the subject of the appeals, and which was awarded to him by such report and order.

The petition, after setting forth the fact of the institution of the suits in India, alleged, that at the period when the decrees of the Provincial and Sudder Court, appealed from to England, were pronounced, the whole of the property claimed by Rungama, as guardian of the Petitioner, was under attachment and management of the Collectors appointed by the Board of Revenue, acting in the district of Guntoor and Masulipatam. That on the 6th of May, 1833, while the appeals to England were pending, Vassareddy Ramanadha Baboo presented a petition to the Sudder Dewanny Adawlut, praying that Court to cause possession of the property to be delivered over to him. That by a proceeding of the Court, on the 10th of June, 1833, it was stated, that Vassareddy Ramanadha Baboo could obtain possession of the property only on giving security, and that there was a specific rule in his case, which required that he should furnish security; and the prayer of his petition was rejected. That the rule referred to by the Court in their proceeding, was Reg. VIII. of 1818, which enacted as [117] follows:—"The Court of Sudder Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favour the same may be passed, for the due performance of such order or decree as His Majesty, his heirs or successors, shall think fit to make on the appeal, or suspend the execution of their judgment during the appeal, taking the like security in the latter case from the party left in possession of the property adjudged against him; but in all cases security is to be given by Appellants to the satisfaction of the Sudder Adawlut, for the payment of all such costs as the said Court may think likely to be incurred by the appeal, as well as for the performance of such order or judgment as His Majesty, his heirs or successors, may think fit to give thereupon; and after receiving such security, the Sudder Adawlut are to declare the appeal admitted, and to give notice thereof to the Appellant and Respondent respectively, that they may take measures, the one to prosecute, the other to defend, the cause, in appeal before His Majesty in his Privy Council, according to the established mode of proceeding in similar cases."

That in the month of January, 1834, Vassareddy Ramanadha Baboo presented another petition to the same Court, praying that he might be placed in possession of the property pending the appeal, upon giving the security required by the above-recited Regulation VIII. of 1818. That in a proceeding of that Court, dated the 14th of April, 1834, the Court stated that it was a point formally decided by them, that no security was to be required for the Government tribute, but merely for the Zemindar's mesne profits, exclusively of the tribute; and they ordered, [118] amongst other things, that it should be referred to the Collectors of Guntoor and

Masulipatam, to report to the Court the aggregate gross receipts payable to the Zemindar in the Vassareddy estates for the Fusly year 1230 (A.D. 1820-1), or its annual average during the whole period of their management. That in a proceeding of the Court, dated the 21st of July, 1834, they stated, that they were of opinion, that the ends of justice would be answered by fixing the amount of security at Rs. 250,000, and it was ordered, that the Provincial Court of the Northern Division should call upon Vassareddy Ramanadha Baboo to furnish good and sufficient security in that sum; and that on his producing competent security to that amount, to be approved of by the Sudder Dewanny Adawlut, the property be placed in his possession. That thereupon Vassareddy Ramanadha Baboo presented a petition to the Sudder Court, praying to be informed whether the security of Rs. 250,000, so required by the Court, was for the whole period during which the appeal might be pending, or for what term. That in a proceeding of the Sudder Court, dated the 8th of September, 1834, it was stated, that the period for which the security was, by the order of the 21st of July, 1834, required, was for one year only, and that at the expiration of that period, the Sudder Court would issue such further instructions as to security as might then appear expedient and equitable. That subsequently, in the same year, Vassareddy Ramanadha Baboo petitioned the Sudder Court for an allowance out of the property, and the Court granted him an allowance of Rs. 1200 per mensem, but ordered that he should find security for that sum. That on the 31st of March, 1835, Vassareddy Ramanadha [119] Baboo presented a petition to the Sudder Court, in which he stated that he had been unable to find security for the allowance of Rs. 1200 per mensem, and prayed that the allowance might be granted to him from the funds in deposit in the Court, without security. That in a proceeding of the Sudder Court, dated the 27th of April, 1835, it was stated, that it was essentially necessary that Vassareddy Ramanadha Baboo should furnish security for the eventual refunding of all payments made to him from the property in dispute, and the prayer of his last-mentioned petition was refused.

That in the month of July, 1836, Vassareddy Ramanadha Baboo presented a petition to the Sudder Court, in which he represented the condition to which the property had been reduced, in consequence, as he alleged, of its continuing under the management of the Revenue officers of Government, and submitted certain statements of the Collectors of Guntoor and Masulipatam aforesaid, showing the arrears of Government tribute then due, and prayed the Sudder Court to place the property in his possession without security, on the condition of his entering into an agreement not to dispose of it by sale, etc., before a decision should have been received on the appeal preferred to his late Majesty in Council. That Rungama, as guardian of the Petitioner, also presented a petition to the Sudder Court, praying that the last-mentioned petition of Vassareddy Ramanadha Baboo might not be granted. That in a proceeding of the Sudder Court, dated the 27th of July, 1836, it was stated, that it appeared to the Court that there could be no question that there would be no net profits from the property for several years to come, and that, con-[120]-sequently, on that account there could be no necessity for requiring any security whatever, previous to ordering the property to be placed in possession of Vassareddy Ramanadha Baboo, and it was ordered as follows:—"The Court direct that whatever lands the Collectors of Guntoor and Masulipatam may have in their charge belonging to the Vassareddy estate, and attached under the order of the Provincial Court, be delivered over to the Petitioner, Ramanadha Baboo. The Court, therefore, resolve that a copy of these proceedings be transmitted to the Provincial Court in the Northern Division, for their information and guidance, commanding them by precept, to instruct the Collectors in the districts of Guntoor and Masulipatam to deliver over to the Petitioner, Ramanadha Baboo, such of the lands belonging to the Vassareddy estate as they may hold under attachment." That in pursuance of the above order of the Sudder Dewanny Adawlut, Vassareddy Ramanadha Baboo was placed in possession of the property in dispute, without giving the security required by section 4, of Reg. VIII., 1818.

That the Petitioner attained his majority in the month of March, 1837. That at divers periods in the years, 1838, 1839, and 1840, and while the appeals to His late Majesty in Council were still pending, the Petitioner presented petitions to the Board of Revenue, complaining that Vassareddy Ramanadha Baboo was wasting and



mismanaging the estates, and praying the Board of Revenue to issue an order to put the estates under the management of the Collectors of Masulipatam and Guntoor, until the decree of His Majesty in Privy Council should be made in the appeals.

[121] That in a proceeding of the Sudder Dewanny Adawlut, dated the 2nd of May, 1842, it was declared as follows:—"The Board of Revenue, in their letter of the 20th of January, 1842, intimated to the Sudder Adawlut, that circumstances indicative of gross mismanagement, and an intentional disregard of his engagements, on the part of Vassareddy Ramanadha Baboo, having been represented to them in recent reports from the Collectors of Guntoor, they had desired that officer to exercise his discretion in attaching the estate, should the Zemindar fail to make payments commensurate with his collections, and that they have been since apprised by a letter, dated the 8th of January, 1842, that it has been found absolutely necessary that the estate should be taken under management, which has accordingly been done. The mismanagement of Vassareddy Ramanadha Baboo resting upon information in possession of the Revenue authorities, the Sudder Adawlut resolve to direct that a copy of the translations of the petitions recorded above, together with a copy of these proceedings, be transmitted to the Provincial Court in the Northern Division, commanding them by precept to instruct the Collectors of Guntoor and Masulipatam to inquire into and report upon the charges made against Vassareddy Ramanadha Baboo, of having made away with the proceeds of the estate during the period it was under his management, under the orders of the Sudder Adawlut, of the 27th of July, 1836."

That some time in the year 1842, possession of the property in dispute was taken from Vassareddy Ramanadha Baboo, and resumed by the Collectors of Guntoor and Masulipatam.

That on the 30th of June, 1843, and pending the [122] appeals, the Chintapully and other Talooks in the Zillah of Guntoor, being a portion of the property in dispute, were advertised for sale, for arrears of revenue due to the Government, amounting to Rs. 26,22,921.

That on the 5th of June, 1843, the Petitioner presented a memorial to the Governor in Council at Madras, and on the same date a like memorial to the Board of Revenue, in which he protested against the intended sale, and prayed that a stop might be put to it until the final decision of the appeals. That the Governor in Council, by an order dated the 19th of June, 1843, referred the Petitioner to the Board of Revenue. That on the 5th of June, 1843, the Board of Revenue, in answer to the memorial, informed him that the advertisement of the intended sale of the Vassareddy estate, for arrears of revenue, had emanated under the orders of Government. That on the 28th of February, 1846, while the appeals were pending, the portion of the property in dispute previously mentioned was again advertised to be sold on the 1st of April, 1846, in satisfaction of arrears of revenue. That on the 28th of March, 1846, the Petitioner presented a petition to the Governor in Council at Madras, praying that the sale might be postponed until the decree of Her Majesty in Council should be made, or that the whole of the Vassareddy estates might be made over to him, on condition of his paying punctually the Government tribute, and a sum of Rs. 50,000 per annum, in liquidation of the arrears due to the Government. That this petition was returned to the Petitioner by the secretary to the Government, on the 21st of April, 1846, with the following indorsement:—"The Petitioner is informed that the reso-[123]lution of the Government, dated the 20th of January, 1846, on the subject of the Guntoor Zemindaries, is final, and that the Petitioner's request cannot be complied with."

That on the 30th of March, 1846, the Petitioner presented a petition to the Collector of Guntoor, praying that he would protect the portion of the property in dispute from sale, until the decree of Her Majesty in Council should become known. That on the 6th of April, 1846, this petition was returned to the Petitioner by the Collector, with the following indorsement:—"The Vassareddy estates were, under the orders of Government, put up to public sale for arrears, and brought in on behalf of Government, on the 1st inst. The request of the Petitioner cannot be complied with."

That on the 29th of February, 1848, the Judicial Committee of the Privy Council, to whom the appeals had been referred, agreed to report to Her Majesty, that the



decree of the Sudder Dewanny Adawlut of Madras, dated the 14th of March, 1832, should be reversed. That Her Majesty in Council was graciously pleased to approve of this report, and by a decree, dated the 2nd of March, 1848, it was ordered and decreed (amongst other things) that the decree of the Sudder Dewanny Adawlut should be reversed, as in the declarations in the report set forth and recommended, and the causes were thereby remitted to the Sudder Dewanny Adawlut at Madras, to do what was necessary to give effect to the declarations in the report, whereof the Judges of the Sudder Dewanny Adawlut of Madras, for the time being, and all other persons whom it might concern, were to take notice and govern themselves accordingly.

That under and by force of this decree, and by virtue of Regulation V. of 1804, the Petitioner was entitled to be put in possession of the whole of the property in dispute, freed and discharged from all arrears of Government tribute or revenue which had become due during his minority. That by Regulation V. of 1804, section 4, it is enacted as follows:—"The lands of incapacitated proprietors shall not be answerable for the payment of public revenue assessed thereon; and if the next collections of any year shall prove unequal to the discharge of the fixed assessment, the deficiency shall be made good by the surplus collection of future years: Provided always, that the allowance for the support of the proprietors shall be paid as well in years of deficient as of surplus produce."

That on the 23rd of December, 1848, and after the arrival in India of the aforesaid Order in Council, the Court of Sudder Dewanny Adawlut made an order, reciting the receipt by the Court of a despatch from the Honourable the Court of Directors, together with the decree of Her Majesty in Council, and with instructions to take the proper measures for carrying the orders of Her Majesty in Council into execution, and for recovery, on behalf of the East India Company, of the expense incurred by them in bringing the cases to a hearing, and the Sudder Dewanny Adawlut then proceeded to make the following order:—"Before issuing the usual orders for the full execution of the decree of Her Majesty in Council, the Sudder Adawlut resolve to direct the Civil Judges of Guntoor and [125] Masulipatam to take the necessary steps in communicating with the Collectors of those districts to secure, by immediate attachment, such property, real and personal, as may belong to the parties above mentioned, with the exception of Puttoory Caly Doss, the third Respondent in appeal No. 11, of 1827, who has been exonerated by the decree of the Privy Council from all liability on account of the costs;" and it was "ordered that extract from these proceedings be sent to the Civil Judges of Masulipatam and Guntoor, by precept returnable in ten days from and after its receipt."

That on the 29th of January, 1849, the Petitioner presented a petition to the Sudder Adawlut, wherein, among other things, the Petitioner complained of certain illegal acts committed by Ramanadha Baboo in attempting to remove certain of the property, funds and furniture, to which the Petitioner was entitled under the aforesaid decree, and requesting that Vassareddy Ramanadha Baboo might be arrested for the purpose of securing the costs incurred, and to enable the Petitioner to obtain a restitution of the property which had been improperly made away with by him, and praying that the Court would immediately issue the necessary order for the release of the estates from attachment, for the purpose of restoring the estates to the Petitioner. That the Sudder Dewanny Adawlut took no notice of the Petitioner's last-mentioned petition.

That on the 11th of January, 1849, the Board of Revenue published an advertisement for the sale of the remaining portion of the property and estates, adjudged by the decree of Her Majesty in Council to belong to the Petitioner, which advertisement was as [126] follows:—"Notice is hereby given, that unless the sum of Rs. 28,06,737, being the balance of *peishcush*, including interest outstanding up to the 20th of December, 1848, against the undermentioned estates, composing Nundegamah Zemindary, belonging to Rajah Vassareddy Ramanadha Baboo, Zemindar" (being part of the estate and property declared by Her Majesty's decree in Council to be the property of the Petitioner, and ordered to be delivered into the possession of the Petitioner), "shall have been liquidated on or before Monday the 12th of February, 1849, the sale of the said estates will, agreeably to the instructions conveyed by the Board of Revenue, in their proceedings dated the 11th of

December, 1848, commence at the Collector's *cutcherry*, at Masulipatam, on that date, and will continue until the whole shall be sold."

That on the 8th of February, 1849, the Petitioner presented a petition to the Sudder Dewanny Adawlut, in which he protested against the intended sale as wholly illegal, and prayed that it might be stayed until the Petitioner should be put in possession of the same, and until the regular course prescribed by the Regulations had been adopted by the Board of Revenue. That in a proceeding of the Sudder Dewanny Adawlut, dated the 12th of March, 1849, the Court declared that they had referred, on the subject of the Petitioner's last-mentioned petition, to the Board of Revenue, and that from the reply of the Board the Court had learnt that the Masulipatam Vassareddy estate (being the estate of the Petitioner, against the sale of which he had petitioned the Court) had been purchased on account of Government, on the 12th of the then last preceding month, and they further declared that they must decline to interfere further in [127] the matter, and ordered that the prayer of the Petitioner should be rejected.

That on the 2nd of April, 1849, the Petitioner again petitioned the Sudder Dewanny Adawlut, to put in force the decree of Her Majesty in Council. That in a proceeding of the Sudder Dewanny Adawlut, dated the 16th of April, 1849, the Court directed, among other things, as follows:—"In conformity with the decree of Her Majesty in Council, and with reference to the order of the Sudder Adawlut, dated the 23rd of December, 1848, directing the civil Judges of Guntoor and Masulipatam to take proper measures to secure, by immediate attachment, such property, real and personal, as may be found to belong to the above parties, the Sudder Adawlut now direct that the civil Judges be commanded by precept returnable in six months, from and after its receipt, to carry the decree into full execution."

That the order of the Court referred to in the last-mentioned proceeding had reference solely to the levying of costs from the Petitioner and the other parties in the appeal, and the direction of the Court to the civil Judges of Guntoor and Masulipatam, to carry the said decree into full execution, was limited to so much of the decree as relates to the levying of costs, and was not an order directing the civil Judges to put the Petitioner in possession of the property to which he is entitled, in order and by virtue of the decree of Her Majesty in Council.

That on the 21st of December, 1850, the Petitioner presented a petition to the Governor in Council of Madras, praying that the Petitioner might be put in possession of the estates and property, in conformity with the decree of Her Majesty in Council. That [128] on the 24th of December, 1851, an answer was returned by the order of the Governor in Council to this petition, as follows:—"The Government cannot accede to the request contained in this petition."

That on or about the 23rd of February, 1851, the Petitioner presented a petition to the Zillah Court of Guntoor, praying for the delivery into his possession of the estates and property, and of Rs. 300,000, awarded to him by the aforesaid decree. That in a proceeding of the Zillah Court of Guntoor, dated the 14th of March, 1851, the Court stated as follows:—"The Court cannot interfere in the matter, and the Petitioner must address himself to the Sudder Adawlut, who will determine as to the propriety of complying or not with the request of the Petitioner."

That the Petitioner had wholly failed in his attempts to obtain from the Sudder Dewanny Adawlut, or from the Board of Revenue, or from the Governor in Council at Madras, possession of the estates and property awarded to him by the decree of Her Majesty in Council, and the decree remained up to the present time unexecuted, although a period of more than four years had elapsed since the decree was made; and the Petitioner suffered under the grievous hardship of a refusal on the part of the Sudder Dewanny Adawlut, to interfere on his behalf, for the purpose of carrying into execution a decree of Her Majesty in Council in his favour, which decree commanded the Court to do what is necessary to give effect thereto. That the Petitioner had no other means of redress open to him than by appealing to Her Majesty in Council, and obtaining a peremptory order, commanding the Sudder Dewanny Adawlut and all other persons whom it may concern, to carry, with-[129]-out further delay, the aforesaid decree into effect; and the petition prayed that Her Majesty in Council would be pleased to take the petition into Her



most gracious consideration, and to grant him a peremptory order addressed to the Judges of the Sudder Dewanny Adawlut, or to such other persons and authorities as to Her Majesty should seem fit, commanding them to execute the decree of the 2nd of March, 1848, and to put the Petitioner in possession of the land and other property awarded to him by the aforesaid decree.

This petition was specially referred to the Judicial Committee.

The petition came on to be heard *ex parte*, on the 16th of June, 1852, when their Lordships ordered it to stand over for service of the petition on the Board of Control, and notice of the proceedings to the East India Company. Both were served, but the East India Company alone appeared.

Upon the petition being opened (5th July, 1852.\*), Mr. Wigram, Q.C., and Mr. E. J. Lloyd, Q.C., for the East India Company, took a preliminary objection to the hearing.

The East India Company appear in deference to the Court's wish, but being entirely ignorant of the facts alleged in the petition, we submit, that the petition ought not to be proceeded with, until the Petitioner has taken proper steps in India to bring the Madras Government before the Court: and we insist, that this Court has now no jurisdiction in the matter: for having made a decree remitting the [130] causes to India to do certain acts, the appellate jurisdiction is gone; and to entertain the petition is to exercise original jurisdiction, there being now no suit before the Court. The Petitioner has mistaken his remedy: the proper course for him to have pursued, was to have taken proceedings in India, by citing the Government: or he might have brought a suit against the revenue authorities for the illegal sale of the estates. *Kirt Chunder Roy v. The Government* (1 Moore's Ind. App. Cases, 383). We submit, that the proceedings complained of may be perfectly right and in conformity with the Regulations, but that we do not appear to defend the Madras Government, or the Sudder Court Judges, who have not been served with this petition: but to urge that necessary inquiries ought to be taken to ascertain the legality of the acts of the Government before this petition can be heard.

Dr. Lushington.—We must now hear out the petition, and then determine the proper course to be adopted.

Mr. Bethell, Q.C., Mr. Forsyth, and Mr. Worsley, for the Petitioner.—First. The present application is well founded. The Petitioner does not ask the Court to interfere with third parties not before the Court. All that the petition prays is, that the decree of the Queen in Council may be carried into effect by the Sudder Court. What the Petitioner sought from the Sudder Court was a precept to the Collectors, directing [131] them to put him in possession of the fruit of his decree; if the Sudder Court had complied with that request, and the Collectors refused to obey the precept, the Petitioner had his remedy in India: but by the Sudder Court holding its hands, the Petitioner has no alternative but to apply here. But, secondly, upon the merits. There are two circumstances sufficient to justify the interference of this Court to protect this property from destruction. In the first place, the Sudder Court was not warranted in permitting Ramanadha Baboo to be put in possession of the estates without taking the security required by Madras Reg. VIII. of 1818, sec. 4: and, again, the proceeding of the Revenue authorities in first causing these estates to be sold for Government arrears, and then buying them in themselves, and that after a decree, awarding possession to the Petitioner, is to overrule the decree of this Court, and render its execution impossible. It would be most unjust, after the Petitioner has obtained a decree in his favour, to make him institute a fresh suit in India to obtain possession, because the Sudder Court miscarried in not enforcing the decree of this appellate Court. There is no such course prescribed by the Madras Regulations: on the contrary, the Regulations treat the Collector as the servant of the Court. By Reg. XXVII. of 1802, sec. 25, if the Collector omit or refuse to obey the process of the Court, then the Court from which the process issues may fine him. It is analogous to a process in this country issuing out of the Court of Queen's Bench, where if the sheriff refused to obey the writ of the Court, it would fine him for contempt. In the same way

\* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



the Collector ought to have been called upon by the Court, by precept, [132] to have carried the decree into execution. Another important question is, that the Petitioner was a minor. The estate was not under the Court of Wards, therefore Reg. V. of 1804 does not apply; but Reg. X. of 1831, sec. 2, cl. i., in clear terms declares, that arrears accruing during minority shall not be a charge upon the estate, so as to entitle the Government to sell the estate in satisfaction of arrears.

Mr. Wigram, Q.C., and Mr. E. J. Lloyd, Q.C., for the East India Company.—This petition is quite novel, and no authority has been cited to justify the application. The petition makes a complaint against two parties; first, against the Judges of the Sudder Court personally, for not having performed their duty; and, secondly, against Ramanadha Baboo, the party put in possession by the Sudder Court. If it is really intended to make any personal complaint against the Judges for contumacy to the order of this Court, they ought to have been personally served with the petition, that they might answer the charges. We only appear as representing the East India Company, and are entirely unacquainted with the statements contained in the petition. But we submit, that the Madras Government has a title paramount to the parties to the original appeals: the Government are no parties to the decree; they stand in the position of a landlord in possession of a leasehold estate for arrears of rent. The property ought not to be taken from the Government without giving them an opportunity of being heard. They have a paramount title, and ought to have been cited by petition. This is not a proceeding *in rem* but *in personam*. We are not acquainted with the [133] practice of the Courts in India in circumstances like the present. It may not be necessary for the Petitioner to institute a fresh suit to get possession. In the Court of Chancery in this country, if a new claimant intervenes, pending litigation, the Court will not decide the case against the third party, without giving him an opportunity of being heard; under some circumstances a new suit is not necessary against him, you serve him with notice of a petition, asking him to give effect to a decree, which he is interrupting. The same thing could perhaps have been done in India. Reg. XII. of 1809, sec. 11, cl. iv., shows that the revenue is a primary charge, and that the Government is bound to look to the proprietor *de facto*, as distinguished from the proprietor *de jure*. It is a question which cannot be satisfactorily determined without going into evidence; we ask, therefore, that the petition may stand over, to enable the Government of Madras to inform the Court what the facts really are, as at present the statements are *ex parte*. No doubt there are other facts which are material to be considered before the case is decided. It may be an omission of the Sudder Court to put the Petitioner into possession, but that cannot affect the right of the Government, which is quite independent of any proceedings the party may have taken in the Court below.

The Right Hon. Dr. Lushington.—Their Lordships have taken into consideration this petition, which prays, that Her Majesty will be pleased to grant a peremptory order, addressed to the Judges of the Court of Sudder Dewanny Adawlut, or [134] to such other persons and authorities as to Her Majesty shall seem fit, commanding them to execute the decree of Her Majesty in Council, bearing date the 2nd of March, 1848, and to put the Petitioner in possession of the land and other property awarded to him by the decree.

Their Lordships feel that in entering upon the consideration of this petition they are placed, for several reasons, in a position of considerable difficulty: First, on account of the entire novelty of the proceeding, this being, so far as any of us are aware, the very first time that any complaint has been addressed to the Judicial Committee, of the non-execution of a decree pronounced by them which has been confirmed by Her Majesty in Council. And, again, we experience some difficulty from the circumstance, that all the facts which are stated in these proceedings are entirely *ex parte*, and we have had no opportunity of ascertaining whether they are in strict conformity with the papers to which reference is made in the petition.

So far as we are enabled to judge from this petition, the Sudder Court seems to have been of opinion, that the property in question having been seized by the Board of Revenue, and being in possession of that Board, they had alone a rightful title, with which the Sudder Court could not interfere, and consequently they conceived,

that having ascertained that fact, they had discharged their duty, and no more depended upon them. We are not in a situation to say whether that determination, on the part of the Sudder Court, was well founded or not. We think it would have been infinitely better for all parties, if the grounds on [135] which the Sudder Court proceeded had been set forth in a more regular form, for the consideration of their Lordships.

There are other circumstances in this case, which, provided they are incapable of explanation, certainly tend to show that the present Petitioner has been subjected to very great hardship and detriment. We allude to the circumstance of security not having been taken, in conformity with Reg. VIII. of 1818, sec. 4. We are now speaking, as already observed, solely upon what appears before us *ex parte*, and, therefore, we do not intend to pronounce any decisive judgment upon it; but, supposing all the circumstances stated in the petition to be true, it would appear that this large property was put into the hands of Ramanadha Baboo, pending the appeals; that it has been wasted and dilapidated, and the whole property exhausted, in consequence of security not having been taken. It is not, however, necessary to allude further to that point.

Their Lordships, taking all these circumstances into their consideration, have determined to adopt the following course, by which course, we trust, the rights of the East India Company, if they have any, or the rights of the Government of Madras, or any other persons purchasing under them, will be protected, and which will also enable the Petitioner to put the Court in motion, so that he may have all that he is justly entitled to under the decree.

We intend to advise Her Majesty, that the Sudder Adawlut be directed forthwith to carry into execution the Order of Her Majesty, and to direct the Collectors to put the Petitioner into possession of the property, [136] according to such order made in the decree, reserving to the Madras Government, and all persons, except the Respondents in the original appeal, the right to appear for their interest, if any.

The report of the Judicial Committee of the Privy Council, dated the 5th of July, 1852, and the Order in Council made thereon, was as follows:—

“The Lords of the Committee, in obedience to your Majesty’s said order of reference, have this day taken the said petition into consideration, and having been attended by counsel on behalf of the Petitioner, and likewise on behalf of the East India Company, their Lordships do this day agree humbly to report to your Majesty as their opinion, that the said Court of Sudder Dewanny Adawlut, at Madras, ought to be ordered forthwith to carry into execution Her Majesty’s Order in Council of the 2nd of March, 1848, made upon the hearing of the said appeal, and to direct the Collectors of Guntoor and Masulipatam, and those districts in which the Vassareddy estates are situated, to put the Appellant, Rajah Lutchmeputty Naidoo, in possession of the said property, in pursuance of the report of this Committee, of the 29th of February, 1848, and of Her Majesty’s Order in Council, of the 2nd of March, 1848, approving the same, reserving to the Madras Government, and to all persons, except the Respondents in the original appeal, the right to appear for their interest, if any.

“Her Majesty having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, [137] as it is hereby ordered, that the said Court of Sudder Dewanny Adawlut, at Madras, do forthwith carry into execution Her Majesty’s Order in Council, of the 2nd of March, 1848, and that the said Court do direct the Collectors of Guntoor and Masulipatam, and of those districts in which the Vassareddy estates are situated, to put the Appellant, Rajah Lutchmeputty Naidoo, Bahadoor, in possession of the said property, in pursuance of the report of the Judicial Committee of the Privy Council, of the 29th of February, 1848, and of Her Majesty’s said Order in Council, of the 2nd of March, 1848, approving the same, reserving to the Madras Government, and to all persons, except the Respondents in the original appeal, the right to appear for their interest, if any. Whereof the Judges of the said Court of Sudder Dewanny Adawlut at Madras, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.”



## [138] ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

RICHARD HILL and Others.—*Appellants*: THE QUEEN.—*Respondent* \*  
[July 19, 1852; Feb. 20, 1854].

The office of surgeon of the district prison of St. Catherine, in the Island of Jamaica (created by the Acts, 5 Will. IV., c. 8, and 4 Vict., c. 26, of the Local Legislation of Jamaica), is an office held during pleasure only, and not during good behaviour [8 Moo. P.C. 155, 156].

Where Justices of the Peace having power to appoint a surgeon, appointed another in the place of one holding the office, held (reversing the proceeding in the Supreme Court upon a *Mandamus*),

First. That the office of surgeon of the district prison being a public office, held at pleasure, and not an ancient office, the choice of another to fill such office, by the Justices, in exercise of the powers vested in them by the local Act, 5 Will. IV., c. 8, confirmed by the 4 Vict., c. 26, was a determination of the first appointment [8 Moo. P.C. 155].

Second. That the office being full, a *Mandamus* would not lie [8 Moo. P.C. 156].

*Semble*.—The remedy was by *Quo warranto* against the occupant of the office.

Special leave to appeal granted *ex parte*, from an Order of the Supreme Court at Jamaica issuing a peremptory *Mandamus*, directing Justices of the Peace to restore a party to the office of surgeon: subject to the right of the Respondent to move upon a counter-petition to quash the leave given [8 Moo. P.C. 149].

This was a special appeal against an order *nisi* granted by the Supreme Court of Jamaica for a *Mandamus*, and against a subsequent order of the same Court making such order absolute, and also against a further order of the Court issuing a peremptory *Mandamus*. The Appellant, by such appeal, sought to discharge the above orders as being from the commencement void, and to have the writs and proceedings of the [139] Court consequent thereon quashed by an Order of Her Majesty in Council.

The prosecutor, William Dutton Turner, claimed a right to the situation or appointment of surgeon to the district prison of the parish and precinct of St. Catherine, in Jamaica, alleging, that it was an office in which the person appointed to do the duties thereof had a property, and that while the estate or property in the office was vested in him he was wrongfully superseded and removed by the Justices of St. Catherine. That the Supreme Court of Jamaica had legally and properly, at his instance, exercised a jurisdiction over the appointment of surgeon to such district prison, and issued a peremptory *Mandamus* to the Justices of St. Catherine to reinstate him in that office, although another person duly qualified, whom the Justices had elected to be surgeon, had been ousted from his office by the proceedings of the prosecutor.

By the Jamaica Act, 5 Will. IV., c. 8, sec. 2, it was enacted, that there should be one sufficient gaol in each of the several parishes of the Island, and one sufficient House of Correction, for the purposes of this Act, and which gaol and House of Correction might be built together or separately, and the expense of building and maintaining such gaol and House of Correction should be paid by the inhabitants of each parish respectively; and the Mayor, Aldermen, and Common Councilmen of the city and parish of Kingston, and the Justices and vestries of the several other parishes, were thereby authorised and required to raise by a tax a sum of money sufficient for such purpose, and forthwith to carry the same into effect, having a due regard to the separate compartments necessary in the accom-[140]-modation and classification of prisoners. And by section 10, it was enacted, that the Mayor, Aldermen, and Common Councilmen of the city and parish of Kingston, and the Justices of the several other parishes, should, and they were thereby empowered and required, from time to time, to appoint a surgeon to each of the prisons and Houses

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



of Correction, and hospital and asylum within their jurisdiction, and which were maintained at the expense of the parishes respectively.

By another Act of the Legislature of Jamaica, 3 Vict., c. 45, certain parts of the hereinbefore-mentioned Statute, including the 10th section, were repealed; and it was, amongst other things, enacted, that the Common Council of Kingston, and the Justices of the several other parishes, should, and they were thereby empowered and required, from time to time, to appoint a surgeon to each of the prisons and Houses of Correction, or other place used for the confinement of prisoners within their jurisdiction, and which were maintained at the expense of the parishes respectively, and every physician or surgeon of a county gaol, and every surgeon so appointed, was required to visit every prison or House of Correction to which he should be so appointed once at least every morning, and oftener if necessary, to see any prisoner confined therein, whether criminal, debtor, or inmate.

By the Jamaica Act, 4th Vict., c. 24, entitled "An Act to make provisions for building, repairing, and maintaining the Gaols, Houses of Correction, and Prisons," it was enacted by the first section, that from and after the 1st of January, 1841, the several parochial gaols and Houses of Correction in the Island [141] should be, and the same were thereby vested in Her Majesty, her heirs and successors, and should be and were thereby placed under the superintendence, management, and control of the Commissioners for superintending the buildings belonging to the public of Jamaica.

By the Jamaica Act, 4th Vict., c. 26, entitled, "An Act for the better Regulation of the Gaols, Houses of Correction, and Prisons," the 5th Will. IV., c. 8, and the subsequent Act, 3rd Vict., c. 45, were repealed. By the 8th section it was enacted, "that it shall be lawful for the Justices of the several parishes, and they are hereby required, to nominate such keepers, superintendents, task-masters, and other officers, as to them may seem expedient, for every prison or House of Correction, or other place used for the confinement of prisoners within their jurisdiction, to which this Act shall extend, except the keeper and officers of the three county gaols, and to remove, as occasion may require, all officers so by them nominated and appointed, in order that no inefficient officer or officers shall be continued in employment."

By the 12th section it was enacted, "that the Justices of the several parishes shall, and they are hereby empowered and required, from time to time, to appoint a surgeon to each of the parochial gaols, Houses of Correction, and other prisons, within their jurisdiction. And every physician or surgeon of a county gaol, and every surgeon so appointed, shall, and he is hereby required to visit every prison or House of Correction to which he should be appointed, as required by this Act, and to report every court (in the case of county gaols) to the Grand or Assize Courts, and in [142] respect to other prisons, to the Courts of Quarter or Special Sessions in the several parishes, the condition of the gaol, House of Correction, or other prison, and the state of the health of the prisoners and inmates under his care. And he shall keep a journal, in which he shall enter the date of every attendance in the performance of his duty, with any observations which might occur to him in the execution thereof. And such journal shall be kept in the prison, and shall regularly be laid before the Justices for their inspection, at the Courts of Quarter or Special Sessions of every parish, every three months, and shall be signed by the chairman of the Court of Quarter or Special Sessions, in proof of their having been there produced." By the 15th section it was enacted, "that the governor shall have authority to suspend, for such time as to him shall seem meet, or to dismiss all, or any, of the officers of any gaol, House of Correction, or prison; and no person who shall have been so dismissed by the governor, shall be thereafter eligible to be appointed to any office in the same, or any other gaol, House of Correction, or prison, without the approval of the governor, under his hand; and in the event of the vacancy in any office, occasioned by such dismissal as aforesaid, not being filled up within thirty days by the appointment by the person or persons authorised by law to appoint to such office, of a fit person, to the satisfaction of the governor, it shall then be lawful for the governor to appoint a fit person to such office."

At a Special Session of the Justices of St. Catherine, held on the 21st of July, 1834, the prosecutor, Turner, was appointed surgeon of the parochial gaol, and House of Correction, for the parish of St. Cathe-[143]-rine, under the authority of

the Act, 5th Will. IV., c. 8. Afterwards, a partnership, as surgeons, was formed between Turner and one Bowerbank. This partnership continued until September, 1850, when it was dissolved by mutual consent. During its existence, the salary was paid to either partner indiscriminately, and shared between them. From the commencement and until the termination of the partnership, the two partners were recognised by the Justices of St. Catherine, and dealt with as professional men, duly qualified, who by mutual consent had engaged to discharge the duties of surgeon to the District Prison, and were both equally under the superintendence and control of the Justices.

On the 13th of September, 1850, the Justices of St. Catherine received an intimation from Bowerbank, that the partnership of Turner and Bowerbank would terminate on the next day, and that it would become a question, in consequence of that dissolution, whether the District Prison should still be attended jointly, or whether it would be more satisfactory to the magistrates that the appointment should be held by one.

At a Special Session of the Justices, a resolution was passed by the Justices present, that "it was the opinion of that board, that the office of the surgeon of the St. Catherine's House of Correction and District Prison was vested in the firm of Turner and Bowerbank at the date of the dissolution of that firm, on the 14th of September, then instant, and that upon the dissolution of that firm the office became vacant, and that a Special Session should be convened for the 30th instant, for appointing a surgeon to the [144] institution, and that, for the meantime only, Drs. Turner and Bowerbank, and each of them, should be appointed surgeons and the surgeon of the institution."

The prosecutor addressed a letter to the senior Magistrate for St. Catherine's, protesting against the right of the Justices to declare such office vacated for the cause in their resolutions assigned, and also protesting against the appointment of a surgeon to the institution, such appointment being solely vested in him; and he gave notice that it was his intention to apply to the Supreme Court, at its next sitting, for a writ of Mandamus directed to him and each other Justice present at such Session, to compel his restoration to the office of surgeon to the House of Correction and District Prison; and that in the meantime, and pending his intended application, he claimed as justice, that the senior Magistrate should refrain from calling a Special Session for the purpose of appointing a surgeon to the above institution.

On the 30th of September, 1850, a Special Session was held, at which the above letter was read, and afterwards a resolution was moved, that Bowerbank should be elected surgeon to the St. Catherine's District Prison and House of Correction. Another resolution was also moved that Turner should be elected surgeon to the prison; and upon a division, Bowerbank was declared to have been duly elected, by a majority of eleven votes to one, and he thereupon entered upon the discharge of the duties of surgeon.

In the October Term, 1850, Turner applied to the Supreme Court of Jamaica for a rule *nisi* for a writ of Mandamus; the application being founded [145] upon his own affidavit, wherein he claimed the situation of surgeon of the St. Catherine's District Prison, as an office of right belonging to him; and after stating, among other things, that Bowerbank had been elected by the Justices on the 30th of September, 1850, he alleged, that he had been always ready to perform the duties of the office, but that he had been prevented from so doing in consequence of the pretended appointment of Bowerbank.

On this application an order was made by the Court that a writ of Mandamus should issue, directed to Edward Trueman Guy, senior Magistrate, and all other the Justices of St. Catherine's, commanding them to restore Turner to the office of surgeon to the St. Catherine's District Prison, with the emoluments of right belonging thereto, unless cause should be shown to the contrary by the first day of the ensuing Court, February 3rd, 1851. Cause was shown by the Appellants and the other Justices of St. Catherine's; and it was insisted by them, that the right and duty of appointing, from time to time, the surgeon or medical attendant to the prison was vested by law in them, and that they had rightly and duly discharged their duty and exercised their right by the appointment of Bowerbank, and that



Bowerbank was the surgeon of the District Prison, duly appointed, and then was in the lawful discharge of the duties of surgeon of the District Prison. And it was further insisted, that the order *nisi* ought to be discharged, inasmuch as in the case before the Court, a Mandamus would be an illegal and unjust course of proceeding. The Court, (Sir Joshua Rowe, Chief Justice,) on the 14th of February, 1851, made the rule for a Mandamus absolute.

A writ of Mandamus was accordingly issued, directed to Edward Trueman Guy, and the other Justices of St. Catherine's, commanding them to restore Turner to the office of surgeon to the St. Catherine's District Prison, or to show cause to the contrary by the first Monday of the ensuing June Court, 1851.

The Appellants, Richard Hill and Thomas Witter Jackson, made a joint return to the writ, stating "That at the before-mentioned session of the Justices of St. Catherine's, held on the 30th of September, 1850, the Justices duly elected Bowerbank to the office of surgeon, and that he had ever since performed, and was then still performing, the duties of the office: and they assigned as reasons for not restoring Turner, 1st, That he had never been appointed by the Justices of St. Catherine's surgeon of the District Prison in pursuance of the Jamaica Act (4th Vict., c. 26); but that the only person who had ever been legally appointed was Bowerbank, although at different times previously to the appointment of Bowerbank, Turner and Bowerbank had been jointly recognised by certain of the Justices as surgeons of the District Prison. 2ndly, That the Justices convened at a Special Session, on May 9th, 1851, to consider what return should be made to the writ of Mandamus, resolved, that they could not restore Turner to an appointment he had never legally held; and that it was not expedient, but would be prejudicial to the course of justice, to remove Bowerbank from the appointment, as he had been duly and legally elected to the office."

A traverse to the return was filed by Turner, on which issue was joined.

A joint return to the writ of Mandamus was also made by the other Appellants, Heslop, Russell, [147] McAnuff, and Aris (four of the Justices), stating, that they had not restored Turner, as by the writ they were commanded, 1st, Because the appointment in the writ mentioned, of Turner, had been made under a Jamaica Act, 5th Will. IV., c. 8 (an Act which expired December 31st, 1840), and not under any other Act. 2ndly, Because they had not removed Turner from office, but they had refused to allow him to execute the office, by reason that he was not entitled under any law in force in the Island to execute the same. 3rdly, Because, after the 31st December, 1840, and whilst the office was vacant, namely, on 1st August, 1842, Bowerbank was duly appointed to the office, and Turner since then had never been appointed to the office. 4thly, Because, on the 30th September, 1850, and whilst the office was vacant, Bowerbank was duly appointed thereto, and had thenceforth faithfully discharged the duties thereof, and did then still fill the office, and perform the duties.

A traverse to this return was filed by Turner, on which issue was joined.

A separate return was made by Lyon, another of the Justices, that he desired to obey the writ, and to restore Turner.

No other returns were made to the writ.

The trial of the issues was heard before Mr. Justice McDougall, one of the Judges of the Supreme Court of Jamaica, at the Assizes held for the county of Middlesex, in the Island, when the jury, under the direction of the learned Judge, found the following special verdict:—1st. We find that the appointment of Dr. Turner was made under the Act, 5th Will. IV., c. 8. [148] confirmed by the 4th Vict., c. 26. 2ndly. We find that the prosecutor was not removed till September 30th, 1850, when he was removed, and not permitted to do the duties of his office, the prosecutor being entitled by law to fill and execute the office. 3rdly. We find that Dr. Bowerbank was not duly appointed, the office not being vacant. 4thly. We assess damages at 40 shillings.

A motion for a new trial was afterwards made by the Appellants, founded upon certain objections made at the trial to the charge by Mr. Justice McDougall to the jury: but the Court, consisting of Sir Joshua Rowe, Chief Justice, and Mr. Justice McDougall, refused to grant a rule.

A peremptory Mandamus was afterwards issued, directed to Guy and other the

Justices of St. Catherine's, peremptorily commanding them immediately to restore Turner to the place and office of surgeon to the House of Correction and District Prison of St. Catherine's, the writ being made returnable at the then next term, commencing on the first Monday in June, 1852.

The Appellants and the other Justices of St. Catherine's, being served with the peremptory Mandamus, made a return to the writ, stating that at a Special Session of the Justices, duly convened, the Justices present restored Turner to the place and office of surgeon to the House of Correction and District Prison of St. Catherine's, together with the emoluments and privileges belonging thereto, as they were commanded, and that he had continued since to discharge the duties of such office.

The Appellants (a minority of the Justices of Saint [149] Catherine's) applied to the Supreme Court for liberty to appeal to Her Majesty in Council, but the Court refused to grant such leave.

The Appellants thereupon applied (July 19, 1852 \*) by petition to Her Majesty in Council for special leave to appeal against the orders and proceedings so made and had in the Supreme Court of Jamaica.

Mr. Rennalls, and Mr. Montague Smith, in support of the petition.—The proceedings are altogether irregular, as a Mandamus would not lie. Although the matter may not be strictly an appealable grievance within the meaning of the 47 and 48 Royal Instructions to the Governor of Jamaica, yet it is a proper case for the exercise of the powers vested in the Judicial Committee by the Statutes, 3rd and 4th Will. IV., c. 41, s. 4, and 7th and 8th Vict., c. 69, s. 1.

Lord Cranworth.—We think you are entitled to have leave to appeal; but as this is an *ex parte* application, and the point not free from doubt, it will be granted, subject to the other side presenting a counter-petition to quash such leave to appeal (a). The Petitioners must enter into the usual security for costs.

The appeal now came on for hearing.

[150] Mr. Montague Smith, Q.C., and Mr. Rennalls, for the Appellants.—The office of surgeon to the District Prison is not an ancient common-law office, of which the duration and appointment are governed by ancient usage, but it is an office of modern origin, created by the local legislature of Jamaica, by the Acts, 5th Will. IV., c. 8, s. 10, and 4th Vict., c. 26. Section twelve of the latter Statute authorises the Justices, from time to time, to appoint a surgeon. It is clear, therefore, that the appointment of a surgeon under the authority of this Statute gave to the person appointed by the Justices no freehold in the office. The situation of surgeon to the prison in question is not a substantive office, wherein the occupant can allege that he has any estate or property. This is apparent from the nature of the duties he has to perform, which require, that skilful treatment and watchful and kind attention should be bestowed on the prisoners; and as they have not the power to choose or discharge the medical attendant, it is obvious that this state of things require, and the law intends, that the Justices should have an absolute discretion in regard to the appointment of a fit and efficient person, and as to his being continued, or a more efficient person appointed in his stead. It was an office held during pleasure only, and not during good behaviour, and the Justices could, in their discretion, and in exercise of the powers vested in them by the twenty-fifth section of the Act, 4 Vict., c. 26, suspend or dismiss any of the officers of the Gaol, House of Correction, or Prison, which discretion has been, in the present instance, improperly interfered with. The authorities upon this point are con-[151]clusive. Thus, in *Ex parte Sandys* (4 Bar. and Ad. 863), the Court held that a clerk to Justices in Petty Sessions, who was appointed by order of the Sessions, had no legal hold upon his office. So also it was held in the case of *The King v. Griffiths* (5 Bar. and Ald. 731) which involved the right to the office of steward of the Tolsey Court of Bristol. Again, in *Smyth v. Latham* (9 Bing. 692), it was determined by the Court of Exchequer Chamber, that the office of paymaster of Exchequer bills was

\* Present:—Lord Cranworth, the Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. Sir Edward Ryan.

(a) As to the practice of presenting a counter-petition to dismiss an order granting leave to appeal upon an *ex parte* application, see *In re Ames*, 3 Moore's P.C. Cases, 409-13.



an office held during pleasure. It follows, then, in law, that the office being held during pleasure, the choice of another is a determination and revocation of the first appointment. *The King v. Thame Guardian' Eeel* (1 Strange, 115), *Rex. v. Mayor of Canterbury* (1 Strange, 674), *Smyth v. Latham*. The Justices had in this case an absolute discretion reposed in them by law to remove the surgeon, and that power they exercised. Therefore, a Mandamus will not lie, to interfere with any appointment they may have made. Had there been any pretence for imputing to them corrupt or improper conduct, the Supreme Court might have granted a criminal information against them. But here the Court usurps a power which the law confides to the Justices. Another objection, which, we submit, is fatal to the whole proceedings, is, that the proceeding by Mandamus was not a fit and proper way of trying the right to the office as between the Respondent and Bowerbank. The Justices in whom the power of appointment resides, made the appointment, *bona fide*, in September, 1850, when the office became full. On that ground alone, even [152] if the Court below was right in treating the office as a substantive independent office, the Mandamus was granted improvidently, inasmuch as, if the prosecutor had any remedy at all, it was by *Quo warranto* against the occupant of the office. *Darley v. The Queen* (12 Clk. and Fin. 520), *The King v. Attwood* (4 Bar. and Ad. 481), *The King v. Beedle* (3 Add. and Ell. 467). The whole proceedings in the Supreme Court, being contrary to law, ought to be set aside, in order that the appointment of the Justices in September, 1850, may have effect.

Mr. H. Hill, Q.C., and Mr. Middleton, for the Respondent.—A new case is now set up by the Appellants, which was not argued in the Court below. It is now urged that the office being full, the proper remedy was by *Quo warranto*, and that a Mandamus will not lie. No such objection was taken in the colony, and we submit, that this Court, as an appellate Court, will not decide an appeal upon grounds not brought forward in the Colonial Court. It cannot be now entertained. Whether this Court has indeed any jurisdiction to entertain this appeal, is a question. There could be no writ of error at common law on a Mandamus, and no Statute or other law either of Great Britain or Jamaica exists, whereby error can be brought on a Mandamus issued in that colony, and in appeals, and complaints in the nature of appeals, the Judicial Committee possess only the same jurisdiction as the Queen in Council possessed before the 3rd and 4th Will. IV., c. 41. The Statute, 7th and 8th Vict., c. 6, which ex-[153]tends the jurisdiction, does not contemplate a case like this. Here there is no error or defect in the record or proceedings alleged. Neither did the Appellants except upon this point to the ruling of the Judge at the hearing, when they could have presented a bill of exceptions; but as they did not adopt that mode of proceeding, the right of appeal is gone. Another objection is, that the Appellants have no right to appeal without the concurrence of the other Justices, or at least a majority of them, which they have not obtained. Nothing has occurred from the commencement of Turner's appointment up to the present time in any way to destroy or diminish his fitness and qualification for the office to which he was duly appointed in 1834. His appointment certainly did not determine on the expiration of the Jamaica Statute, 5 Will. IV., c. 8. The other Statutes, 3 Vict., c. 45, and 4 Vict., c. 24 and c. 26 respectively, being affirmative and prospective, did not prejudice his appointment, which had been made previously to the passing of those enactments. The Respondent never resigned his office; therefore, the alleged appointment of Bowerbank to such office was a nullity. The Colonial Statutes do not authorise the appointment of two persons to the office: indeed, two persons could not be appointed to such office at common law. There never was any appointment of the firm of Turner and Bowerbank. If there had been, the dissolution of partnership would not have vacated it. The twenty-fifth section of a local Act, 4 Vict., c. 26, relied on by the Appellants, only authorises the Justices to suspend or dismiss officers of the Gaols and Houses of Correction. Now such power is given by the twelfth [154] section, creating the office: it does not empower them to displace the surgeon. Upon a sound construction of the Statutes creating this office, it is clear, from the very nature of the duties, that it is an office held during good behaviour: therefore, the case of *Ex parte Sandys* (4 Bar. and Ad. 863), and the other authorities upon that point relied upon by the Appellants, do not apply.

Judgment was reversed.

The Right Hon. Sir John Patteson (Feb. 23, 1854).—The writ of Mandamus in this case states, that Dr. Turner was duly appointed to the office of surgeon to the House of Correction, and that he has been illegally removed from it, and prays that he may be restored. A return having been made, and certain issues joined, on which a verdict was given in favour of Dr. Turner, a peremptory Mandamus has issued: against all which proceedings certain of the Justices of the parish have appealed.

The first question is, whether Dr. Turner has such a tenure and property in the office that his restoration to it can be properly made the subject of a writ of Mandamus. He contends, that he held the office during good behaviour; the Justices, on the other hand, contend, that he held it only during pleasure.

The office is not an ancient office, so as to be governed by the rules of the common law, but was created by an Act of the Legislature of Jamaica, 5 Will. IV., c. 8, and continued, with certain modifications, by an Act, the 4th Vict., c. 26.

The 12th clause of the latter Act directs, that the Justices shall appoint a surgeon, and describes the [155] duties of his office, but has no express enactment as to the tenure of the office, the time during which it shall be held, or the mode of removal from it.

These must be ascertained by a consideration of the nature of the office, and of the scope and provisions of the Act, according to the rule laid down by the Court of Exchequer Chamber in the case of *Smyth v. Latham* (9 Bing. 692). That case differs from the present in some circumstances, but the principle is there clearly established. Their Lordships, adopting that principle, and looking at all the provisions of the Jamaica Acts, cannot fail to see that the duties of the office are such, that any individual may be fully capable of performing them when appointed, and yet may, from various circumstances, quite consistent with his having been and being of good behaviour, become inefficient, or be placed in such a position as that he ought not, with due regard to the public service, to be continued in the office; and we are of opinion, that the Legislature of Jamaica intended to leave the question of continuance in the office in the discretion of the Justices. It is true, that the 12th clause of the 4th Vict., c. 26, does not so expressly enact, and that the 8th clause of the same Act does contain such express enactment, as to certain offices specified in that clause, with the addition of the words "and other officers as to them may seem expedient;" and the 25th clause enables the governor to dismiss all or any officers of the House of Correction, without specifying the officers. But the argument raised from the language of those clauses, against such power of dismissal with regard to the surgeon, because such language is not used in the 12th clause, is by no means satisfactory; the Legislature may have [156] intended the 8th and 25th clauses to apply to all officers appointed by the Justices, and may have inserted the 12th clause only for the purpose of obliging them to appoint a surgeon; or, if this be not so, there is yet no inconsistency in holding, that the 12th clause gives the surgeon to be appointed under it a tenure during pleasure only, there being no words in that clause which give him a different tenure.

Upon the whole, their Lordships are of opinion, that Dr. Turner held his office only during pleasure, at the discretion of the Justices, and it is well established that the Courts of law will not interfere by Mandamus with the exercise of that discretion.

This being the view which their Lordships take of the case, it follows that all the proceedings by Mandamus were wrong, and that their Lordships must advise Her Majesty to reverse the judgment for a peremptory Mandamus pronounced by the Court below.

It is here right to add, that the objection now taken to the proceeding by Mandamus, does not appear to have been taken in the Court below, or, at all events, if taken at all, not to have been pressed, and their Lordships, therefore, are not to be considered as expressing any opinion, that if the tenure of the office had been during good behaviour they would not have held the judgment for a peremptory Mandamus to be right. No costs. Judgment reversed (a).

(a) See Viner's Abr., tit. "Mandamus" (G) 8, where it is stated, upon the authority of an anonymous case in Comberbach's Reports, p. 41, that a Mandamus



[Mews' Dig. tit. COLONY. III. APPEALS TO PRIVY COUNCIL, 3. *Leave to appeal*; tit. CROWN OFFICE, D. MANDAMUS, 2. k. *to admit, elect, or restore to offices*, ii. *In what cases granted*; F. QUO WARRANTO, 2. *Against whom and for what offices*, b. *Parochial Offices*; tit. PUBLIC OFFICER, E. IN OTHER CASES, 1. *Appointment*, 2. *Determination of Appointment*. As to special leave to appeal (a) in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125; (b) in criminal cases, see note to *In re Ames*, 1841, 3 Moo. P.C. at p. 413.]

## [157]                      ON APPEAL FROM NEWFOUNDLAND.

HUGH ALEXANDER EMERSON,—*Appellant*; THE JUDGES OF THE SUPREME COURT OF NEWFOUNDLAND,—*Respondents* \* [Nov. 29, 1852, and Feb. 16, 1854].

An order *nisi* for striking an attorney and practitioner of the Court of Newfoundland off the Rolls of that Court, unless cause to the contrary should be shown in four days, made absolute upon no cause being shown, notwithstanding an application made by him for enlargement of time to enable him to prepare his defence, reversed by the Judicial Committee as being irregularly and improperly made by the Court.

The Appellant in this case was an attorney and practitioner of the Supreme Court at Newfoundland. He had been admitted in 1825, and had filled continuously for twenty years, the office of Solicitor-General of the colony, and held that office at the date of the orders complained of. The appeal was brought against a rule absolute, dated the 10th of April, 1852, made by the Judges of the Court of Newfoundland, striking the Appellant off the roll of attorneys of that Court.

The circumstances under which this rule was made were these:—

In the year 1835, the Appellant was instructed by a person named Grealy to recover the sum of £76 19s. 18s. currency, from one Henderson, the surviving partner of the firm of Jordan and Henderson, [158] and a judgment was obtained by him for that amount. In the year 1850, Grealy presented a petition to the Supreme Court of Newfoundland, stating, that the Appellant had been employed as his attorney against Henderson in the year 1835, that judgment was passed in his favour for the amount sued for, and that he believed the whole sum and costs had been paid to the Appellant by the firm of Robinson and Co., being freight due to the brig *Elizabeth*: that he received from the Appellant the sum of £24 only, and that £52 19s. 8d. was still due to him from the Appellant; that he had frequently applied to him for it without any satisfaction, and had been at last recommended to apply to the Court for redress. Grealy filed an affidavit in support of his petition. The Court directed the Appellant to answer the petition on oath. In answer to this petition, the Appellant filed an affidavit, admitting having been employed as alleged, and having recovered some money, but stating that he had not the least recollection of the amount so recovered, nor could he ascertain it, inasmuch as all his books and papers had been lost in a fire which consumed his dwelling-house in 1847; that whatever amount he had recovered for Grealy he had paid over to him, and had taken his receipt, but which receipt was also burned; that from that time till this petition, he had never heard of the subject. Grealy filed an affidavit in reply, stating that he had applied personally many times to the Appellant for the money, and that the Appellant always promised to pay him.

When the case came on before the Court, the Appellant pressed upon the Court the hardship of being called upon to answer a charge after fifteen years, when all

to restore a surgeon to an hospital was denied, because it was not in the power of the Court, nor was it a public office. And see S.P. 3, New Abr. 532.

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

his papers were destroyed, and no demand [159] had been made upon him during that period. The Court made an order dismissing the petition, but without prejudice to any action which the Petitioner might hereafter bring against the Appellant, on terms that the Appellant was, within one week, to file an undertaking not to plead or rely upon the Statute of Limitations in such suit, otherwise the Petitioner was to be at liberty to proceed to trial upon this issue, namely, Whether the Appellant, as attorney for the Petitioner, in the action against Henderson, did receive, in the said cause, or under any writ, process, or judgment therein, any and what sum of money over and above the sum he paid to the Petitioner, and which ought to have been paid to the Petitioner on account thereof, with liberty for Plaintiff and Defendant to be examined at the trial. The Appellant declined to file the undertaking, and an action was thereupon commenced against him, and a declaration delivered therein upon the feigned issue directed by such order. The Appellant pleaded the Statute of Limitations, but the Court ordered the plea to be taken off the file with costs. The feigned issue was tried in December, 1851, when the jury made the following special verdict:—"There is no satisfactory evidence to show the amount received out of the freight of the *Elizabeth*, on the execution of *Grealy v. Henderson*; but it appearing to the jury, from the amount of freight stated to be earned by the *Elizabeth*, after allowing reasonable disbursements, there should have been sufficient to satisfy the execution, or, if otherwise, there was property by which the amount might have been recovered, as appears by the satisfying of a subsequent execution against the said Henderson at the suit of H. A. Emerson, Esq.; [160] the jury, therefore, find a special verdict for the Plaintiff, £52 19s. 8d. currency." The Appellant then moved the Court to have the verdict entered for him on the ground of the finding of the jury being in law a verdict for the Defendant, or that the verdict should be set aside and a new trial granted; but the Court refused both applications, and discharged the rule *nisi* obtained on behalf of the Appellant.

The Appellant then desired an investigation of the accounts of Henderson's estate, by which it would appear what sums he had actually received from the freight of the *Elizabeth*, and for that purpose filed a petition against the administratrix of Jordan Henderson, and made an affidavit in support of it; and the Court afterwards made an order calling upon such administratrix to file an inventory and account of the estate and effects of her deceased husband. In the meantime, Grealy applied to the Court for an order against the Appellant for payment of the amount of the verdict, with interest, and whilst this application was being argued, the sheriff brought into Court the writ book, in which he discovered certain entries of proceedings in the cause of *Grealy v. Henderson*, by which it appeared, that the Appellant had issued an attachment against the vessel *Elizabeth* for £20 0s. 2d. sterling, the debt due to Grealy, and that the demand had been satisfied. Upon this discovery, the Appellant, being advised of his inability to produce any documentary evidence, in consequence of the entire destruction of his books and papers, or to afford any conclusive explanation, in consequence of the great lapse of time, the event occurring so long previous, paid, under protest, Grealy's claim and costs.

Upon the Court being informed that the matter was [161] disposed of, the Chief Justice observed, that the Court would give judgment in the matter on the following morning. Accordingly, on the next morning, (the 6th of April,) the Chief Justice Brady delivered a written judgment, which did not contain any decision of the Court on the matters formerly at issue in the cause of *Grealy v. Emerson*, but consisted of a long and elaborate review of the course taken by the Appellant in reference to the petition of Grealy, and the proceedings subsequent to the filing thereof; and the judgment concluded by ordering the Appellant to show cause, in four days, why he should not be struck off the Rolls of the Court. It did not appear that any notice had been given of the intention of the Court to give such judgment, nor had any motion, application, or complaint been made by any person whatever to the Court against the Appellant in reference to his conduct.

The Appellant was served with the rule to show cause on the same evening, and he applied on the next day but one following for inspection of the documents on which the judgment was founded, and also for a copy of the judgment, to enable him to prepare his defence, but was unable to obtain them, as he was informed that



the papers were with the Chief Justice, and would not be returned to the office till the 9th or 10th of the month.

The Appellant thereupon made an affidavit of the facts with reference to his application to inspect the papers, that he had not, up to the morning of the 10th of April, the day on which the rule was returnable, seen the papers, and had not time since the service of the rule to make the necessary preparations for his defence in a matter so vitally important to him; [162] and upon the rule being called upon, on the 10th of April, which was the last day of term, he moved for an enlargement of the rule until the first day of the next term, to afford him time to prepare his defence, and urged that, according to the law and practice of the Court, it was not competent for the Court to call upon an attorney to answer, or for the Court to discuss such a rule, upon the last day of term.

At half-past three o'clock of the same day, the Chief Justice refused to grant such enlargement, and stated that, unless cause was shown before the rising of the Court on that day, the rule would be made absolute. Shortly after five o'clock in the afternoon of that day the Chief Justice called upon the Appellant's counsel to show cause against the rule, when he informed the Court that he could not show cause, as he was not prepared to do so for want of time to prepare his defence, when the Chief Justice ordered the rule to be made absolute, and immediately adjourned the Court.

On the 19th of the same month the Appellant applied to the Court for leave to appeal to Her Majesty in Council, which was refused by the Court, on the ground that the Charter constituting the Supreme Court did not authorise them to permit an appeal in such a case.

The Appellant then petitioned (Nov. 29, 1852 \*) Her Majesty in Council for leave to appeal from such order.

Mr. Montague Smith, in support of the petition, cited *Smith v. The Justices of Sierra Leone* (3 Moore's P.C. Cases, 361).

[163] Leave to appeal was granted upon the Appellant giving security for costs.

The Judges were served with notice of the appeal, and a case was put in for them as Respondents, by the solicitors of the Treasury, signed by the law officers of the Crown, by which it was submitted that, for the reasons set forth in the judgment of the Court, the rule or order absolute was rightly made, and ought not to be set aside.

The appeal now came on for hearing (Feb. 16, 1854).

Mr. Montague Smith, Q.C., and Mr. Coleridge, for the Appellant.—Nothing can be more repugnant to justice, or prejudicial to the Appellant's character, than the course pursued by the Court. In the first place, the proceedings were most irregular, for they originated at the instance of the Court itself, a course contrary to the practice of Courts in this country, where if any charge be brought against an officer of the Court, the Court directs a proper person to apply for a rule, and the matter is never mentioned by the Court until it comes before them for full discussion.—[Sir John Patteson: It does not appear that any motion had been made for a rule to strike him off the Rolls.]—None; it was the act of the Court alone. The Appellant is here charged with having recovered and received a sum of money, and with having withheld it from his client; appropriating it to his own use,—a charge involving gross professional misconduct. And upon a charge so grave against the Solicitor-General of the Colony, the Court *ex mero motu*, take proceedings against him for the purpose of striking him off the Rolls, which proceedings, we submit, are oppressive and unjust. The Appellant was not allowed by the Court sufficient time to prepare his defence to the charges brought against him. The Judges, from some cause, were prejudiced against the Appellant, and prejudged the case against him. They delivered a written judgment previously prepared, without any notice to him, and without calling upon him for his defence. He applied for an enlargement of the rule to enable him to prepare

\* Present: Lord Cranworth, the Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

his defence, which the Judges refused, under circumstances which, in any case, would be harsh and unjust. Such a sentence, in the absence of any sufficient grounds to sustain it, cannot, we submit, be allowed to remain, but must be reversed, and the Appellant restored to the Rolls of Attornies of the Court.

The Attorney-General (Sir A. Cockburn), with whom was Mr. Welsby, for the Respondents.—I do not appear to support this judgment: the duty of the Attorney-General, on behalf of the Crown, is to render assistance to the Court in arriving at a conclusion which will do justice to the parties most concerned. On behalf of the Crown, I beg to express a strong and unqualified opinion that the judgment cannot stand, and ought to be reversed, as the Appellant, whose interests are so materially involved in the decision, has had no opportunity afforded him by the Court below to answer the charge preferred against him.

Their Lordships, without calling for a reply, delivered judgment, as follows, by

The Right Hon. T. Pemberton Leigh.—This case comes before their Lordships in a very [165] singular position, for, the Appellant having prayed that certain orders of the Court below might be reversed, and the Judges who pronounced those orders being named as Respondents to the appeal, and having, by the printed case which they have put in, insisted that those orders were perfectly correct, it now appears that the Attorney-General and the law officers of the Crown are of opinion, being instructed on behalf of the Crown, that those orders, which the Respondents' case insists are perfectly correct, are, in point of fact, not capable of being maintained. We must consider that this case comes before us on an opportunity given to the Judges, if they thought fit, to appear. They were served with notice, and notice was also given to the Secretary of State, and we think that we must consider that the law officers of the Crown appear here on behalf of the Crown, as instructed by the Secretary of State, and that if the Judges of Newfoundland had wished to appear and support this judgment, they could and would have done so.

All their Lordships have to determine on the present occasion is, whether the two orders complained of have been regularly and properly pronounced or not. By one of these orders the Appellant is to be struck off the Rolls of the Court within four days, unless in the interval he showed cause to the contrary; and by the second of these orders, no cause having been shown, the conditional order is made absolute and he is struck off the Rolls.

Now the sole question which their Lordships have to consider is, not whether there were circumstances in this case which might require explanation on the part of the gentleman against whom these proceedings were directed, but whether, supposing such a [166] case to exist, the course which was taken by the Court was a regular and proper course, or not. Now it is impossible to dissent from the observations which have been made at the bar, that the course which was taken, in pronouncing the order in the first instance, that he should be struck off the Rolls unless he showed cause, was, to a certain degree, and indeed to a very great degree, prejudging the case, supposing that case ever was brought forward. Again, the order making absolute that order which was originally conditional, and refusing this gentleman any opportunity of giving an explanation, if explanation was required, was a proceeding, as it appears to their Lordships, which it is impossible to uphold.

The course which was taken was irregular also, as it appears to their Lordships, in another particular. There was an application for a new trial in a case pending between two parties in an action of debt, at least the case was for the recovery of a debt against an officer of the Court. In that proceeding an issue had been directed and tried, and an application was made for a new trial of that issue; but before that motion had been disposed of, the matter was settled. The proper course, therefore, would seem to have been to have discharged the rule with costs, as the cause was at an end. If, in the course of those proceedings, anything appeared to the Court in the conduct of one of its officers which required that an explanation should be given, in order that it might be seen, whether there was any necessity for a further and severer proceeding against him, their Lordships are of opinion, that that ought to have been the subject of a separate and distinct application; that notice should have been given to this gentleman that an explanation was required by the Court of those cir-[167]-cumstances, and that upon that explanation not being sufficient, the proper course would have been that some person should have been instructed



on behalf of the Crown to apply to the Court for a rule for this gentleman to show cause why further proceedings should not be taken. Their Lordships are unanimously of opinion, that the course which was taken was one which cannot be sustained; and it is upon these grounds, without saying anything upon the one hand, or the other, as to the suspicion which does or not attach to this gentleman, that their Lordships are of opinion, that the orders which have been pronounced cannot be maintained, and that we must advise Her Majesty to set them aside.

[Discussed and distinguished in *Newton v. North-Western Provinces (Judges of)*, 1871, L.R. 4 P.C. 24, 25.]

## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

WILLIAM VALENTINE and Others,—*Appellants*; JOHN CLEUGH,—*Respondent* \*  
[July 13, 1854].

### THE "TELEGRAPH."

The regulations respecting the exhibiting of lights by vessels, and other provisions guarding against accidents from collision, made by the Lords of the Admiralty, pursuant to the powers vested in them by the Act, 14th and 15th Vict., c. 79, s. 26, have the force of the Act of Parliament, and are to be strictly and literally complied with [8 Moo. P.C. 172].

By the Admiralty regulations, all sailing vessels at anchor in roadsteads or fairways are directed to exhibit, between sunset and sunrise, a constant bright light at the mast-head, so as to show a clear, good light all round the horizon.

A barque anchored in a proper place, with a light hoisted on the larboard mizzen rigging, was run into by a steamer proceeding in her proper course. The Court of Admiralty held, that the barque had substantially, though not literally, complied with the Act of Parliament and regulations made in pursuance thereof, by exhibiting a light on the larboard mizzen rigging, and that the light was more visible there than at the mast-head. Upon appeal, held (reversing such decision):

First. That the regulations were not complied with, as the light ought to have been exhibited at the mast-head. Secondly. That the collision was attributable to the barque's departure from the regulations, in neglecting to exhibit the light at the mast-head, and that consequently, by the Act. 14 and 15 Vict., c. 79, s. 28, the owner of the barque was not entitled to recover against the steamer [8 Moo. P.C. 178].

Costs, on the reversal, given to the Appellants, both in the Court below as well as in the Appellate Court [8 Moo. P.C. 178].

This was a cause of damage, civil and maritime, brought by the Respondent, the owner of the barque [168] *Palermo*, against the steam-ship the *Telegraph*, for damage occasioned by a collision caused by the *Telegraph* running into and doing serious damage to the *Palermo*, while she was lying at anchor in a proper place.

The collision occurred at about 10 P.M., on the 28th of November, 1853, in Belfast Lough; the *Palermo* being at anchor near to Grey Point, with her head to the south, and with her starboard side towards Belfast. The *Telegraph* was proceeding on a voyage from Belfast for Liverpool, with goods and passengers. It was admitted that the *Palermo* did not comply with the regulations (a) made by the

\* Present: The Right Hon. Sir John Dodson, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

(a) The following are the regulations, dated the 1st of May, 1852, and published in the *Gazette*, respecting sailing vessels, made by the Commissioners for executing the office of Lord High Admiral of the United Kingdom, in pursuance of the Statute, 14th and 15th Vict., c. 79, s. 26, and directed to be strictly observed:—

[169] Lords of the Admiralty, pursuant to the Statute, 14th and 15th Vict., c. 79, s. 26, respecting lights to be exhibited by vessels, and which require all sailing vessels at anchor in roadsteads or fairways, to exhibit a constant bright light at the mast-head from sunset until sunrise.

The sole question at issue was, whether the non-compliance with that regulation was not the cause of the collision. Throughout the pleadings on the part of the *Palermo* it was stated, that a light was hoisted, not at the mast-head, but in the mizzen rigging, which, it was contended, was the best position for it, under the circumstances. On the part of the *Telegraph* it was alleged, that no light was visible on board the *Palermo*, although a most vigilant look-out was kept on board the *Telegraph*; and that if a proper light had been exhibited at the mast-head, it must have been seen in time to have avoided the collision. In the rejoinder on the part of the *Telegraph*, it was pleaded, and it was not denied that the light was on the larboard mizzen rigging.

Affidavits were filed on the one side, to show that the light was hoisted in such a position as not to be visible to the *Telegraph*; and, on the other side, that a light hoisted on the larboard mizzen rigging was as visible as if it were at the mast-head. The [170] witnesses also differed as to the state of the weather at the time of the collision.

The Judge of the Admiralty (the Right Hon. Dr. Lushington, who was assisted by two of the Elder Brethren of the Trinity House), by an interlocutory decree, dated the 18th of May, 1854, pronounced for the damage proceeded for. The judgment of the learned Judge was in these terms: "The Trinity Masters are of opinion, looking at all the circumstances of the case, that a light hoisted in the larboard mizzen rigging was as visible as if it were at the mast-head. They say, moreover, that if any comparison is to be drawn between the two positions, they think all the circumstances of this case show it would be more visible at the larboard mizzen rigging than it would have been at the mast-head."

From this interlocutory decree the present appeal was brought by the owners of the *Telegraph*.

The appeal was argued by Dr. Addams and Mr. Forsyth for the Appellants; and Dr. Haggard and Mr. Willes for the Respondent.

The principal argument arose upon a comparison of the evidence of the witnesses, whether the light hoisted by the *Palermo* in the larboard mizzen rigging was visible to the *Telegraph*. Upon the question, whether the owner of the *Palermo* could recover for the damage sustained by the vessel, as he had not complied with the regulations made by the Commissioners for executing the office of Lord High Admiral, pursuant to the Statute, 14th and 15th Vict., c. 79, s. 26, by exhibiting a light at her mast-head, [171] *Holden v. The Liverpool New Gas and Coke Company* (3 Com. B. Rep. 1), and *Fawcett v. The York and North Midland Railway Company* (16 Q.B. Rep. 610), were cited.

Sir John Patteson.—This is a question, respecting the damage sustained by the barque *Palermo* in consequence of the steamer, the *Telegraph*, having struck her stern, as she lay at anchor, with her starboard paddle-box, and doing her considerable damage.

It appears to be quite clear, according to the evidence, and according to the opinion expressed by the learned Judge himself in addressing the Trinity Masters,

"SAILING VESSELS.

"We hereby require that all sailing vessels when under sail, or being towed, approaching, or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision.

"All sailing vessels at anchor in roadsteads or fairways shall be also bound to exhibit, between sunset and sunrise, a constant bright light at the mast-head, except within harbours, or other places, where regulations for other lights for ships are legally established.

"The lantern to be used when at anchor, both by steam vessels and sailing vessels, is to be so constructed as to show a clear, good light all round the horizon."



that the *Palermo* was anchored in a proper place on the night in question. It appears, also, that the steamer, the *Telegraph*, was proceeding from Belfast to Liverpool in her proper course, that her steering was proper, and her speed such as was right and proper. Therefore, there is nothing wrong by the owners of the *Palermo* with respect to anchoring, and there was nothing wrong by the owners of the steamer with respect to the course she was pursuing, nor the speed at which she was going; but the whole question turns upon the position of the light that was exhibited by the *Palermo*.

Now, many of the witnesses for the *Telegraph* say there was no light at all exhibited by the *Palermo*. We can easily understand their saying so; if, in truth, they did not see the light, they would say there was none. But it does not follow that there should be no light because they did not see it. The light may have been placed in such a position that they were not able to see it; but it is positively sworn by the persons on board the *Palermo* that there [172] was a light in the larboard mizzen rigging, put there as soon as she came to anchor, and which remained there an hour and a half previous to the collision, and continued burning after such collision as brightly as before.

There are other questions as to the state of the weather, and the witnesses seem not to agree upon it. Some say that it was rainy, some that it was hazy, and others say that lights could be seen all through the night wherever they were exhibited. It is sworn, that the steamer passed some thirty vessels that exhibited lights, and she did not strike any of them. It is admitted that the state of the night was such that lights could be seen to a considerable distance.

All these difficulties are, however, cleared away, when we come to the question raised on the Act of Parliament, the 14th and 15th Vict., c. 79, and to the regulations of the Lords of the Admiralty, made in pursuance of that Act, which regulations by the Act have the force of the Act itself, because it is expressly enacted, that the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral, shall make regulations as to the exhibition of lights. The 27th section lays down the rules to be observed by vessels passing each other, where both are in motion, and therefore that need not be adverted to. Then comes the 28th section, which enacts as follows: "If in any case of a collision between two or more vessels it appear that such collision was occasioned by the non-observance of either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral, with respect to the exhibition of lights, the [173] owner of the vessel by which any such rule has been infringed, shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried, that the circumstances of the case were such as to justify a departure from the rule." Now here the circumstances of the case do not appear to us to be such as to justify a departure from the rule. In the Court below, the Respondent, the owner of the *Palermo*, did not give any reason why the regulations were not strictly and literally complied with; he does not say that there were circumstances such as justified a departure from the regulations; he does not put it on that ground at all. The 27th section then goes on, "And in case any damage to person or property be sustained in consequence of the non-observance of any of the said Rules, the same shall in all Courts of justice be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having the charge of such vessel, and such master or other person shall, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule, be subject in all proceedings, whether civil or criminal, to the legal consequences of such default."

It is perfectly clear, therefore, that if the regulations which are to be issued by the Commissioners for executing the office of the Lord High Admiral are not literally complied with, and any collision takes place and damage occurs which is attributable to a departure from the regulations, and not under justifiable circumstances, the party who has so departed from the regulations cannot recover. Then we have [174] regulations made by the Lords of the Admiralty, and it is upon these regulations that the case really turns. The regulation regarding sailing vessels says distinctly, "all sailing vessels" (the *Palermo* was a sailing vessel) "at anchor,"—(she

was at anchor),—"in roadsteads or fairways, shall be also bound to exhibit, between sunset and sunrise, a constant bright light at the mast-head, except within harbours or other places where regulations for other lights for ships are legally established." Then it goes on to say, "The lantern to be used when at anchor, both by steam vessels and sailing vessels, is to be so constructed as to show a clear, good light all round the horizon." This is perfectly plain, except there be any difficulty with respect to what is meant by "at the mast-head." It does not say at what mast-head, whether foremast, or mainmast, or mizzenmast, but at the mast-head.

Now, in the course of this discussion, it seemed to be somewhat assumed, we thought, that the words, "at the mast-head," might mean on or attached to the mast. If that were so, it is obvious that putting a light against the mast, whether on the one side or the other, must necessarily prevent the light being seen all round, as it would be dark on the other side of the mast. It seemed to us very extraordinary, if that should really be the meaning; and upon consulting the sailing masters, whose assistance we have, they tell us what seems to be the true meaning; and looking ourselves at the words, "The lantern shall show a clear, good light all round the horizon," we are clearly of opinion, that "at the mast-head" means at the very top; that if the top-gallantmast is standing, it must be at the top-gallantmast—whichever is the standing mast, that is the mast. We do not mean one of the three masts as compared with [175] the other masts of the vessel; perhaps there is a choice as to the mast. There is no difficulty in doing this, there are halyards by which it is easier to run a light to the top than to put it against the mast. Now if the lantern was at the very top, it would show a light all round the horizon.

It is conceded by the Respondent that those who had charge of the *Palermo* did not literally comply with this regulation; they did not hoist a constant bright light at any mast-head at all, but they hoisted a light in the mizzen rigging, and so far it is quite plain that they departed from the literal meaning of the Act of Parliament, and the regulations of the Admiralty. As already said, the Respondent has not assigned any special reason why he should be justified in departing from the regulation and the Act of Parliament, and the case is not put upon that ground; but it is very justly, and most fairly and properly, put in the address by the learned Judge of the Admiralty Court to the Trinity Master, "whether you are of opinion that the omitting to hoist a light at the mast-head was the occasion of this collision." The learned Judge goes on to say, "The solution of this question must depend on considerations which particularly belong to you"—speaking to the Trinity Masters, who assisted him—"as relates to this particular case, because you are best capable of judging whether this vessel, the *Telegraph*, proceeding from the port of Belfast, would be able to descry a vessel with the same facility, with a light hoisted at the larboard mizzen rigging, as she would if it had been at the mast-head." The *Palermo* was anchored, he it observed, with her head to the south, about south-south-east or thereabouts, and the wind was blowing against her head, and the [176] proper course of the steamer being east by north, she would come on the starboard side of the vessel, the light being in the larboard mizzen rigging. We do not think there could be a mistake in the Court below with respect to the steamer coming on the larboard side, and not the starboard, because the evidence is so clear as to these points. But the learned Judge goes on to say, "If you are of opinion that she would not"—that is, not see the light so well as if it were placed at the mast-head—"then I cannot help thinking that this collision might have been avoided by hoisting a light at the mast-head, and that it is fairly to be inferred, that the collision was occasioned in consequence of its not being so hoisted." Now we think that inference very fair, and very right and proper, because there being an express regulation of the Admiralty that the light is to be hoisted at the mast-head, if parties, of their own authority, and without justifiable reason, depart from such regulations, and put a light somewhere else, it ought to be at their own risk.

Now, as admitted in argument, it is not departure from the regulations which would preclude a vessel from recovering altogether, unless that was the occasion of the collision. It might be a light night, so that a vessel could be seen without a light, or there might be misconduct on the part of the other vessel, and in these,



and other cases that might be put, the party would be entitled to recover, although the regulations had not been complied with. The collision must be clearly traced to a departure from the regulations; and it is our desire, that it should be understood, that those who depart from them do so at their own peril. The learned Judge goes on to say, "On the other hand, if your nautical knowledge leads you [177] to the conclusion that, in all probability, the light would be equally discerned in the larboard mizzen rigging as at the mast-head, then, under these circumstances, it appears it would be impossible to say that the collision was occasioned by a disregard of the terms of the Act of Parliament."

Now, nothing can be fairer than that way of putting it, and it really is reduced to this simple question, whether the Trinity Masters, and the learned Judge who acquiesced in their view, are right in the opinion at which they arrived? because the whole case turns on that. "The Trinity Masters," the learned Judge said, "are of opinion, looking at all the circumstances of the case, that a light hoisted in the larboard mizzen rigging was as visible as if it were at the mast-head." No doubt it might be as visible to persons on the larboard side of the vessel, but was it as visible to all persons? that is the question. He then proceeds: "They say, moreover, that if any comparison is to be drawn between the two positions, they think all the circumstances of this case show, it would be more visible in the larboard mizzen rigging than it would have been at the mast-head." Their Lordships are in very great difficulty to understand how they arrived at that conclusion. How it could possibly be said to be more visible, we are really quite unable to conjecture. We have had the advantage of being assisted by gentlemen fully conversant with this subject, who are clearly of opinion, as their Lordships also are, that the Trinity Masters were entirely wrong in their view of the case. The question turns simply upon whether or not the steamer, coming as she did, would be able to descry the vessel with the same facility with a light hoisted at the larboard mizzen rigging as she would if it had been at the mast-head. The Trinity Masters (and the [178] learned Judge adopted their decision) have determined that she would be able to do it; the Sailing Masters who assist us entertain a totally different and opposite opinion, and in their view we entirely concur, as we think she certainly could not.

Here is the light in the mizzen rigging, here is the steam-vessel coming up; and no doubt the mizzen-mast, and the sail that was brailed up, and other things, might very likely have hidden the light from view; but, if it had been at the top of the mast it could not have been hidden. Therefore, we cannot see how there can be the slightest doubt on the question, and we are assisted by nautical men who take the same view of the case. We are clearly of opinion, that the view taken by the Trinity Masters is not a just and proper view, but that the light was in all probability hidden by the position in which it was placed; at the mast-head it might, and in all probability would, have been seen. It is to be observed, that there was a good look-out on board the steamer, which fact is not denied; and, therefore, it is fairly and properly to be assumed, indeed from the facts of the case it is quite apparent, that the collision was occasioned by a breach of the regulations, in not placing the light at the mast-head. That being so, by the Act of Parliament the owners of the *Palermo* are not entitled to recover. Their Lordships are of opinion, that the decree and sentence of the Court below must be reversed, and the cause retained, and that the owners of the *Palermo* must be condemned in the costs below as well as here. The unsuccessful party must take the consequences of bringing an action which he cannot sustain, and we shall advise Her Majesty accordingly.

[S.C. 1 Spinks E. and A. 427. As to (i.) collision regulations, see now the Merchant Shipping Act, 1894 (57 and 58 Vict. c. 60) s. 419 (4); *Tuff v. Warman* 1857, 2 C.B. N.S. 740; on app. 5 C.B. N.S., 573; *The Khedive*, 1880, 5 A.C. 876; *The Argo*, 1900, 9 Asp. Mar. Law Cas. 74; the Merchant Shipping Act, 1897 (60 and 61 Vict. c. 59); Merchant Shipping (Liability of Shipowners) Acts, 1898 (61 and 62 Vict. c. 14), and 1900 (63 and 64 Vict. c. 32); (ii.) both ships being in fault, see *Wilson v. Canada Shipping Co.*, 1877, 2 A.C. 389; (iii.) costs, see *The Glanibanta*, 1876, 1 P.D. 283; as to Admiralty jurisdiction, see note to *Vaux v. Sheffer*, 1850-52, 8 Moo. P.C. 89.]

## [179] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

WILLIAM HADDON SMITH,—*Appellant*; JOHN DEIGHTON and RICHARD BILLINGTON,—*Respondents* \* [Nov. 29, 1852].

It is essential to the validity of a church-rate, that the notice required by the Statute, 58 Geo. III., c. 69, s. 1, summoning the parishioners together, should clearly apprise them of the special purpose for which the vestry meeting is to be called [8 Moo. P.C. 187-188].

A notice of a vestry meeting was issued by the churchwardens, to levy a rate for the purpose of defraying the expenses incurred by the churchwardens in repairing and restoring the parish church, rendered necessary by reason of a late fire: or otherwise, to consider the expediency of borrowing the amount of such expenses on the credit and security of the church rates pursuant to the provisions of the Statutes, 58 Geo. III., c. 45, or of the 59 Geo. III., c. 134, and in case it should be considered expedient to borrow the amount of such expenses, to authorize the churchwardens to take the necessary proceedings for that purpose, and to do all matters incident thereto. At the meeting held in pursuance of such notice, it was resolved: First, that the churchwardens should be authorized to borrow upon security of the church rates, in payment of the expenses incurred in restoring the church, to be paid by annual instalments of not less than one-tenth of the loan with interest. Secondly, that in payment of the first instalment of the loan, and the ordinary expenses of the parish church, a rate should be granted to the churchwardens. In pursuance of this second resolution a rate was made to pay the first instalment of the loan, and also for the necessary and incidental expenses of the church.

Upon appeal, held (reversing the judgment of the Court below, admitting a libel in a cause of subtraction of church rate) that the rate was invalid, as the notice was insufficient, and not in compliance with the provisions of the Statute, 58 Geo. III., c. 69, s. 1. For although there was sufficient authority by the notice for the first resolution, yet that the notice was insufficient, and fatal to the second resolution, for making a rate for necessary and incidental expenses of the church [8 Moo. P.C. 189].

In reversing such judgment, the Judicial Committee gave the Appellant the costs incurred in the Court below, but not of appeal [8 Moo. P.C. 189].

This was an appeal respecting the admission of a libel, in a cause of subtraction of church rate, pro-[180]-moted by the Respondents, the churchwardens of the parish church of Saint Michael, Cambridge, against the Appellant, a parishioner and inhabitant of that parish. The question substantially involved in that cause was the validity of a church rate made in pursuance of a notice calling a vestry meeting, for the purpose of raising a rate to defray the expenses of repairs and restoration of the church, which had been destroyed by fire. The suit was brought in the Arches Court, by Letters of request from the Episcopal Court of Ely.

The libel, in substance, pleaded, first, that the church having been nearly destroyed by fire in 1849, was repaired and restored by the churchwardens, and opened for divine service in 1850. Second, that a great portion of the expense incurred in restoring the church was defrayed by voluntary contributions, but that as such contributions failed to cover the expenses by about £1200, it was proposed that the churchwardens should, with the consent of the vestry and incumbent of the parish and of [181] the Bishop of the Diocese, borrow, upon the credit of the church rates of the parish, that sum, and raise from time to time, by rates, the money necessary to repay, by instalments, such principal sum, with interest on the balance due, till the repayment of the whole principal, pursuant to the provisions of the Statute, 59 Geo. III., c. 134, s. 14. The third article set forth, that a meeting

\* Present: Lord Cranworth, Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, the Right Hon. Sir. Edward Ryan, and the Right Hon. Sir John Patteson.



of the parishioners was held in the vestry-room, on the 23rd of January, 1851, pursuant to the following notice (which was annexed as an exhibit in the cause): " Notice is hereby given, that a meeting of the parishioners of the parish church of the parish of St. Michael, in the town of Cambridge, in the county of Cambridge, will be held in the vestry-room of the said parish church, on Thursday next, the 23rd day of January, 1851, at twelve o'clock at noon, to levy a rate, for the purpose of defraying the expenses incurred by the churchwardens in and about the repairing and restoring of the parish church of the said parish of St. Michael, rendered necessary by reason of the late fire; or otherwise, to consider the expediency of borrowing the amount of such expenses on the credit and securities of the church rates of the said parish, pursuant to the provisions of the Statutes of the 58th of Geo. III., c. 45, or of the 59th of Geo. III., c. 134, and, in case it shall be considered expedient to borrow the amount of such expenses, to authorise the churchwardens to take the necessary proceedings for that purpose, and to do all matters incident thereto: " at which meeting the following resolutions were proposed and seconded, and carried by a majority of the parishioners then and there assembled: " First, that the churchwardens and all other proper parties be, and are hereby autho-[182]-rised to borrow and take up at legal interest, upon the security of the church rates of the parish of Saint Michael, in the town of Cambridge, the sum of £1200, in payment of the expenses incurred in the restoration of the church, the said sum to be repaid by annual instalments of not less than one-tenth part of the loan with interest; and that the churchwardens and all other proper parties do join in the making the requisite security for such loan; and second, that in payment of the first instalment of a loan of £1200 and interest, and the ordinary expenses of a parish church, a rate of one shilling and nine-pence in the pound be, and the same rate is hereby granted to the churchwardens of the parish of Saint Michael." The fourth and fifth articles pleaded, that on the 15th of April, 1851, the churchwardens, with the consent of the Bishop, and of the incumbent of the parish of Saint Michael, by deed, dated on that day, charged the church rates of the parish with the payment of £1200, by them borrowed in pursuance of the first of the two resolutions of the vestry set forth in the preceding article. The sixth article pleaded, that contemporaneously with the execution of this deed, and on the 15th of April, 1851, a rate of one shilling and nine-pence in the pound was made in pursuance of the second of the two resolutions above set forth, whereof the heading was as follows:—" Parish of Saint Michael, Cambridge, the 15th day of April, in the year of our Lord, 1851. We, the undersigned, being the churchwardens of the said parish of Saint Michael, in the town of Cambridge, in the county of Cambridge, and Diocese of Ely, whose names are hereunder subscribed, do hereby, and in pursuance of an order [183] made by the churchwardens and parishioners of the said parish in vestry assembled on the 23rd day of January last, rate, tax, and assess all the inhabitants and parishioners of the parish aforesaid, for and towards the repayment of the sum of £180, (being the first instalment of the loan of £1200 and interest borrowed and taken up, by and with the consent of the vestry of the said parish, and of the incumbent thereof, and of the Bishop of the Diocese in which the said parish is situated, to defray the expenses incurred in and about the repairing and restoring the parish church, rendered necessary by a fire,) and for and towards the sum of £60 (being the amount of the other necessary and incidental expenses of the said parish church for the current year ending at Easter next)."

The succeeding articles pleaded, that the rate had been confirmed, but that the Appellant had refused to pay the rate, and that the Justices of the borough of Cambridge, upon the Appellant being summoned before them and objecting to the validity of the rate, had declared that they had no authority to enforce the payment of the rate.

The admission of this libel was opposed by the Appellant, but the learned Judge (Sir John Dodson) by his decree, bearing date the 19th of February, 1852, admitted the libel. From this decree the present appeal was brought, and now came on for hearing.

Dr. Haggard and Dr. Bayford in support of the appeal.—The libel was improperly admitted by the Court below. The rate in question was invalid. The notice [184] summoning the vestry, at which the rate was made, was defective and

insufficient as a notice for the making a rate for the general annual expenses of the parish. The notice was issued pursuant to the Statute, 58 Geo. III., c. 69, the first section of which enacts, "That no vestry, or meeting of the inhabitants in vestry, of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof." In *Prideux* (Churchwarden's Guide, pp. 68, 71, 6th edit.) it is laid down, that it is essential to the validity of a church rate, that the notice summoning the inhabitants together, apprise them of the special purpose for which the meeting is to be called, as provided by the above Statute, 58 Geo. III., c. 69, s. 1, in order that the parishioners may be duly apprised. The requisites of this Statute must be strictly complied with, and the purpose specified in the notice with sufficient certainty, otherwise the proceedings are invalid, and the churchwardens have no legal power to enforce the vote of the vestry.—[The Lord Justice Knight Bruce: Are not the words of the notice sufficient, "for the purpose of defraying the expenses incurred," "or otherwise to consider the expediency of borrowing," etc?—They are not sufficiently explicit. The principal object of the notice are the repairs of the fabric, not the expediency of borrowing money for general church purposes. Again, no mention is made in the notice of the general annual expenses of the parish, incidental to a church rate, the amount of which is, in this case, in comparison with the whole rate, so large, that the rate itself is on that ground also invalid. But the validity of the rate here depends entirely on the [185] sufficiency of the notice. In *Blunt v. Harwood* (1 Curt. 648) the notice for the meeting was to receive the report of a committee appointed to consider a plan produced at a former vestry meeting, and this notice the Ecclesiastical Court held sufficient, but the Court of Queen's Bench, in the same case, *Blunt v. Harwood* (8 Add. and Ell. 610), upon an application for a prohibition (though the decision turned upon another point), doubted if it was a sufficient notice.—[Sir John Patteson: In *Clutton v. Cherry* (2 Phill. 373) Sir John Nicholl held, that it was not necessary in all cases that notice should be given of the specific purpose for which a parish vestry is convened.]—That was before the passing of the Statute, 58 Geo. III., c. 69.—[Lord Cranworth: The question really is, whether it is a good notice under that Statute.]—We contend that the notice is defective, and consequently the rate made in pursuance of the resolutions is invalid.

Dr. Addams, and Dr. Twiss, for the Respondents.—The notice summoning the vestry meeting was a sufficient compliance with the requirements of the Statute, 58 Geo. III., c. 69, s. 1. The time, the place, and the purpose of the meeting, are clearly stated, which is all that is required. In *Warner v. Gates* (2 Curt. 318), Sir Herbert Jenner said, "The first objection is, that there was not sufficient notice of the purpose for which the vestry was assembled; 'it was for making of a church rate and other purposes.' Certainly there is no specification of the exact object or purposes to which the rate was to be applied; but there is a notice that the meeting was to be for the [186] making of a church rate, and it is hypercritical to say, that every particular circumstance and object is to be stated in the notice."—[Lord Cranworth: In that case the objection was, that the notice was too general, here the Appellant contends that it is too particular to justify the rate. Sir John Patteson: Does not the Court in that case seem to think, that a notice in general terms might be sufficient, but that if you choose to particularise, you are confined to the special purpose stated in the notice? This was said in reference to a question the Queen's Bench had asked as to the requisite form of the notice since the Statute, 58 Geo. III., c. 69, whether it would be good if it specified no object.]—*Blunt v. Harwood* does not apply, as the rate there made was resolved at a meeting, the notice of which was to consider a plan to be produced, of which the parishioners were entirely ignorant. The Appellant must be taken to have acquiesced in the rate, as he made no protest at the vestry meeting.—[Lord Cranworth: Is he bound to do so?—The contention of the Appellant is, that the notice is too special; but the object of the notice is sufficiently clear; it was for the purpose of levying a rate, which might have been for the current year's expenses. The third article of the libel sets out the first resolution of the vestry, to borrow money on the security of the rates in payment of the expenses incurred for the restoration of the church; and the second resolution is for payment of the first instalment of the proposed



loan, and the ordinary expenses of the parish church. The objection is not as to this being an improper item in the rate, but because the notice was not sufficient, as it does not include such item. We submit, however, that the notice is not so limited, and did not [187] prevent the vestry entertaining the question of the ordinary expenses of the church.

Dr. Haggard, in reply.

The Right Honourable Dr. Lushington.—In this case an objection has been taken to the admissibility of a libel in a cause of church rate. This objection is founded upon a comparison of the third and sixth articles of the libel, as bearing upon the Statutes, 58 Geo. III., c. 45, and 58 Geo. III., c. 69, for the regulation of parish vestries. By the first section of the latter Statute it is enacted, that “no vestry, or meeting of the inhabitants in vestry, of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during, or immediately after, divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel.” The objection taken here is, that this is not such a notice as the Statute requires, and the real question at issue is, what is the true meaning of the notice required by such Statute? Undoubtedly, it was the intention of the Legislature in framing this Statute to provide, that due information should be given to all the parishioners of the special purpose for which their attendance is required. These enactments were made to remedy the great evils that had arisen from convening a meeting upon a general notice, the parishioners being entirely ignorant of the [188] particular purpose for which they were called upon to meet.

We are clearly of opinion, that, in order to comply with the requirements of this Statute, the special purpose intended to be discussed should be stated in the notice calling the vestry. This has not been done in the present case. The notice here is “to levy a rate, for the purpose of defraying the expenses incurred by the churchwardens in and about the repairing and restoring of the parish church of the said parish of Saint Michael, rendered necessary by reason of the late fire; or otherwise, to consider the expediency of borrowing the amount of such expenses on the credit and security of the church rates of the said parish, pursuant to the provisions of the Statutes, of the 58th Geo. III., c. 45, or of the 59th Geo. III., c. 134, and, in case it shall be considered expedient to borrow the amount of such expenses, to authorise the churchwardens to take the necessary proceedings for that purpose, and to do all matters incident thereto.”

It is not difficult, nor can any doubt be entertained as to the meaning which would attach to the words of this notice. The subject-matter is confined exclusively to one specific object, being merely to levy money to repair and restore the church, rendered necessary by the fire; and although other matters were in fact brought forward at the meeting so convened, yet we consider that the notice of the meeting is exclusively confined to the statement therein contained, namely, the expense of the repairs of the church in consequence of the fire, and that this would exclude any other subject not necessary for such a purpose. It appears to us, that only one object was contemplated by the notice, namely, to con-[189]-sider how the expenses incurred in repairing the church should be defrayed; either by making a rate, or by borrowing money, and that the notice gave no further information to the parishioners.

Now, upon an examination of the third article of the libel, it appears, that the parishioners did adopt one of the two ways announced by the notice for raising the money: they authorised the churchwardens to borrow the amount on security of the rates, and we consider that there was sufficient authority in the notice for the first part of the resolution: but, as to the second part of the resolution, the making a rate for the general expenses of the parish, we are all clearly of opinion, that the notice was wholly insufficient for that purpose, and that the provisions of the Statute have not been complied with.

This objection being conclusive, in our minds, as to the invalidity of the rate, the result will be, the judgment of the Court below must be reversed, the libel

rejected, and the cause remitted. Their Lordships do not consider that they ought to give costs in the Appellate Court, but they are of opinion that the Appellant ought to have the costs in the Court of Arches.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, n. *Costs*; tit. ECCLESIASTICAL LAW, XXVII. CHURCH AND CHAPEL RATES, 1 *Making*, d. *Notice of holding Vestry to make*. See Compulsory Church Rate Abolition Act, 1868 (31 and 32 Vict., c. 109); and Prideaux's *Churchwarden's Guide*, 16th ed. p. 131.]

[190] ON APPEAL FROM THE COURT OF CHANCERY, IN JAMAICA.

WILLIAM BALFOUR and JESSE ALEXANDRINA his Wife, and CHARLES GORDON GRAY and AUGUSTA FRANCES ELIZABETH GRAY,—*Appellants*; ELIZABETH WATT and others,—*Respondents* \* [Feb. 2, 1853].

Heard *ex parte*.

By the Jamaica Act, 8 Vict., c. 48, entitled, "An Act to declare Judgments a lien upon land, to abolish arrest in certain cases, and for other purposes," an Order made by the Court of Chancery in Jamaica, in an Administration suit, for the payment of a legacy, declared due from the Testator's estate, has, when duly registered, the force and effect of a Judgment at law, and constitutes the legatee a judgment creditor, so as to entitle him to the writ of *Venditioni Exponas*.

This was an appeal against two orders of the Court of Chancery of Jamaica, made on the 3rd of March, 1851, for the payment of two several legacies found due, and directed to be paid in a suit for the administration of M'Pherson's, the Testator's, estate.

The Appellants, on the 3rd of January, 1850, presented their petition in the causes of *Anderson v. Robertson*, and *Cumming v. Watt*, then pending in Jamaica, seeking to obtain execution of two Orders of the Court, made on the 23rd of July, 1849, for the payment of certain sums of money to the Appellants respectively, out of the estate of one Robert Watt, deceased. And the Appellants, by their petition, prayed [191] that they might be at liberty to issue writs of *Venditioni Exponas*, for the recovery of the sums so ordered to be paid to them, in conformity to the 14th Section (a) of the Jamaica Statute, 8 Vict., c. 48. The petition of the Appellants was dismissed with costs, by the Order of the 3rd of March, 1851.

The Appellants were legatees under the Will of Hugh Gray M'Pherson, of the island of Jamaica, who died in the island, on the 22nd of March, 1835. M'Pherson, by his Will, dated the 1st of August, 1831, bequeathed a legacy of £600 to the children of his cousin, Charles Gordon Gray; to which legacy, and the interest thereof, the Appellants, Charles Gordon Gray, and Augusta Frances Elizabeth Gray, were declared to be entitled by an Order of the Court of Chancery of Jamaica, made in the cause of *Cumming v. Watt*, and bearing date the 23rd of July, 1849. M'Pherson, by his Will, also bequeathed a legacy of £400, to the children of the Reverend Thomas Steel, to which, with the interest thereof, the Appellant, Jesse Alexandrina Balfour, late Jesse Alexandrina Steel, became entitled, as the only surviving child of the Rev. Thomas Steel, deceased, as declared by another Order of the Court in the same cause of *Cumming v. Watt*, bearing date also the 23rd of July, 1849; and, after making other provisions respecting his

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

(a) The provisions of this section are similar to the 18th section of the British Statute, 1 and 2 Vict., c. 110, for abolishing arrest on mesne process.



estate, the Testator appointed Edmund Francis Green, of London, since deceased; Robert Watt, of Jamaica; Alexander M'Pherson, of Scotland, since deceased; and Kennett M'Pherson, of Jamaica, since deceased, to be the executors of his Will. Watt alone [192] proved the Will in the Court of Ordinary, in Jamaica, and entered into the possession of the real and personal estate of M'Pherson, which he got in and received to a very considerable amount. Watt died in Jamaica, on the 10th of January, 1841, being at the time of his death largely indebted to the estate of his Testator, M'Pherson, on account of the assets he had got in and received. Watt, by his Will, dated the 30th of December, 1840, among other things, directed that all his just debts should be fully paid and satisfied as soon after his decease as possible, and he charged and made liable all his estate, real and personal, to the payment thereof, and he thereby nominated and appointed James Rait, and Margaret Rait his wife, both of Jamaica, and since deceased, Elizabeth Watt (one of the Respondents), and Duncan Robertson, of Jamaica, Esq., since deceased, to be the executors and trustees of his Will.

Shortly after the death of Watt, his Will was duly proved in the Court of Ordinary of Jamaica, by James Rait, and Margaret his wife, who duly qualified as executor and executrix thereof. And, shortly afterwards, Elizabeth Watt, one of the Respondents, also qualified as an executrix; and Duncan Robertson afterwards also qualified as an executor; and, after the death of Rait, and Margaret his wife, Robertson entered into the possession of the real and personal estate of Robert Watt, jointly with the Respondent, Elizabeth Watt.

A Bill was filed in the Court of Chancery of Jamaica, on the 22nd of April, 1842, by Alexander Cumming, and others, against the Respondent, Elizabeth Watt, and Duncan Robertson, as the surviving qualified executors of Robert Watt, and also [193] against William Stanford Grignon, since deceased, and the Respondent, Joseph Gill Jump, as the qualified executors in Jamaica, of James Rait, then lately executor of Robert Watt. The Complainants claimed to be entitled, under the Will of M'Pherson, to the residuary estate of the Testator, devised and bequeathed to the grandchildren of the Testator's uncle, Alexander M'Pherson, of Dalraddy, North Britain. And, the Bill prayed, that an account might be taken of the personal estate and effects of M'Pherson, that had come to the hands of the Defendants, or to the hands of Robert Watt and James Rait, deceased, respectively; and that, if necessary, an account might be taken of the debts of the Testator, M'Pherson, and of such of the specific and pecuniary legacies as had been paid, and of such as remained unpaid, and that the same might be paid in a due course of administration; and for an account of the residue of the Testator's estate, due to the complainants, and that the amount when so ascertained might be paid, and the personal estate of M'Pherson applied in liquidation thereof, and in a due course of administration; and that the clear residuary estate of M'Pherson might be ascertained and secured by the Court, for the benefit of all persons interested therein; and that inasmuch as the personal estate of M'Pherson had not been invested in separate securities in the name of Watt, as executor, but had been used and applied by Watt in his own affairs, and mixed up with and then formed an important portion of the estate of Watt, in case the Defendants thereto should not admit assets of Watt in their hands sufficient to pay the sum of money received by Watt on account of the estate of M'Pherson, that an account might be taken of the personal estate [194] of Watt, and of the rents and profits of his real estate.

A bill was also filed in the same Court by James Anderson and Ann his wife, late Ann Watt, a legatee under Watt's Will, against Duncan Robertson and Elizabeth Watt, for an account and payment of the legacy.

The cause of *Cumming v. Watt* came on to be heard, and an Order, dated 6th of January, 1844, was made therein by the Court, referring it to the Master to inquire who were the grandchildren of Alexander M'Pherson, entitled to claim as residuary legatees under the Will of M'Pherson; and that an account should be taken of the personal estate of M'Pherson, and what portion thereof was collected by Watt, his executor, and for an inquiry whether the same was separately invested in any and what funds, or whether it was blended by Watt with his own monies. Subsequently to this Order, another Order was made in the same cause, dated the 6th of June, 1846, directing the Master to whom the cause stood referred, to take

an account of the several legacies and annuities bequeathed by the Will of M'Pherson.

The Master made his report on the 10th of August, 1846, which was afterwards confirmed absolute, and he thereby found, that the Complainants were entitled to claim as residuary legatees under the Will of M'Pherson; and the Master also found, that upon taking the accounts of Watt, as executor of M'Pherson, after making to Watt all reasonable allowances, there was a balance of £10,205 10s. 8d. sterling due by Watt to the estate of M'Pherson, and after deducting from the balance of £10,205 10s. 8d. sterling, the amount of the several unpaid legacies and arrears of annuities, and the sums of money necessary [195] to be invested and set apart for securing payment of the annuities (which legacies and arrears of annuities, and necessary sums, would amount to £3433), the Master found there would remain a free residue on account of the personal estate of M'Pherson, amounting with interest, to the sum of £6772 10s. 8d. sterling.

The cause came on to be heard on further directions, on the 31st of October, when the Master's report was confirmed, and a decree made in conformity thereto.

On the 31st of December, 1846, the Appellant, Balfour, presented a petition, under the Order made in the suit of *Cumming v. Watt*, on the 31st of October, 1846, by which it had been directed that Robertson and the Respondent, Elizabeth Watt, the executors of Watt, should, out of the assets of Watt, to the extent of the sum of £3433 sterling, pay the sums, together with interest thereon, reported due, to the pecuniary legatees and annuitants of McPherson; and, among others, a legacy of £400 to the children of the Rev. Thomas Steel, deceased, on their proving their title thereto before the Master. By the petition he claimed in right of his wife, the Appellant, Jesse Alexandrina Balfour, late Jesse Alexandrina Steel, the legacy of £400, so bequeathed to the children of the Rev. Thomas Steel by the Will of McPherson, Jesse Alexandrina Balfour being the only surviving child of the Rev. Thomas Steel, deceased, and prayed for a reference to the Master. Upon the hearing of the petition, it was referred to the Master to make inquiry into the title of the Appellants, Balfour and his wife; and the Master, having thereupon made his report, that the Appellant, Balfour, in right of his wife, was [196] entitled to the legacy of £400 so bequeathed to the children of the Rev. Thomas Steel, an Order was made in the cause of *Cumming v. Watt*, by the Court, on the 23rd of July, 1849, whereby the Master's report was confirmed, and his Honour the Vice-Chancellor declared, in the terms of the report, that the Appellant, Jesse Alexandrina Steel, then Balfour, was the only surviving child of the Rev. Thomas Steel, deceased, and that she was married to and became the wife of the Appellant, Balfour, on the 19th of September, 1840; and that the Appellant, Balfour, in right of his wife, was entitled to the legacy of £400, so bequeathed to her by the Will of McPherson, and interest thereon until payment of the same. And it was further ordered, that Robertson and Elizabeth Watt should, out of the assets of the estate of Watt, forthwith pay to the Appellant, Balfour, the sum of £556, the amount of principal and interest reported by the Master in his report in chief in the cause, together with further interest at 6 per cent. on £400, being the principal of the legacy, from the 10th of August, 1846, the date of the report in chief, until payment, together with the costs, to be taxed, incurred by the Appellant, Balfour, on his petition, and of all proceedings thereunder.

After the making of the Order, of the 31st of October, 1846, in the cause of *Cumming v. Watt*, the Appellants, Charles Gordon Gray, and Augusta Frances Elizabeth Gray, on the 3rd of January, 1849, also presented a petition in the cause of *Cumming v. Watt*, claiming to be entitled to the legacy of £600, bequeathed by the Will of McPherson, and directed by the decree in *Cumming v. Watt*, of the 31st of October, 1846, to be paid by Robertson [197] and Elizabeth Watt, out of the assets of Watt, to the children of Charles Gordon Gray, the cousin of McPherson, on their proving their title thereto, praying by their petition for an inquiry as to their title. Upon the hearing of this petition, it was referred to the Master to make such inquiry; and the Master having made his report, that the Appellants, Charles Gordon Gray and Augusta Frances Elizabeth Gray, were the parties entitled to the legacy of £600, an Order was made by the Court, in the cause of *Cumming v. Watt*, bearing date the 23rd of July, 1849, whereby the Master's report was con-



firmed absolute, and his Honour the Vice-Chancellor declared, in the terms of the report, that the Appellants, Charles Gordon Gray and Augusta Frances Elizabeth Gray, were the children of Charles Gordon Gray, the cousin of the Testator, McPherson; and, therefore, entitled to the legacy bequeathed to them by the Will of the Testator, and reported due to them by the Master's report of the 10th of August, 1846. And it was further ordered, that Robertson and Elizabeth Watt should, out of the assets of the estate of Robert Watt, forthwith pay unto the Appellants, Charles Gordon Gray and Augusta Frances Elizabeth Gray, the sum of £804, the amount of principal and interest reported by the report in chief in the cause, together with further interest at 6 per cent. on £600, the principal of the legacy, from the 10th of August, 1846, the date of the report, together with the costs, to be taxed, of the petition, and of all proceedings thereunder.

By an Act of the Legislature of Jamaica, 8 Vict., c. 48, entitled, "An Act to declare judgments a lien upon lands, to abolish arrest, except in certain cases, and for other purposes," it is recited in the eighth [198] section, that the existing law is defective, in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and that it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors, than they possess under the existing law. And it is enacted by that section, that the real estate of which the Defendant in a judgment, or any person in trust for him, is seised or possessed, shall be liable to be taken possession of under a writ of extent issued upon the judgment. And, by the ninth section it is enacted, "That by virtue of any writ of *Venditioni Exponas*, to be issued out of any Court of this Island, the Provost Marshal-General, or other officer having the execution thereof, may seize and take any money, Receiver-General's checks, bank notes of any bank, bills of exchange, bonds, etc., or other securities for money belonging to the person against whom the writ shall be issued." And, it is afterwards enacted by the fourteenth section of the same Act, "That all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Court of Insolvency, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the Supreme Court. And the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be deemed judgment creditors within the meaning of this Act: and all powers hereby given to the Judges of the Supreme Court, with respect to matters depending in the same Court, shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Court of Insol-[199]-vency; and all remedies hereby given to judgment creditors, are in like manner given to persons to whom any moneys, or costs, charges, or expenses are by such orders or rules respectively directed to be paid."

The Orders of the 23rd of July, 1849, were duly registered, according to the above Act.

The Appellants, not having been paid any part of the legacies of £400 and £600, and interest, and being advised that, under the above Act of the 8th Vict., c. 48, s. 14, the two Orders of the Court of Chancery, of the 23rd of July, 1849, had the same effect as judgments at law, and that the Appellants were entitled to the same remedies as upon a judgment, for obtaining payment of the sums of money thereby respectively ordered to be paid out of the assets of the estate of Robert Watt, by Robertson and Elizabeth Watt; on the 3rd of January, 1850, presented a petition in the Court of Chancery of Jamaica, entitled in the causes of *Anderson v. Robertson*, and *Cumming v. Watt*, praying that they might be at liberty to issue writs of *Venditioni Exponas* against the stock, goods, and effects of the estate of Robert Watt, in the hands of Robertson, as executor and receiver, to satisfy the amounts severally directed to be paid by the two Orders of the 23rd of July, 1849. The petition set forth the two orders of the 23rd of July, 1849, made in *Cumming v. Watt*, for the payment of the two legacies of £400 and £600, and interest and costs, to the Appellants respectively by Robertson and Elizabeth Watt forthwith, out of the assets of the estate of Robert Watt. And, after setting forth various matters not in issue in this appeal, stated, that the Petitioners had been kept out of their debt for many years, and prayed that they might be at liberty [200] forthwith to issue writs of *Venditioni Exponas* against the stock, goods, and effects of the estate

of Robert Watt, in the hands of Robertson, as such executor or receiver; or that the same might be sold by and under the direction of the Court, to such extent as might be required to satisfy the amounts severally directed to be paid by the two several Orders of the 23rd of July, 1849, in favour of the Appellants, together with the costs of the application.

The facts of this petition were verified by the affidavit of William Wemyss Anderson, the constituted attorney, in Jamaica, of the Petitioners.

The petition was heard in the Court of Chancery of Jamaica, on the 24th of January, 1851, and an Order was made on the 3rd of March, 1851, whereby his Honour the Vice-Chancellor dismissed the petition with costs.

From this Order the Appellants brought the present appeal. The Respondents did not appear, and the appeal was now heard *ex parte*.

Mr. Baily, Q.C., and Mr. Rennalls, in support of the appeal, argued, that the two Orders of the 23rd of July, 1849, made in the suit of *Cumming v. Watt*, for the payment of the two legacies given by the Will of McPherson, had, by virtue of the 14th section of the Jamaica Act, 8 Vict., c. 48, the effect of a judgment at law recovered in the Supreme Court in the Island, making the Appellants judgment creditors within the meaning of that Act, and, as such, entitled to the remedies given to judgment creditors, for the recovery of the moneys directed to be paid, with costs. That the Appellants were clearly entitled to the relief prayed for [201] by their petition, as the Court in Jamaica was the proper Court for establishing the demand of the estate of McPherson against the estate of Watt, as that Court had exercised its jurisdiction over the subject-matter, by the Order of the 6th of January, 1844, in the suit of *Cumming v. Watt*, directing the account of McPherson's estate, and of the amount collected by Watt. That the Appellants were entitled to the benefit of that Order, and to the proceedings consequent thereon, as they had properly established in that suit their right to, and by the Orders of the 23rd of June, 1849, were decreed payment of, their legacies.

The Lord Justice Knight Bruce.—This Order cannot stand, for the Colonial Statute clearly applies to a case like the present. It is impossible to understand what these Appellants have done to disqualify them from applying in the cause of *Cumming v. Watt*. They have established the liability of Watt's estate to pay their legacies, and it appears that there is sufficient funds to pay them. The costs of the petition in the Court below, and of appeal, must come out of the estate. The Order will be reversed, without prejudice to the parties applying to the Court below.

The following Report was made by their Lordships, which was approved by Her Majesty, and ordered accordingly:—"Their Lordships humbly report to your Majesty as their opinion, that the said Order of the Vice-Chancellor of Jamaica, of the 3rd of March, 1851, ought to be reversed, and that the Appellants be entitled to the benefit of the Jamaica Act, 8 Vict., c. 48; and that the Appellants are entitled to have [202] the amount of principal and interest of their legacies and costs, and further interest by the two Orders of the 23rd of July, 1849, directed to be paid, and their costs of the petition in the Court below, and likewise the sum of £251 2s. 1d. sterling, for the costs of appeal, raised and paid out of the stock, goods, and effects mentioned in the prayer of the said petition; and their Lordships are further of opinion, that the cause ought to be remitted, with these recommendations, back to the Court of Chancery in Jamaica, and that the said Court be directed to proceed therein accordingly, so as to carry the said declaration into effect; but their Lordships do further report that your Majesty's Order in this appeal is to be without prejudice to any application which may be made by any of the parties interested in the estate of Watt, to have the amount raised and paid out of any other part of the assets of Watt's estate."

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 22. *West Indies*.]



## [203] ON APPEAL FROM THE SUPREME COURT AT CEYLON.

The QUEEN, by HER MAJESTY'S ADVOCATE-GENERAL for CEYLON,—  
*Appellant*; WILLIAM NICHOLAS PRICE, JAMES SMITH, and GEORGE  
 STEWART,—*Respondents* \* [Feb. 2, 1853, and Feb. 17, 1854].

HEARD *ex parte*.

By the 23rd clause of the Charter of Justice of Ceylon (1833), District Courts were established with certain powers, such District Courts consisting of a Judge and three Assessors, and, by the 36th clause of the Charter, an appeal is given from such Courts to the Supreme Court in all matters of law and fact.

By Ordinance (for the establishment of Police Courts), No. 11, of 1843, sec. 14, of Ceylon, the Supreme Court has full power and authority to review the proceedings of the Police Courts, and, if necessary, to set aside or correct the same, for incompetency of the Court in respect of excess of jurisdiction, or for gross irregularity in the proceedings, etc.

By the Ordinance, No. 11, of 1844, sec. 7, power is given to a District Judge or Police Magistrate to enforce any recognizance taken before a Justice of the Peace, upon proof of its forfeiture.

Held by the Judicial Committee (affirming the decision of the Supreme Court of Ceylon), that a decision of a Police Magistrate, under sec. 7 of the Ordinance, No. 11, of 1844, declaring the recognizance of sureties forfeited, in default of appearance of the principal party, charged criminally, was a "proceeding" within the fourteenth section of the Ordinance, No. 11, of 1843, and the proper subject of review by the Supreme Court [8 Moo. P.C. 212].

A. was out on bail upon a criminal charge. On the 7th of August, 1851, a notice requiring A. to appear "forthwith" before the Supreme Court at Colombo, was issued. This notice was left on the 12th of the same month at the last place of abode of A., who was not to be found, and, on the 13th, the day after, the Court was held, and, as A. when called did not appear, his recognizance was declared to be forfeited. The sureties were then proceeded against, and the Magistrate, under sec. 7 of the Ordinance, No. 11, of 1844, declared that their recognizances were forfeited. The Supreme Court on review reversed the decision. Upon appeal, the Judicial Committee sustained this decision, holding, that it was a "gross irregularity" within the meaning of section 14 of Ordinance, No. 11, of 1843; for, as it was a case against sureties, it must be clearly shown that the conditions on which their liability depended had been literally complied with, which had not been done, as the notice was imperfect, and the proceedings under it irregular; A. being entitled to a distinct and intelligible notice of the place and time of holding of the Court [8 Moo. P.C. 216].

The word "forthwith," in a notice to a party charged criminally and out on bail, to appear, on pain of forfeiting his recognizance, means, "within a reasonable time from the service," and not from the date of the notice [8 Moo. P.C. 213].

In the month of March, 1851, the Respondent, Price, being charged before John Dalziel, a Justice of [204] the Peace for the Midland Circuit at Colombo, in the Island of Ceylon, with fraud and theft, in the course of his employment as Assistant Commissary-General in Ceylon, entered into a recognizance with two sureties (James Smith and George Stewart, the other Respondents), himself in the sum of £1000, and the sureties in the sum of £500 each, the condition to be void if Price should appear and answer to any information, indictment, or sufficient complaint which should be presented against him in any competent Court for the Midland Circuit, upon receiving notice of the time and place of holding such Court at Colombo, which place was thereby elected by him, Price, for that purpose.

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

On the 28th of July, 1851, the above-named Justice of the Peace issued an order for the commitment of Price, to take his trial upon the above charge, before the Supreme Court of Ceylon; and on the 7th of August, 1851, a notice was issued from the Fiscal's office at Colombo, signed by the Deputy Fiscal, and directed to Price, by which he was required to appear [205] before the Supreme Court at Colombo forthwith, on pain of forfeiting his recognizance. Price was not then to be found in Colombo, and a copy of the notice was, therefore, on the 12th of August, 1851, affixed at his last place of abode in Colombo, and also on the walls of the premises occupied by Smith (one of the sureties) at Colpetty, in the Island. On the 12th of August, 1851, another notice was issued from the same office, signed by the Deputy Fiscal, and directed to Smith and Stewart, the sureties, whereby they were directed to appear before the Supreme Court at Hulsdorp forthwith, on pain of forfeiting their recognizance as security of Price, a copy of which notice was on the same day personally served on them. On the 13th of August, 1851, Her Majesty's Advocate-General for Ceylon presented to the Supreme Court at Colombo (being a competent Court for the Midland Circuit), an indictment against Price for fraud and theft, and the officer of the Court was required to place him at the bar; but Price, after being duly called by the officer of the Court, failed to appear.

On the 13th of March, 1852, notices signed by the Clerk of the Police Court at Colombo, were served on Smith and Stewart, requiring them to take notice that on Tuesday then next, the 16th of March, proof of the forfeiture of the bail-bond to the Queen, entered into by them and Price as aforesaid, would be taken by that Police Court.

Accordingly, on the 16th of March, at the Police Court at Colombo, before John Spencer Collpeper, Esquire, Police Magistrate, the Deputy Queen's Advocate moved, in conformity with the Ordinance of 1844, No. 11, to prove the forfeiture of the recognizance, the same then being in that Court, and for that [206] purpose adduced evidence of the facts before set forth.

Upon that occasion, the Police Magistrate having (notwithstanding an objection taken by the Advocate of Smith and Stewart, that the Police Court had no jurisdiction in the case) heard the evidence adduced, decided, that the recognizance had become and was forfeited, and accordingly ordered, that Price should pay into Court, on or before the 31st of March, the sum of £1000, and that Smith and Stewart should each pay into Court, on or before the same day, the sum of £500 each; that notice of such order should be sent to Smith and Stewart, and, in default of payment, a warrant of distress should issue. Notice of the last-mentioned order was given to Smith and Stewart, who thereupon applied by petition of review to the Supreme Court, stating that they were aggrieved at such finding of the Police Court, and praying, that the Supreme Court would set aside and correct the same in review, for the following reasons: First, that the Court or Magistrate had no jurisdiction in the subject-matter, and could not entertain the same, or declare the recognizance forfeited. Second, that assuming that there was no excess of jurisdiction, the recognizance was void and contrary to law, and the Justice of the Peace had no authority to order or accept the same. Third, that assuming that there was no excess of jurisdiction, and that the recognizance was not void, there was no forfeiture thereof, the examination of Price having been unduly and unnecessarily delayed, there having been no warrant of commitment or recommitment either pending such examination, or after it was closed, and Price not having been duly committed for trial, [207] and no due notice having issued to him, or to his sureties, of the alleged commitment, either before or after it took place, or calling upon him to appear and take his trial, or his sureties to surrender him for such purpose; and not giving him, Price, or his sureties, any notice of such trial, or of the indictment intended to be presented against him; and not giving Price due notice of the proceedings to declare the bond forfeited; and that all the proceedings had or taken against Price, and in respect of the charge against him, were otherwise grossly irregular. Fourth, that much illegal and incompetent evidence was received.

The Queen's Advocate objected to the jurisdiction of the Supreme Court to review the proceedings; but the Supreme Court reserved the matter of the petition



for the decision of the Judges collectively, before whom the case came on to be heard at their General Sessions at Colombo, on the 16th of June, 1852, when the Queen's Advocate again objected to the jurisdiction of the Supreme Court, contending, that it was the intention of the Legislature in the Ordinance of 1844, No. 11, sec. 7, that matters of this description should not be subject to appeal or review. The Court, after consideration (the Chief Justice dissenting), decided against the objection of the Queen's Advocate, and held, that the objection to the appellate jurisdiction of the Court to entertain these proceedings in review was untenable.

The discussion of the case on the merits was afterwards resumed; and, on the 30th of June, 1852, the Supreme Court, by its judgment, determined that the proceedings before the Police Magistrate ought to be set aside, upon the ground, that there was no valid or sufficient proof of the forfeiture of the recognizance, [208] inasmuch as the notice to Price, of the time and place of holding the Court before which he was to be tried, was insufficient; because, being dated on the 7th, and served on the 12th of August, 1851, it required him to appear before the Court "forthwith," whereby he was left in uncertainty as to what was the time specified for his appearance.

As the jurisdiction of the Supreme Court was denied, a petition was presented by the Advocate-General, on behalf of the Crown, to the Judicial Committee, praying for leave to appeal, which their Lordships granted (2nd Feb., 1853 \*).

The Respondents did not appear, and the appeal was heard *ex parte*.

The Attorney-General (Sir Alexander Cockburn), and Mr. N. S. Welsby, for the Crown.—In support of the appeal, it was contended, First, that the proceedings taken under the seventh section of the Ordinance, No. 11, of 1844, before the Police Magistrate, were not subject to be brought by way of review or appeal before the Supreme Court, or before the Judges of the Court at General Sessions, as the power given to the District Judge, or Police Magistrate, was to the District Judge or the Police Magistrate in his magisterial character, and not to the Police Court, as a Court. That this was apparent from the circumstance, that the District Court, created by clause 23 of the Ceylon Charter of Justice, consists not of a single Judge only, but also of three Assessors, while by Ordinance, No. 11, of 1844, the District Judge or Police Magistrate individually is to [209] carry out the law; and such was the opinion of the Chief Justice, who dissented from the other Judges upon this question of jurisdiction; the nature of the appeal provided by the Charter being different from the subject-matter of the appeal given by the Ordinance, No. 11, of 1843, sec. 14. Secondly, that the notice to the Defendant, Price, which directed him to appear before the Court at Colombo "forthwith," on pain of forfeiting his recognizance, was a sufficient notice in point of law for that purpose; the legal effect thereof being, a notice to appear within a reasonable time after the service thereof.

Judgment was reserved.

Sir John Patteson (23rd Feb., 1854).—In this case, a recognizance was taken before John Dalziel, Justice of the Peace for the Midland Circuit, Ceylon, with a condition, as prescribed by the Ordinance of 1843, No. 15, sec. 36, in the following terms.—[His Lordship read the recognizance, and proceeded:—]—This recognizance being brought before a Police Magistrate, under the 7th section of the Ordinance, No. 11, of 1844, was decided by him to be forfeited, and Price and his two sureties were directed to pay the moneys in which they were bound.

The sureties appealed to the Supreme Court; which Court decided, that the forfeiture of the recognizance had not been proved.

The first question now raised is, whether any appeal lay to the Supreme Court? This question was also discussed in the Supreme Court, where a majority of the Judges held, that an appeal did lie; the Chief Justice dissenting.

[210] By the Charter of Ceylon, District Courts are established, consisting of a

\* Present:—The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

Judge and three Assessors, from which Courts an appeal is given to the Supreme Court as to all matters of law and fact.

The Police Courts were established by an Ordinance, No. 11, of 1843, and by the 14th section of that Ordinance an appeal is given to the Supreme Court on certain specified grounds. That section enacts, "That the Supreme Court shall have full power and authority to review the proceedings of the said Police Courts, and if necessary to set aside or correct the same for incompetency of the said Police Court, in respect of any excess of jurisdiction, or that the cause has been already tried, or forms the subject of a trial pending in some other competent Court, or for incompetency of the Court in respect of the Magistrate himself, or that either the Magistrate or his near kinsman had an interest in the cause, or for malice or corruption on the part of the Magistrate, or for gross irregularity in the proceedings, or on account of the admission of illegal or incompetent evidence, or of the rejection, as illegal, of legal and competent evidence. Provided always, that when any party shall make application to have any such proceedings reviewed by the Supreme Court, such application shall distinctly set forth the particular facts and grounds on which such review is applied for. And, provided further, that no such application shall have the effect of staying the execution of any sentence or judgment pronounced by any such Police Court."

By the Ordinance, No. 11, of 1844, sec. 7, power is given to a District Judge, or Police Magistrate, to enforce any recognizance taken before a [211] Justice of the Peace, upon proof of its forfeiture. This section is in these words: "If any recognizance or bail-bond entered into before a Justice of the Peace shall become forfeited, it shall be lawful for any District Judge, or Police Magistrate having jurisdiction in the place where such recognizance or bail-bond was entered into, and he is hereby required upon proof of such forfeiture, to enforce payment of the amount hereof, unless the same shall be made, into Court, at a certain time to be by him named for that purpose, and all the charges relating thereto, and to deal with the party or parties having incurred such forfeiture, in such and the same manner as he is by this Ordinance directed, to recover the amount of fines, penalties, and forfeitures imposed by his own Court, and the charges relating thereto, and to deal with the party or parties who shall have incurred the same."

The law-officers of the Crown now contend, that this power is given to the District Judge, or Police Magistrate, as an individual, and not as a Court, and of this opinion was the Chief Justice of the Supreme Court.

The principal reason for this opinion appears to be, that the District Court consists not only of a Judge, but of three Assessors, who are not mentioned in this Ordinance, and, therefore, it is inferred, that the power was intended to be given to the Judge of the District Court individually, and not to the District Court, as a Court, and by a parity of reasoning to the Police Magistrate individually, and not to the Police Court, as a Court; and further, that the appeal from the District Courts given by the Charter, and from the Police Court by the Ordinance of 1843, No. 11, are different in their terms and extent.

[212] Their Lordships, however, think, that these reasons are not sufficient, that the power may well be given to the Judge of the District Court, apart from the Assessors, and yet not to him individually, and separated from his character as Judge and a constituent part of the Court, and they cannot distinguish the Police Magistrate, as an individual, from the Court in which he presides. And this view of the case is strengthened by the reference made to the first section of the Ordinance, 1844, No. 11, in which the Police Magistrate is plainly treated as a Court, and which section is in a great measure incorporated into the seventh section.

Their Lordships, therefore, are of opinion, that an appeal lay in this case on any of the grounds specified in the 14th section of the Ordinance, No. 11, of 1843.

The next question is, whether any of those grounds were established.

It is said, that the recognizance itself was irregularly taken by the Justice of the Peace, before any witnesses were examined; but the Court below answered, and, their Lordships think rightly, that the Police Magistrate could not enter into that



question, but was bound to take the recognizance as he found it, and inquire only whether it was forfeited.

It is also said, that the Police Magistrate exceeded his jurisdiction on account of the amount of the recognizance being greater than he had power to deal with; but their Lordships think, that there is no ground for this objection, the Ordinance being quite general in its terms.

The real and main question is, whether the notice of the holding of the Court at Colombo, left at the [213] last place of abode of Price, he himself not being found, is sufficient. The notice is dated the 7th of August, and requires Price to appear before the Supreme Court at Colombo, "forthwith." It was left at Price's last place of abode, on the 12th of August, and on the 13th, Price was called in the Court, but did not appear. Now, the more regular form of notice would seem to have been, that "the Court would be holden" on the 13th of August, at Colombo (or probably some specified place in Colombo), and that Price was required to appear at that place on that day, and the question is, whether the notice actually served (for leaving it at the last place of abode must be considered as sufficient service), is equivalent to such more regular notice.

The word "forthwith," when used in an Act of Parliament, has been construed to mean "in a reasonable time;" as soon as the party who is to perform the act "can reasonably perform it." It was so construed in *Tennant v. Bell* (9 Q.B. Rep. 684), in an action against an overseer for not delivering to an inhabitant "forthwith," on demand, a copy of a poor-rate, under the provisions of the 17th Geo. II., c. 3, s. 2. The demand there was on the 24th of October, and the copy was not tendered till the 6th of December, but it was held sufficient, under the circumstances which had occurred. A similar construction had been put upon that Statute, in *Spenceley v. Robinson* (3 Bar. and Cr. 658). The same construction was put on the word "forthwith" in *Hyde v. Watts* (12 Mee. and Wels. 254), on a covenant to insure "forthwith." The word "forthwith" in the present notice must, therefore, be taken to mean "so soon as you reasonably can." But, as the notice is dated the 7th of [214] August, and was not served till the 12th, the Court below seems to have considered, that if Price had been personally served, he might well suppose that "forthwith" had reference to the date of the notice (7th of August), and that the time for his appearance had already expired.

Their Lordships cannot agree in this view, for it is a general and universal rule, as to all notices, which is well understood, that they operate only from the time of service, and not from the day of the date. The true construction, therefore, of the notice is, "so soon as you reasonably can, after service of this notice;" and if Price had appeared in the Court in such reasonable time, there cannot be any doubt but that he would have fulfilled the condition of the recognizance; or, if the Court had arisen before the expiration of such reasonable time, and Price had come within such reasonable time to the place where the Court had been held, he would not have forfeited the recognizance, though possibly it might have been competent for the Crown to give him a further notice to appear at some subsequent Court.

The real question is, whether the notice of the place and time of holding the Court is sufficient. It is a case against sureties, with respect to whom it must be shown that the condition on which their liability depends has been literally performed.

Now, Price was entitled to notice—First, of the Court in which the indictment was to be preferred. Second, of the place of holding the Court. Third, of the time of holding it. And it seems very doubtful, whether the meaning of this is not that notice must be given before the holding of the Court.

As to the first matter, the notice states the Court [215] to be, "the Supreme Court," and probably that is a sufficient statement.

As to the second matter, the notice states "at Colombo." It is extremely doubtful whether this is sufficient, for it does not appear whether the Supreme Court, considered as a Court of Midland Circuit, is held in the same place in Colombo as the Supreme Court generally is; it is observable that in the notice to the sureties (which is not necessary, however, to give) the statement is "the Supreme Court at Hulfsdorp," which is in Colombo.

As to the third matter, namely, the time of holding the Court, the notice seems

plainly insufficient. The word "forthwith" applies not to the holding of the Court, but to the appearance of Price. Indeed, being construed "within a reasonable time," it cannot be applied to the holding of the Court, for, of course, it cannot be meant, that the Court was to be held within a reasonable time from the service of the notice. Therefore, no time for holding of the Court is distinctly specified. Neither can it be necessarily collected from the terms of the notice that the Court was actually sitting, either at the date of the notice, or at the time of the service. Even supposing that it is not necessary that the notice should be served before the holding of the Court, Price was entitled to a distinct and intelligible notice of the time of the holding of the Court, and we are clearly of opinion, that such notice was not given to him.

The only remaining question is, whether the decision of the Police Magistrate, that the recognizance was proved to have been forfeited, being a decision without sufficient evidence, was a "gross irregularity" [216] within the meaning of the 14th section of the Ordinance of 1843, No. 11, so as to give the Supreme Court jurisdiction by way of review or appeal.

Their Lordships are of opinion, that it was a "gross irregularity," within that section. A mere erroneous decision upon a question, simply of law, would amount only to a mistake in judgment, but the holding a recognizance to be forfeited, when there is no proof of such forfeiture, cannot but be considered, as a "gross irregularity," unless those words are to be restricted to mere informalities, which we think they cannot be; and if, as is plain by the 14th section, an appeal lies in the case of wrong reception, or rejection of evidence, much more must it have been intended to lie, when there is no evidence at all to warrant the decision.

Their Lordships will, therefore, advise Her Majesty to dismiss this appeal.

[Mews' Dig. tit. CRIMINAL LAW, D. PROCEDURE AND PRACTICE, III. *Trial*, 5. *Recognisances*, c. *Forfeiture and Discharge*; XV. BAIL, 3. *Other Points*; also tit. TIME, 1. COMPUTATION OF, f. *Particular words as to*. As to meaning of "forthwith," cf. *Coster v. Hetherington*, 1859, 1 E. and E. 82; *Reg. v. Worcestershire*, with," cf. *Costar v. Hetherington*, 1859, 1 E. and E. 802; *Reg. v. Worcestershire*, 1846, 10 Jur. 595; *Ex parte Lamb*, 1881, 19 Ch. D. 173; and see Stroud, *Jud. Dict. s.v.* "Forthwith."]

# [217] *In re* HEATH'S PATENT \* [Feb. 1 and 8, 1853].

The circumstance of there being *lis pendens*, respecting the validity of the Letters Patent, is no objection to the grant of an extension of the original Letters Patent.

Term of Letters Patent extended for seven years on the ground of the meritorious nature of the invention, and the extensive litigation the Patentee had been put to in protecting his patent rights which had prevented any remuneration [8 Moo. P.C. 223, 224].

Form of Order in Council, pursuant to the Statute, 15th and 16th Vict., c. 83, s. 40, directing the Lord Chancellor to make and seal new Letters Patent, upon the report of the Judicial Committee recommending an extension of the term, under the provisions of the Statutes, 5th and 6th Vict., s. 83, and 7th and 8th Vict., c. 69 [8 Moo. P.C. 224].

No accounts were kept by the deceased Patentee of the expenditure or receipts, on account of his Patent. Upon its appearing that his estate was of little value (his effects being sworn for administration under £100) the Petitioner, the administratrix of the Patentee, on the allegation that there had been no profits, but considerable loss, to such estate, was examined to prove that fact [8 Moo. P.C. 222].

This was a petition by Mrs. Heath, the administratrix of the Patentee, for an

\* Present: The Lord Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



extension of the term of Letters Patent for England, Wales, and the town of Berwick-upon-Tweed, granted to her late husband, Josiah Marshall Heath, on the 5th of April, 1839, for an invention consisting of "certain improvements in the manufacture of steel and iron." This invention, as stated in the specification, related, first, to the extraction of pure cast iron from certain ores of that metal, without the intervention of any earthly alkaline or saline matter to form a vitreous flux, cinder, or slug; secondly, the formation of cast steel, by fusing the pure cast iron along with malleable iron, or certain metallic oxides, in such proportion as may decarburate the cast iron to a certain degree, and by completing the decarburation in a suitable cementing [218] furnace; thirdly, the use of a certain portion of oxide of manganese in the process of converting cast iron into malleable iron by the process of puddling; fourthly, the use of carburet of manganese in such process whereby iron is converted into cast steel; and, lastly, he proposed to make an improved quality of cast steel, by introducing into a crucible, bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese, and exposing the crucible to the proper heat for melting the materials, which were, when fluid, to be poured into an ingot-mould in the usual manner; but he did not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of carburet of manganese in any process for the conversion of iron into cast steel.

The petition alleged, that the Patentee had made expensive and elaborate experiments in perfecting the invention, which was of great public value: that infringements of his patent had taken place, and that he had brought actions for such infringements, and also proceeded in the Court of Chancery for protection of his patent rights; and that a Writ of Error from the Exchequer Chamber was then pending in the House of Lords regarding the validity of the Letters Patent, and that by reason of his extensive litigation, he was not only without remuneration for his invention, but had been at great losses.

A caveat was entered and objections lodged against an extension, by Unwin, the Defendant in the actions brought by Heath for infringement. The objections [219] were confined exclusively to the validity of the Letters Patent.

Mr. Webster, for the Petitioner. Sir Frederick Thesiger, Q.C., Mr. T. Jones, and Mr. Deighton, for the Objector. The Attorney-General (Sir Alexander Cockburn) for the Crown.

It appeared from the evidence, that before the discovery by Heath, the best cast steel could only be manufactured from sheer steel, cast steel being incapable of welding with iron. Heath's discovery consisted in using carburet of manganese in converting iron into steel, the result of which was not only to render common English iron almost as serviceable as the best Swedish iron, and thus reduce the cost one-half, but also in effecting a great saving in what is technically called "waste." Carburet of manganese is a metallic substance, compounded of black oxide of manganese and carbon. Unwin, after the date of the Patent, in manufacturing cast steel, put blistered steel into a crucible, together with certain proportions of black oxide of manganese, and of carbon. These substances became fused at a given temperature, and when in a state of fusion, from the affinity of the oxide for the carbon combined, formed carburet of manganese. Heath considered this an infringement of his Patent, contending that, as the carbon and oxide of manganese by their combination formed a carburet of manganese before they acted upon the steel, it was in all respects the same as if the Defendant had, in the first instance, [220] introduced carburet of manganese into the crucible in its compound form. Heath brought an action for infringement against Unwin: the trial took place before Lord Abinger, in 1843, when the Plaintiff was non-suited, and the Court declined to set the non-suit aside. Another action was brought and tried before Mr. Baron Parke, in 1844, when there was a verdict for the Plaintiff on all the issues, but the Court ordered a verdict to be entered for the Defendant on the question of infringement. Another action was brought by the direction of the Vice-Chancellor of England, and tried before Mr. Justice Cresswell, at the Common Pleas, in 1850, when that learned Judge, expressing the opinion that he was bound by the direction of the Court of Exchequer, on the construction of the specification, acted in conformity therewith,

and directed the jury that there was no evidence of infringement; and the jury, in conformity with such direction, found a verdict for the Defendant on the issue of infringement. To this direction a Bill of Exceptions was tendered, and the Defendant in error (the Petitioner) obtained the judgment of the Court of Exchequer Chamber, by which the judgment of the Court of Common Pleas was reversed. The Judges of the Exchequer Chamber differed in opinion, on the question of infringement, four of the learned Judges being of opinion that the use of the elements of carburet of manganese was, under the circumstances stated in the Bill of Exceptions, the use of carburet of manganese in the manufacture of steel, within the meaning of the specification of Heath, and that there was evidence of a direct infringement of the Patent. Two of the Judges were of a different opinion. From which [221] judgment a Writ of Error to the House of Lords was then pending (*a*).

The case of the Petitioner was, that by this extensive litigation, her husband had been at great expense and loss. There had been no profits.

Dr. Lushington.—Although we do not decide upon the validity of the Letters Patent, yet we require *prima facie* evidence of novelty.

Evidence of the novelty and the meritorious nature of the invention was then given.

Mr. Webster.—There is no point raised by the Objector in his objections, which is not a pure question of law, and it is no answer to an application for an extension, that a suit respecting the validity of the Patent is pending. *In re Kay's Patent* (3 Moore's P.C. Cases, 24; S.C. Webs. Pat. Reps. 568). There is no denial of novelty, or merits, or that adequate remuneration has been obtained for this useful and meritorious invention. Extensive litigation would be a strong ground for coming here, coupled with the fact of there being no profits.—[Dr. Lushington: If you put it on the ground of loss, you must produce the Patentee's accounts. The *onus* is upon you.]—No evidence upon that point can be given, as Heath kept no books, and there has been not only no remuneration, [222] but actual loss. If he was living he could be examined. The letters of administration are sworn under £100.

The Right Hon. Dr. Lushington.—Their Lordships are of opinion, taking all the circumstances of this case into their consideration, that they ought to give a reasonable time to the Petitioner to produce further evidence of the accounts of Mr. Heath. They expect that the administratrix will be called, and explanations given, as far as possible, and the banker's book of Mr. Heath, or something of that kind, brought before their Lordships, that they may get some material for forming an opinion. They will, therefore, adjourn the hearing for a week for that purpose.

The case stood over, and was brought on again on the 8th of February, when Mrs. Heath, the administratrix, was examined upon this point. It appeared from her evidence, that her husband kept no ledger, and that from a general book he kept, though there were a few entries of profits, yet that he had, in making experiments and manufacturing articles of steel, which he had given away, to show the quality of the steel, been a great loser by the Patent, and that £200 was more than the receipts from the working of the Patent.

The Right Hon. Dr. Lushington.—Their Lordships are satisfied on this head, and need not trouble you any further.

We are of opinion, that the introduction of carburet of manganese, according to the terms expressed [223] in this specification, has been an invention of very considerable merit. The words of the specification are as follows:—"Lastly, I propose to make an improved quality of cast steel, by introducing into a crucible, bars of common blistered steel, broken as usual into fragments, or mixtures of cast and malleable iron, and carbonaceous matter along with from one to three per cent. of their weight of manganese, exposing the crucible to the proper heat for melting the materials, which are, when fluid, to be poured into an ingot-mould in

(*a*) This Writ of Error from the judgment of the Exchequer Chamber, reversing the judgment of the Court of Common Pleas, has been since argued before the House of Lords, and is now standing over for judgment. See report of the case in the Exchequer Chamber, *nom. Heath v. Unwin* (13 Mee. and Wels. 593).



the usual manner;" the specification then goes on to say, that the Patentee does not claim for the use of an admixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of his invention, but only the use of carburet of manganese, under a new process, for the conversion of iron into steel.

Their Lordships understand, that the main objection which was preferred against the renewal of this Patent was, that, in point of practice, the carburet of manganese was not sufficiently applied to the manufacture of steel, but that it was found out in the making use of this invention, that it could be done more efficaciously by carbonaceous matter, together with manganese being used in the process of making the steel instead of carburet of manganese itself. Their Lordships are of opinion, that notwithstanding such an alteration in the practice has taken place, yet it does not materially detract from the merits of the original invention, and, therefore, their Lordships being perfectly satisfied that no benefit has arisen to the Patentee from this invention, are disposed to advise Her Majesty to continue the Patent for the period of [224] seven years. They are disposed to give that length of time, in preference to a somewhat shorter period, on account of the litigation, which is said to be subsisting in the Courts of law, inasmuch, as in all probability some time must necessarily elapse before this litigation will be at an end, and the parties have an opportunity of availing themselves of the extension of the Patent. Of course it is unnecessary to say that their Lordships, in advising Her Majesty to renew this Patent, do not in the slightest degree pronounce any opinion as to the validity of the Patent itself. The trial of that question is competent to other tribunals, and it is a question which their Lordships never, in the remotest degree, interfere with. If it should so happen that the Courts of law should pronounce against the validity of this Patent, the renewal which their Lordships now advise Her Majesty to make will fall to the ground.

This being the first Patent which had been extended since the Act, 15 and 16 Vict., c. 83 (a), came [225] into operation, it is thought advisable to set out the Report and Order in Council made upon the petition, which was as follows:—

" Their Lordships do agree humbly to report to Her Majesty, as their opinion, that (in case your Majesty should think fit) a further extension of the Letters Patent for England, Wales, and the town of Berwick-upon-Tweed, obtained by Josiah Marshall Heath now deceased, and bearing date at Westminster, 15th of April, 1839 the same being now vested in the Petitioner, Charlotte Catherine Heath, widow, administratrix of Josiah Marshall Heath, ought to be granted to Charlotte Catherine Heath, and that such extension should be for the term of seven years from and after the expiration of the term granted by original Letters Patent." And Her Majesty having taken this Report into consideration by an Order in Council, ordered, " That the Right Honourable the Lord Chancellor,

(a) By section forty, it is enacted, that " All the provisions of the said Act of the fifth and sixth years of King William the Fourth, for the confirmation of any Letters Patent, and the grant of new Letters Patent, and all the provisions of the said Act, and of the Acts of the Session holden in the second and third years of Her Majesty, chapter 67, and of the Session holden in the seventh and eighth years of Her Majesty, chapter 69, respectively, relating to the prolongation of the term of Letters Patent, and to the grant of new Letters Patent for a further term, shall extend and apply to any Letters Patent granted under the provisions of this Act, and it shall be lawful for Her Majesty to grant any new Letters Patent, as in the said Acts mentioned: and in the granting of any such new Letters Patent, Her Majesty's Order in Council shall be a sufficient warrant and authority for the sealing of any new Letters Patent, and for the insertion in such new Letters Patent of any restrictions, conditions, and provisions in the said Order mentioned; and the Lord Chancellor, on the receipt of the said order in Council, shall cause Letters Patent, according to the tenor and effect of such Order, to be made and sealed in the manner herein directed for Letters Patent issued under the warrant of the Law Officer: Provided always, that such new Letters Patent shall extend to and be available in and for such places as the original Letters Patent extended to and were available in: Provided also, that such new Letters Patent shall be sealed and bear date as of the day after the expiration of the term of the original Letters Patent which may first expire."

upon the receipt thereof, do cause new Letters Patent, according to the tenor and effect of this order, to be made and sealed for such [226] part of the United Kingdom of Great Britain as the original Letters Patent extended to and were available in, namely, for England, Wales, and the town of Berwick-upon-Tweed, for 'certain improvements in the manufacture of iron and steel,' as described in the Patent granted to Josiah Marshall Heath, and bearing date at Westminster on the 5th of April, 1839, and such new Letters Patent are to be granted to Charlotte Catherine Heath, in whom the legal interest of the original Letters Patent is now vested, for the further term of seven years from and after the expiration of the term granted in the original Letters Patent, whereof the Right Honourable the Lord Chancellor, and all other persons whom it may concern, are to take notice, and govern themselves accordingly."

[Mews' Dig. tit. PATENT; F. CONFIRMATION, ETC.; 2. *Renewal and extension*; a. *Generally*. S.C. 2 Web. P.C. 247. As to (i.) account being taken of litigation, see *Pettit Smith's Patent*, 1850, 7 Moo. P.C. 133, and note thereto; (ii.) further evidence of accounts, cf. *Perkin's Patent*, 1845, 2 Web. P.C., at p. 17; *Clark's Patent*, 1870, 7 Moo. P.C. N.S. 255; L.R. 3 P.C. 421. As to extension generally, see s. 25 of the Patents Act, 1883 (46 and 47 Vict., c. 57), and Privy Council Regulations of 26th Nov. 1897 (Stat. R. and O. 1899, p. 1837).]

## [227] ON APPEAL FROM THE COURT OF APPEALS IN CANADA.

JOHN POLLOK and Others,—*Appellants*; WILLIAM BRADBURY,—*Respondent*\*  
[Feb. 3 and 4, 1853].

The 5th section of the Canadian Ordinance, 2 Vict., c. 36, defining the description of debts that may be proved and allowed against a bankrupt's estate, enacts, that in case the bankrupt shall be liable for any debt, in consequence of having made or indorsed any bill of exchange or promissory note before the first publication of the notice of issuing of the warrant, or in consequence of the payment by any party of any bill or note of the whole or any part of the money secured thereby, or of the payment of any sum by any surety of the bankrupt in any contract whatsoever, although such payment in either case shall be made after such first publication, provided it be made before the making of the first dividend, such debt shall be considered, for all the purposes of that Ordinance, as contracted at the time when such bill or note, or other contract, shall have been so made or indorsed, and may be proved and allowed against the estate, as if the debt had been due and payable by the bankrupt before the first publication.

In an action by A. and Co., indorsees and holders of a promissory note against B., the payee and indorser, B. pleaded that A. and Co. had the note by an usurious title, and that he was the indorser only for accommodation and surety. He also pleaded, that a verbal agreement existed between A. and Co. and C. and D., the makers, to withhold the enforcement of the note till a balance of a floating account was struck, and further certain pleas of compensation and extinction. To prove these pleas, B. called C. and D. as witnesses. C. and D. had become bankrupts since the making of the note, and had obtained their certificate. To remove any objection to their competency on the score of interest, B. put in; first, a release from them to the assignee under the bankruptcy, by which they released the assignee and estate from any allowance or percentage which they might be entitled to have from the estate; second, a release by B. to C. and D., from the costs of the action; and thirdly, their certificate of bankruptcy. No evidence was given of a dividend having been paid out of the estate of C. and D.

Held, first, that the releases and certificate did not make them competent wit-

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



nesses, as they had an interest to defeat the action: for, if B. had to pay the amount of the note subsequently to the making of the first dividend, he was precluded by the Canadian Ordinance, 2 Viet., c. 36, sec. 5, from proving the debt under the Commission, and then as a damnified surety he had a right of action against C. and D. [8 Moo. P.C. 250].

Second. That the *onus* was upon B. to prove that no dividend of C. and D.'s estate under the Commission had been declared [8 Moo. P.C. 254].

Held, also, that the plea of a verbal agreement qualifying the written contract expressed in the note, was bad in law [8 Moo. P.C. 260].

A. and Co. were general merchants, bankers, and commission agents at Montreal, and their course of trade consisted principally in procuring and advancing to colonial dealers, called "Forwarders," supplies of goods, cash, and negotiable securities, as required, from time to time, by their customers, to support them in their dealings, returns being made by such Forwarders, after some interval of time, at their convenience, in the freight of produce from the Upper Country, and in the payment of cash and negotiable securities. In the accounts they kept with C. and D., there was kept a column on both sides for interest, from the time the payment was made or due; and, at the periodical close of the account, A. and Co. made a charge for their commission, calculated in the year 1839, upon the balance then due, and after that time upon the cash advances. Held, that the pleas of usury were not proved, and, that it did not appear from the accounts that the charge for commission was a cloak for usury, but was to be treated as a *bona fide* compensation for the labour and inconvenience in conducting such business [8 Moo. P.C. 264].

In this case the Appellants are merchants, carrying on a very extensive business at Montreal, under the name and style of "Gilmour and Co.," at which place their [228] course of trade consisted principally in procuring for, and advancing to, colonial dealers, called "Forwarders," and, among others, to Messrs. Hackett and Dickinson, supplies of goods, cash, and negotiable securities as required, from time to time, by such customers, to support them in their dealings, returns being made by such Forwarders, at their convenience, in the freight of produce from the Upper Country, and in the transfer of vessels and barges, and in the payment of cash and negotiable securities. This relation of the parties was peculiar to the country, and of a multifarious nature, including, on the part of the Appellants, the whole business of general merchants, as well as of bankers and commission agents for Messrs. Hackett and Dickinson, and involved long and complicated [229] accounts. In the accounts there was kept a column on both sides for interest, from the time the payment was made or due; and, at the periodical close of the account, the Appellants made a charge for their commission, calculated in the year 1839, upon the balance then due, and since that time upon cash advances. The principal question involved in the appeal arose upon this latter commission. The Appellants contended, that it was a *bona fide* compensation for the labour, expense, and inconvenience in conducting such business. The Respondent insisted, that such commission was only a cloak for charging a higher rate of interest than allowed by law, and amounted to usury.

The action was brought by the Appellants in the Court of Queen's Bench, in the District of Montreal, as indorsees and holders, against the Respondents, as payee and indorser, of a promissory note. By the first count in the declaration the Plaintiffs claimed the sum of £1000 12s. 6d., for principal and expenses on a promissory note for £1000, dated the 25th September, 1840, made by Hackett and Co., payable twelve months after date, to order of the Respondent, and by him indorsed to the Appellants. The second count was for £1000 12s. 6d., as due for money lent, paid, had and received, and on an account stated.

To this declaration the Respondent pleaded ten pleas. The first set forth, that from the 6th of May, 1839, until the month of February, 1842, Hackett and Dickinson carried on trade at Montreal, as Forwarders, under the firm of "Hackett and Co.;" that from May, 1839, John Pollok, Arthur Pollok, Allan Gilmour, and Allan Gilmour the younger, four of the Appellants, carried on trade, with Ritchie and others, [230] at Montreal, as general merchants, under the firm of "Ritchie and Co.,"

until January, 1841, when the last-mentioned firm was dissolved; that from that time forward the Appellants carried on trade at Montreal, under the name of "Gilmour and Co.;" that, about the year 1839, Hackett and Co. and Ritchie and Co. entered into an arrangement, by which it was agreed, that Ritchie and Co. were to advance money and goods to Hackett and Co.; and that Hackett and Co., in consideration of the advances so to be made to them, were to forward produce, etc., for Ritchie and Co., at rates 25 per cent. below the current rates; that, by the consent of all parties, Gilmour and Co. took the place of Ritchie and Co. on the dissolution of the latter firm, with respect to all the dealings and agreements between Ritchie and Co. (of which firm, Gilmour and Co. were the successors) and Hackett and Co.; that on the 25th of September, 1840, Ritchie and Co. agreed to make an additional advance to Hackett and Co., by discounting their paper to the amount of £2500 currency, if indorsed to the satisfaction of Ritchie and Co.; that Hackett and Co. thereupon induced the respondent to indorse a note for £1000 (the note on which the action was brought), and one Ferrie, carrying on trade there under the name of Ferrie and Co., to indorse a note for £1500. Bradbury and Ferrie being merely accommodation indorsers; that thereupon Ritchie and Co. obtained the two notes from Hackett and Co., and that it was corruptly and against the law agreed between Hackett and Co. and Ritchie and Co., that Ritchie and Co. should lend to Hackett and Co. £2375. and that Ritchie and Co. should forbear, and give day of payment thereof to Hackett and Co., until the two promissory notes should reach maturity; and [231] that Hackett and Co., for the loan of the said £2375 currency, and for giving day of payment thereof for the time aforesaid, should give and pay to Ritchie and Co., when the two notes should reach maturity, the sum of £125 currency, which Ritchie and Co. styled their commission, but which was, in truth, so much usurious interest on the sum so to be advanced; and also, that the firm of Hackett and Co. should pay interest on the sum of £2375 from the time it should be required, and be so lent and advanced until the time of the payment of the sum of £2375, with interest, as aforesaid, to Ritchie and Co.; and that for securing the payment of the £2375, with interest, as aforesaid, to Ritchie and Co., Hackett and Co. should deliver to Ritchie and Co. the two promissory notes. The five following pleas contained in substance the same defence, varied only in form.

The seventh plea alleged, that the Plaintiffs, the holders of the notes, were indebted to Hackett and Co., the makers, in a sum of £35,000, for causes set forth, and that the promissory note was indorsed by the Defendant for accommodation only; and that it was agreed between Ritchie and Co., Hackett and Co., and the Defendant, that the note should be held by Ritchie and Co. merely as a pledge or security for the payment of any balance that might be found due from Hackett and Co. upon a final settlement of account with Ritchie and Co., and that the Defendant should not be troubled respecting the note until such final settlement should have taken place, and then only for the balance due from Hackett and Co. to Ritchie and Co. And the plea further alleged, that Hackett and Dickinson had become bankrupts, and that there was no balance due [232] from Hackett and Co.; but, in substance, that the sum due from Ritchie and Co. to Hackett and Co. was sufficient to include and discharge the promissory note.

The eighth plea set forth, that Ritchie was the head of the firm of Ritchie and Co. whilst that firm existed; that on the 4th of April, 1840, Hackett and Co., with the view of decreasing the balance due by them to Ritchie and Co., by bill of sale of that date transferred to Ritchie and Co. certain ships, schooners, and barges, therein specified, of the value of £3250. That although these transfers were made to Ritchie in his own name, yet they were, in truth and in effect, made to the firm of Ritchie and Co., of which Ritchie was the head; and that Ritchie and Co., until the time of the dissolution of that firm, had used and enjoyed the schooners and barges as their own; and that the Appellants, as Ritchie's successors, then had possession of the same. That although, by the deeds of transfer of these vessels, Hackett and Co. acknowledged to have received part of the above sum of £3250, yet in truth no part of that sum had been paid to them: that, therefore, the Plaintiffs owed Hackett and Co. £3250 currency, which the Defendant had a right to set off by way of compensation against the demand of the Plaintiffs.

The ninth plea averred, that the barges and schooners were delivered by Hackett



and Co. to Ritchie and Co., for the purpose of being sold, on account of Hackett and Co.; that Ritchie and Co. and the Plaintiffs had converted the schooners and barges to their own use, and were thus accountable for the value thereof, such value being £3250.

The tenth plea was a *defense au fonds en fait*, con-[233]-taining a general denial of all the facts stated in the declaration.

To the pleas of usury, the Plaintiffs filed general answers, and to the pleas alleging that the promissory note was discharged, the Plaintiffs answered specially, averring, that independently of the two notes, there was a large balance due to them by Hackett and Co. With this answer the Plaintiffs filed a general account of the dealings between them and Hackett and Co., from the commencement of the year 1839 down to March, 1842, the particulars of which it is unnecessary to set out, as the effect of them, so far as relates to this case, is stated in the judgment.

The Defendants, in reply to the special answers of the Plaintiffs, contended, that a number of large sums of money, for which the Plaintiffs had taken credit in the account so filed by them, should be struck out from the account, on the ground, that these sums had been advanced under usurious agreements, and in consideration of an usurious allowance of 5 per cent. over and above legal interest, and the Defendant further alleged, that if these sums were so struck from the account, there would be a balance in favour of Hackett and Co.

At the hearing, it was contended, that the account furnished by the Plaintiffs did, upon the face of it, make out the usury alleged, as they had in that account credited Hackett and Co. with the two promissory notes, and had debited Hackett and Co. with various advances at different periods, some in cash and some in bills on their own promissory notes, and had also debited Hackett and Co. with a commission on those advances, amounting to 5 per cent. over and above [234] the legal interest of 6 per cent.; and to prove the applicability of those debits to the promissory note in question, and in support of the pleas of usury, the Defendant called as a witness Hackett, one of the members of the firm of Hackett and Co., to whose competency the Plaintiffs objected, on the ground, that he was interested in the success of the defence. To establish the disinterestedness of this witness, the following documents were put in evidence and proved. First, a release from the witness to the assignee of the estate under his bankruptcy (he and his partner, Dickinson, being declared bankrupts under the Canadian Ordinance, 2 Vict., c. 36), of any allowance or percentage to which he might become entitled to. Secondly, a release from the Defendant to the witness, whereby the Defendant released the witness from the costs of the action; and thirdly, the witness's certificate under the bankruptcy. The objection was reserved, and his evidence taken, in the first instance, *de bene esse*. Hackett, in his evidence, stated, that the firm of Hackett and Co. were the makers of the promissory note, that the firm had become insolvent, that a warrant in bankruptcy issued in February, 1842, directing the messenger to take possession of all their property, that an assignment of the property was made by the Commissioners for Bankrupts, and that the witness and his partner had since obtained their certificate. The witness also stated, that he had granted to the assignee a discharge, and had also released and discharged his bankrupt estate, and the bankrupt estate of the firm, from any and every allowance of any kind or description whatever, and from any and every percentage whatever from the bank-[235]-rupt estate. The witness further stated, that the Defendant indorsed the promissory note for the accommodation of the firm of Hackett and Co., and that the Defendant had given to him a release from any claim which he might otherwise have had or made against him, or the estate of Hackett and Co., for or on account of the costs which he might be condemned or have to pay in consequence of the institution of this action, or the judgment to be rendered thereon. The witness was then asked various questions relating to several sums in the account between his firm and Ritchie and Co., amounting in the whole to £1368 16s. 10d., as to the terms and conditions on which those sums were lent and advanced by Ritchie and Co. to Hackett and Co., and also as to other sums of money in which Hackett and Co. were in the account debited to Ritchie and Co. The substance of his evidence on all these points was, that these sums of money, including the sum advanced on the promissory note in question, were advanced under an agreement, that Ritchie and Co. should deduct the usual interest of 6 per cent., and a commission of 5 per cent.,

and that the note was discounted by them on those terms that the consideration given for this note of £1000, and for the before-mentioned one of £1500, was £2300, in cash and their own promissory notes, namely, £2100 in notes at three months, and £200 in cash. That there being a running account between the two firms, Hackett and Co. were credited on the one side with the gross amount of the two notes, and also with interest for the time the notes given to them had to run, and were debited on the other side with the [236] amount of the notes and cash given to them, and the interest on the amount of the two notes for the time they had run, and also for the commission of 5 per cent. As to the other sums of money advanced, Hackett stated, that £500 was advanced on a deduction of interest at 6 per cent., and a commission of  $7\frac{1}{2}$  per cent., and the other sum on a deduction of the same interest, and a commission of 6 per cent. There were other sums of money advanced by Ritchie and Co., which, according to Hackett's evidence, were advanced on the terms of 6 per cent. interest, and 5 per cent. commission, the sum of £500 alone being subjected to  $7\frac{1}{2}$  per cent. commission. The fact, alleged in the pleas of the Defendant, relating to the transfer of the schooners and barges, and that the prices at which they were transferred were their true and fair value, and that no part of the purchase-money had ever been paid to Hackett and Co., was also proved by Hackett. It was also stated by him that the Plaintiffs, instead of giving credit to Hackett and Co. for the whole amount of the prices at which the vessels were transferred to them, afterwards sold them without any authority, and had given Hackett and Co. credit only for about £1526 10s. 1d. currency, as being the nett proceeds of the sale.

Dickinson, the other member of the firm of Hackett and Co., was also tendered as a witness, and objected to by the Plaintiffs, upon the same grounds as they had made to Hackett. Dickinson, before giving his evidence, made the same releases of his estate and claims to the assignees, and also to the Defendant, and received the same release as Hackett from the Defendant. This objection was also reserved, and his evi-[237]-dence, subject to the reservation, taken. He in all respects corroborated the statement made by his partner, and also stated, that in consequence, partly of the extent of business given by Ritchie and Co. and the Plaintiffs as their successors, but chiefly on account of the advances made by them, the firm of Hackett and Co. performed their forwarding at rates from 16 to 25 per cent. below the rates then generally established and acted upon.

The objection to the competency of these witnesses was argued in the course of the inquiry, and was, in the first instance, disallowed; so that the evidence of both Hackett and Dickinson stood as evidence in the cause until after the termination of the case.

With regard to the question, whether the sums charged by Ritchie and Co., as commission, in one instance of  $7\frac{1}{2}$  per cent., and in the others of 5 per cent., over and above the legal interest of 6 per cent., on cash advanced by them to Hackett and Co., were, in fact, usurious charges or deductions, witnesses were called on both sides to state what was the custom of the trade upon that point. On the part of the Plaintiffs, two witnesses, Brondgeest and Hart, merchants, were called in. The former said that he had for several years been president of the Board of Trade in Montreal, that the Plaintiffs' charges, under the name of commission, were usual and customary charges upon transactions of the nature of those contained in the account, and that 5 per cent. commission was a reasonable charge: that in some instances  $7\frac{1}{2}$  per cent. was charged. He said that those charges were not made as a cloak for usury, but as a compensation for the trouble, expense, and inconvenience attendant upon such transactions, keeping up exten-[238]-sive mercantile establishments, employment of clerks, and application of time and services. That such charges are made in an open and undisguised manner by merchants, and were not regarded as an additional interest beyond the rate of 6 per cent. per annum, which was also charged as the consideration for the loan or advance, and forbearance of the amount advanced. That such advances were sometimes made with, and sometimes without, securities. That the Board of Trade recognised charges of commission for indorsing bills or notes; and instances were mentioned by him where the Board of Trade recognised charges of commission. He stated that he did not consider that the risk attendant upon making advances in cash formed a part of the consideration of a charge of 5 per cent. commission, any more than



that attendant upon other transactions, such as the sale of goods. He, however, further said, that there was, of course, a degree of risk attendant upon all mercantile transactions, and that there was no doubt that risk would influence most persons as to the terms upon which they would transact business; that, in making advances, when indorsed promissory notes were taken in security, it was generally anticipated that the party making the advances would require to negotiate such notes, and that the trouble attendant upon such negotiation was worth something, more or less. On his cross-examination, he admitted that the commission charged would, according to his opinion, vary according to the risk incurred in making advances on promissory notes. Hart gave evidence of a like purport. He also said that the commission of 5 per cent. was not paid on risk. On cross-examination, he said, that if a merchant discounted notes as bankers did, and charged [239] 5 per cent. commission, he should consider his doing so usurious, and not justified by any of the usages of which he had spoken. But, that if notes were placed in the hands of a merchant to be negotiated, for the purpose of facilitating the business of a third party, he considered the merchant entitled to his commission for the service rendered. He was asked in cross-examination, "If a party were to place paper in the hands of a commission merchant of such a description, from the high standing of the parties to the paper, that the money for that paper could, without difficulty, be procured from banks or other money-lenders, without the commission merchant putting his own name upon it, what would he consider a reasonable charge for the trouble to which a commission merchant would be subjected in such case?" And his answer was, "One per cent., if a party other than the commission merchant would advance the money on the paper."

On the part of the Defendant, Dougal and Young, merchants, were examined as witnesses, who expressly denied the existence of any mercantile usage justifying the charge, under the name of commission, made by the Plaintiffs.

The cause was fully heard on the merits on the 17th of January, 1846; and on the 27th of May, 1846, the Court of Queen's Bench pronounced judgment (the Chief Justice dissenting, and the fourth Judge being absent), by which judgment they rejected the evidence of Hackett and Dickinson, as incompetent witnesses, and, considering that the Defendant had not established in evidence any of the several pleas by him pleaded, and that his pleas were unfounded in law, in as far as the law could be applied to the [240] evidence of record, they adjudged that the Plaintiffs were entitled to recover from the Defendant the sum of £1000 12s. 6d. currency.

From this judgment the Defendant appealed to the Court of Appeals of Lower Canada, and that Court, by its judgment, dated the 9th of June, 1849, reversed the decision of the Court of Queen's Bench. This judgment was as follows:—"Considering, that it is established by legal and sufficient evidence in this cause, that the promissory note declared upon by the Respondents in the Court below, was made and delivered by the Appellant to Hackett and Dickinson, named in the Respondent's declaration, being merchants trading together under the name of Hackett and Co., without any consideration having been received for the same by Bradbury, from Hackett and Dickinson, and as an accommodation note; and considering also, that the same note was so made and delivered by Bradbury, and was afterwards indorsed and delivered by Hackett and Dickinson, to certain persons trading together under the name or firm of Ritchie and Co., under and in pursuance of a corrupt and unlawful agreement by and between the persons trading together as last aforesaid and Hackett and Dickinson, to the effect, that the persons trading as last aforesaid should lend and advance to Hackett and Dickinson the sum of £1425 current money of the Province of Canada, for which loan the persons trading as last aforesaid should have and receive from Hackett and Dickinson the note indorsed as aforesaid, with a commission of 5 per cent. on the sum specified in the note, and also legal interest for that sum, at the rate of 6 per cent. per annum; and considering also, that the corrupt and unlawful agreement was fully [241] carried into execution by and between the persons trading as last aforesaid and Hackett and Dickinson; and considering also, that it is established by the evidence in this cause, that the Respondents severally were either parties to the corrupt and unlawful agreement, or before and at the time of becoming holders of the note were cognizant thereof, and that their title to the note is derived from and through the persons trading

together, under the name or firm of Ritchie and Co.; and considering also, that on the evidence adduced in this cause the commission of 5 per cent., stipulated as aforesaid by the persons trading under the name of Ritchie and Co., cannot be justified or treated as a commission for trouble or expense to be incurred by the persons trading as last aforesaid, but must be considered to have been and was a charge of so much money, exceeding and over and above the legal rate of interest stipulated to be paid for the forbearance, and giving day of payment of the aforesaid sum of £1425, lent and advanced, as aforesaid, by the persons trading as last aforesaid to Hackett and Dickinson, contrary to the law in such case made and provided; and considering, therefore, that the note, by reason of the corrupt and unlawful agreement aforesaid, was from the time of the making thereof as aforesaid, and now is, absolutely null and void in law; and considering, therefore, that in the rendering of the judgment aforesaid of the Court below there is manifest error; it is by the Court adjudged, that the judgment appealed from, namely, the judgment of the Court of Queen's Bench, dated the 27th of May, 1846, be, and the same is hereby reversed, annulled, and made void; and the Court now here proceeding to render such judgment in the premises [242] as by the Court below ought to have been rendered: It is adjudged that the action be hereby dismissed, with costs in the Court below, as well as on appeal."

Against this judgment the present appeal was brought.

Mr. Bliss, Q.C., Mr. Forsyth, and Mr. Dodgson, for the Appellants.—In this case there are three questions: First, we contend, that the special pleas are all bad in law. Secondly, that the evidence of Hackett and Dickinson was inadmissible, on the ground of interest, and ought to have been rejected; and, lastly, that the pleas of compensation fail, as they are not supported by evidence; and that the pleas of usury also fail, because they are not supported by evidence; and, because the parol evidence and the accounts prove that there was no usurious contract at all, the commission being a *bona fide* commission, and not usurious.

I. Upon the pleadings. The first six pleas set up usury as a defence; and the seventh, eighth, and ninth pleas, compensation. Now, the principal point for the Appellants is, that the sum of £125 mentioned in the first plea, was a *bona fide* commission, and not of an usurious nature; but as the validity of the pleas of usury are denied, it will be convenient to take that branch of the case first. Now, the first plea alleges, that the £125 so agreed to be paid, and charged by the Appellants, exceeds 6 per cent. per annum, contrary to the Ordinance. Such a plea was clearly bad, for the agreement which is charged by the plea to be usurious, does not fix the rate of interest, but simply states, that Hackett and Co. were to pay £125 and in-[243]-terest. If the agreement had stated that interest, at the rate of 6 per cent. was to be paid, besides the £125, then it would have been usurious; but the plea does not say so, it simply uses the word "interest," and it is a question for the Court to determine the legal effect of such agreement to pay that sum and interest; we submit, however, that when by an agreement for a loan, no rate of interest is fixed, the lender cannot claim more than the legal rate, and that the Court will not assume, in this case, that more than the legal rate was intended. According to the general rule, where an agreement leaves anything without limit, and general, the law holds that it shall be reasonable, and, if there is a limit fixed by law, any excess beyond that would be illegal. The utmost meaning, therefore, which can be given to an agreement to pay £125 and interest, where the £125 is itself considered to be interest, is, that such a further reasonable sum is to be paid for interest, as, when added to £125, will not exceed the legal rate. Neither does the plea which alleges that Ritchie and Co. charged 6 per cent. per annum, show that by the terms of the agreement they were entitled to make that charge. The first plea then is clearly bad, and the next five pleas are open to similar objections. Indeed, the sixth plea does not show that the agreement under which the note was transferred was usurious. Like the other pleas, it does not fix the rate of interest, which, we submit, is to be settled by construction of law. If the terms of an agreement make it usurious, it may be necessary in pleading, to allege, as matter of form, "that it is contrary to the Ordinance," but such allegation will not make the transaction usurious, unless the terms of the agreement [244] show it to be so: the mere allegation is inoperative and worthless.



II. The competency of the witnesses Hackett and Dickinson to prove the alleged usury. Notwithstanding the attempts to render them competent by the several releases, there exists an objection fatal to the reception of their evidence. It must be borne in mind that the Respondent indorsed the note for the accommodation of Hackett and Co. That fact is material to the Respondent's case, for, without it, he can have no pretence for his pleas of compensation.—[The Respondent's Counsel here interposed, and abandoned the pleas of compensation, and rested the defence of usury entirely upon the advance of £1000, and upon the pleas affecting it.]—The Respondent, by indorsing for the accommodation of Hackett and Co., acquired, as against Hackett and Co., the rights of a surety, and of coming upon his principal for an indemnity against, and for the reimbursement of, any monies which, by reason of his suretyship, he might be compelled to pay. Now, if by this action he is compelled to pay, as surety, he is entitled to recover from the witnesses Hackett and Dickinson the same amount as damages, sustained by reason of the breach of the contract to indemnify. The Respondent may consider, that if the witnesses are discharged by their certificate from the note, they are also discharged from repaying him the sum sued for, but this is obviously an error. If, indeed, the Respondent could only sue upon the note, as indorser, that view might be correct, but as a damnified surety he has a right of suing on the contract to indemnify, quite independent of his right of suing on the note as indorsee. The distinction between the two separate rights of action is plain; [245] for, first, if he sues on the note as indorsee, he will not recover, if he has lost or transferred the note; while, if he sues as surety, a loss or transfer of the note will be no answer to the action. Secondly, if the Respondent, being unable to pay the whole amount of the note, is compelled to pay part: in such case, he will not be entitled to the possession of the note; and not being the holder of it, he is not able to sue upon it. Still, he can sue for the breach of the contract to indemnify. Thirdly, if, after the surety has paid part, the holder obtains the residue from the principal, and delivers up the note to the principal, who destroys the note, the right of the surety to sue for the part which he has paid will still remain. Lastly, suppose, that instead of indorsing the note, a surety enter into a collateral guarantee to secure its payment, and is compelled, as such surety, to pay the note, or part of its amount, how, in such a case, can the witness's discharge by bankruptcy from the note itself, discharge him from his liability to his surety? And, what substantial difference is there between a surety who guarantees by indorsing, and a surety who guarantees by a separate instrument? From these four considerations, it is plain that the Respondent has, as surety, a right of suing the witnesses, independent of his right as indorsee. The discharge effected by the certificate, is simply a discharge from the note itself. Now, the money which the Respondent may be obliged to pay, being paid after the making of the first dividend, is not proveable under the bankruptcy, and is consequently not discharged, 2 Vict., c. 36, sec. 5 (see this section, *post* [8 Moo. P.C.], p. 252). The *onus* is upon him to show that there has been a dividend declared, so as to exclude the Respondent from proving under the bankruptcy. The certificate was a bar to any action by the Appellants, as holders of the note: the witnesses have, therefore, a clear interest to defeat the action, because they could only be compelled to pay in the event of the action being successful. The release for costs only is not sufficient. *Maundrell v. Kennett* (note, 1 Camp, 408) is exactly in point. That case was an action by the indorsee against the maker of a promissory note: the defence was, that it was an accommodation note, and had been indorsed to the Plaintiff after it became due. To prove this, the payee and indorsee was called, and being examined on the *voir dire*, it appeared, that since the date of the note he had become bankrupt, and had obtained his certificate. Mr. Justice Bayley held, that he was not a competent witness, as he was no longer liable to the Plaintiff, but would be liable to the Defendant, if the latter were obliged, in that action, to pay the promissory note drawn for his accommodation. *Jones v. Brooke* (4 Taunt. 464), and *Cartwright v. Williams* (2 Stark, N.P. 341), are to the same effect. They referred also, upon this point, to the Statutes, 49 Geo. III., c. 121, and 6 Geo. IV., c. 16, sec. 52.

III. The two defences set up are compensation and usury, but, we submit, that the evidence does not support either of them. The argument against the seventh,

eighth, and ninth pleas, is shortly this: that the note, according to its tenor, is due; that the consideration and purpose for which it was transferred to Ritchie and Co. are not shown to have failed; and, that the verbal agreement not to molest the Respondent, [247] derogating as it does from the contract, as expressed by the note and indorsement, cannot be allowed to deprive the indorsees of the right of suing. To allow the Respondent to compensate the note out of the money due on the open and unsettled account, would defeat the very object for which the note was transferred to the Appellants. In ordinary cases a surety is entitled to set up the same compensation as would have been a defence to his principal, because there is either an implied contract between the parties to this effect, or else the right is given by law itself independently of contract. But it cannot be allowed to exist where it would be inconsistent with the actual express agreement, because, if the right be considered as arising from an implied agreement, it is impossible that an agreement can be implied contrary to, or inconsistent with, the express agreement; and, if it be considered as conferred by the law independently of agreement, then "*conventio vincit legem*," and "*Quilibet potest renunciare Juri pro se introducto*." The law will not confer the right contrary to the agreement of the parties. But such agreement, that Hackett and Co. should not be molested until the final settlement, is not proved by evidence. Even if it was, it would not make the plea good, as it is not alleged to have been in writing, and it is contrary to principle to allow a verbal agreement to qualify the written contract expressed by the indorsement of the note. *Adams v. Wordley* (1 Mee. and Wel. 374), *Brown v. Langley* (4 Man. and Gr. 466), *Webb v. Spicer* (19 Law Journ. Q.B. 31). The allegation of usury is quite unfounded. The accounts show that the charge of five per cent. was clearly in the nature [248] of a commission for trouble and expenses, and not an evasion of the usury laws. The Appellants were merchants, not money-lenders, but agents and bankers for Hackett and Co.; the course of business being the disposal by the Appellants of negotiable securities, and other matters familiar in the transaction of business in Canada. If a commission can be fairly discharged for such business as the Appellants did, the parties may determine the amount without incurring usury. *Palmer v. Baker* (1 Mau. and Sel. 56), *Scott v. Brest* (2 Term Rep. 238). This commission, we insist, is a compensation for procuring and providing with money, at such times and places as may be required in the course of a multifarious business. Commission has long been established in bankers' accounts, *Carstairs v. Stein* (4 Mau. and Sel. 192), *Baynes v. Fry* (15 Ves. 120), *Masterman v. Cowrie* (3 Camp. 488), *Stoveld v. Eade* (4 Bing. 81), *Solerte v. Melville* (7 Barn. and Cr. 430), and it has also been determined that the case of bankers forms no exception. *Exp. Gwyn* (2 Dea. and Ch. 12), *Exp. Goss* (2 Dea. and Ch. 240). Such commission is not to be viewed as an isolated transaction, but as inseparable from the general business. But, there is no evidence, if the testimony of Hackett and Dickinson be excluded, that there was any agreement at all, much less that the notes were given as a security for the payment of any balance that might become due on a final settlement, and that until such final settlement Hackett and Co. should not be troubled. The accounts are admitted to represent correctly the dealings between the par-[249]-ties, the only question being, whether certain items charged as commission, are truly for commission or interest. This, we apprehend, from the authorities, is clear; and we submit, therefore, that as the facts stated in the declaration were proved, the judgment of the Court of Appeals in Canada should be reversed, and that of the Queen's Bench at Montreal affirmed.

Mr. Temple, Q.C., and Mr. Brewer, for the Respondent.—The objection now urged by the Appellants against the competency of the witnesses Hackett and Dickinson, by reason of their supposed interest, is untenable. Their evidence was properly admitted by the Court of Appeals. Thus, in *Ashton v. Longes* (Moo. and Mal. 127), the action was brought on a bill against the acceptor; the drawer, who had obtained his certificate, was held to be a competent witness for the defendant, to prove that the bill had been usuriously discounted. So, in *Moody v. King* (2 Barn. and Cr. 558), a bankrupt was held to be a competent witness to prove, on behalf of the Defendant, a surety, that the bill accepted was for his accommodation. It is too late now to object, for if this objection had been taken at the time, the witnesses would have executed a general release. The drawer of an accommodation



bill who has become a bankrupt has been held a competent witness for the acceptor, after a general release from him. *Cartwright v. Williams* (2 Stark. 341). Neither is the construction put upon the Canadian Ordinance, 2 Vict., c. 36, s. 5, correct, for the effect of that construction would be, that the debt was not proveable, and that [250] the creditor might always prevent the bankrupt from obtaining his certificate, as was the case before the passing of the Statute, 49 Geo. III., c. 121. The burthen of proving that a dividend has not been made, rests upon the Appellants, who would exclude the testimony of these witnesses.—[Sir John Patteson: If a surety pays the debt after the declaration of the first dividend, he cannot prove against the estate; and if he pays it before, he cannot prove, except as a creditor: is not that the meaning of the Canadian Ordinance, 2 Vict., c. 36, s. 5?—It seems so, but in *Filbey v. Lawford* (3 Man. and Gr. 468), it was held, that a demand by a surety against B., for not performing his engagement to take up a bill, was proveable under the fiat of bankruptcy which had been issued against B., and was, therefore, barred by B.'s certificate. [They were stopped by the Court.]

Sir John Patteson.—The point now for our decision (which we have thought it best to hear the arguments upon and dispose of first), is, how far these two witnesses, Hackett and Dickinson, the makers of the promissory note, the subject of this action, and who were certificated bankrupts, are competent witnesses to be examined for the Defendant, the payee and indorser of the note. There are several reasons alleged why they were not competent witnesses; amongst others, it is said, that the effect of the releases given to them was not such as to render them competent; but we do not think it necessary to give any opinion as to the effect of these releases, because they do not in any way touch the [251] general question, as to how far either party is incompetent by reason of his being liable to the Defendant, in the event of the Defendant, who is the surety, paying the principal money. It is quite clear that if either of these witnesses, having become bankrupt, had been an uncertificated bankrupt, he must have paid the money due upon the note to somebody or other. He would be liable to pay the money to the Plaintiffs: or, if the Defendant, the surety, paid them, he would be liable to pay him. It has been held in several instances that, under such circumstances, an uncertificated bankrupt would be a competent witness. But as soon as it appears that he has obtained his certificate, it is plain that his certificate is a bar to any action that may be brought against him by parties in the situation of the present Plaintiffs. If, therefore, he is not likewise protected by his certificate against any action which may be brought by the present Defendant, after the Defendant has paid the debt, the witness becomes interested to defeat such an action as this, in order that the Plaintiffs may not force the Defendant, the surety, to pay, and thereby enable him to come upon the witness for the money. Therefore, it is true, that the circumstance of obtaining their certificate raises the question, whether they were competent witnesses or not for the Defendant in this action? *Prima facie*, there can be no doubt that they would be incompetent witnesses, because, if the Defendant pays the money after the time when the bankruptcy attaches (which in England, prior to the 49 Geo. III., c. 121, would be from the act of bankruptcy, though in Canada it is from the publication of the notice of issuing the warrant of bankruptcy), they would be liable for the monies paid by [252] the Defendant, who could sue them, notwithstanding the certificate, unless by the effect of the Ordinance, 2 Vict., c. 36, the debt had become proveable under the commission. We must look, therefore, to the 5th section of this Ordinance, to see what is the meaning of the words which state what debts shall be proveable. The 5th section says:—"And be it further ordained and enacted by the authority aforesaid, that all debts due and payable from such bankrupt, at the time of the first publication of the notice of issuing the said warrant, may be proved and allowed against his estate, assigned as aforesaid; and all debts then absolutely due [which we take to be in contradistinction to being contingently due], although not payable until afterwards, may be allowed as if payable presently, with a discount or rebate of interest, when only interest is payable by the contract, until the time when the debt would become payable, and all monies due from such bankrupt on any Bottomry or *Respondentia* bond, or on any policy of insurance, may be proved and allowed in case the contingency or loss should

happen before the making of the first dividend, in like manner as if the same had happened before the said first publication of the said notice, and in case the bankrupt shall be liable for any debt in consequence of having made or indorsed any bill of exchange or promissory note before the first publication of the said notice, or in consequence of the payment by any party to any bill or note, of the whole or any part of the money secured thereby, or of the payment of any sum by any surety of the bankrupt on any contract whatsoever, although such payment in either case shall be made after the said first publication, provided it be made [253] before the making of the first dividend, such debt shall be considered, for all the purposes of this Ordinance, as contracted at the time when such bill or note or other contract shall have been so made or indorsed, and may be proved and allowed, as if the said debt had been due and payable by the said bankrupt before the said first publication, and also any claim or demand by or in right of the wife of the bankrupt, founded on her contract of marriage with the bankrupt, or for or in relation to her separate property; and all demands against the bankrupt for or on account of any goods or chattels wrongfully obtained, taken or withheld by him, may be proved and allowed as debts against his estate."

This is the material part of the section of this Ordinance, so far as it relates to this subject; and the question, therefore, really is, what is the effect of the words "before the making of the first dividend?" It is not, "if it shall be payable before the making of the first dividend;" and the words, "but although such payment in either case shall be made after the said first publication, provided it be made before the making of the first dividend." The plain meaning of those words seems to be, that, if the surety pay the money due from the bankrupt for whom he was surety subsequent to the making of the first dividend, he shall not prove it against the estate, and that the certificate shall not be a bar to an action by him (because they are correlative in point of extent). But another question remains, whether or no we are to take it that this debt might not still be proved? That is to say, on whom does the *onus* lay of showing whether it is a proveable debt or not? The debt has not yet been paid by the surety, the Defendant; if, therefore, there [254] had been a dividend, it is quite clear, according to our interpretation of this Ordinance, that the surety cannot now come in and prove this debt under the commission. And, if the certificate is to bar him, why he will lose his remedy altogether, neither having any demand nor right of action against the estate, nor against the certificated bankrupt. We do not know any instance to be found in any of the cases which have arisen out of the bankrupt law, where such a state of things has occurred, that a man could neither prove his debt under the commission, nor yet bring an action against the certificated bankrupt. But it is said, there must be a dividend; but as far as we can find from the proceedings before us, there is no proof one way or the other, whether there has or has not been a dividend. It is quite clear that if hereafter the Defendant, supposing he is obliged to pay this debt, should sue Hackett for the amount as money paid to his use, and Hackett plead his certificate, that certificate would not be a bar unless he could go further and show it was a proveable debt, and, therefore, the *onus* in such a state of things would clearly be, not only to show his certificate, but to show that the money had been paid by the surety, the Defendant in this case, prior to the making of the first dividend, so that he might have proved it, if he pleased. But it does not follow, when he is offered as a witness by such surety, that the same rule will necessarily prevail, and that the *onus* is necessarily the same. Still, at the same time, it being part of the Defendant's case, in order to render the witness competent for him, that the witness should be discharged by his certificate from the debt which the Defendant is liable to pay for him as [255] his surety, which discharge depends on the surety's being able to prove the debt, when he has paid it, under the commission, we think, that it was necessary that the Defendant in this case should have shown that there had been no dividend. If the Defendant had shown by evidence that there had been no dividend made, then it might be, that as there was a possibility of the present Defendant paying the money before any dividend was made, and, therefore, that he might be enabled to prove under the commission, so that the certificate would operate against him. That might have been a sufficient reason why the witnesses should be competent witnesses: but to



make them competent witnesses, the Defendant ought to have shown that no dividend had been made. It is not a negative which is incapable of proof, because there are the proceedings; they are in Canada, and it might very easily have been shown whether any dividend had been declared under the commission against Hackett and Co. at the time of commencing the action; and the Defendant not having done so, we think the liability of the witnesses to the Defendant, the surety, does not appear to be barred by the certificate the witnesses have obtained, and, therefore, that they were interested to defeat this action in order that they might not be liable to the surety when he had paid the money. We think, therefore, that the judgment of the Court of Queen's Bench at Montreal was right, and that the bankrupts were incompetent witnesses. The evidence of both those witnesses, therefore, must be struck out of the case (a), and it now remains to be seen whether [256] the other evidence in the case is sufficient to prove the plea of usury.

Their Lordships then called upon the Respondent's counsel to establish that point.

Mr. Temple, Q.C., and Mr. Brewer, for the Respondent.—The promissory note which forms the subject of this action was discounted by the Appellants for usurious considerations of a twofold nature. First, the discount of the note formed a part of the current account between the Appellants and Hackett and Co., as Forwarders, and for advances of money and goods made by the Appellants to Hackett and Co. Now the advances of money and goods by the Appellants were made on the express condition, that the business done by Hackett and Co. should be done at charges from ten to twenty per cent. below the established charges of the trade. The sums charged by Ritchie and Co., whom the Appellants now represent, under the name of commission, in the one instance of seven and a-half per cent., and in the others of five per cent. over the legal interest of six per cent. on cash advanced by them to Hackett and Co., was a cloak for usury and contrary to the law of Canada. Ordinance, 17 Geo. III., c. 3 (a). The witnesses [257] Dougal and Young expressly denied the existence of any mercantile usage justifying such a charge under the name of commission. Even had such charge or deduction been usual, such usage was not warranted by law. The important point, however, is, that the fact, whether a charge as commission is or is not usurious, is a question for a jury, and the Court will not disturb a verdict unless it clearly appears that the jury has drawn an erroneous conclusion. *Carstairs v. Stein* (4 Mau. and Sel. 192).—[Dr. Lushington: It does not appear in this case that the witnesses were examined before a jury; they appear to have been examined upon interrogatories. A distinction exists between cases where the evidence in the Court below is taken before the Judge and jury, and where the evidence is taken behind the back of the Judge; in the former case the Court is accustomed to consider such evidence conclusive, in the latter the Court itself feels at liberty and even bound

(a) Upon the question of the competency of a witness, on the ground of interest in the event of the suit, see *Bent v. Baker* (3 Term Rep. 27), and 2 Smith's L. Cases, p. 39 (2nd Edit.), where the cases upon this branch of the law of evidence are collected. See, also, the English Statute, 14th and 15th Vict., c. 99.

(a) The 17th Geo. III., c. 3, is entitled "An Ordinance for ascertaining damages on protested Bills of Exchange, and fixing the rate of interest in the Province of Quebec," and enacts by section 5, as follows:—"From and after the publication of this Ordinance it shall not be lawful upon any contract, to take, directly or indirectly, for loan of any monies, wares, merchandise, or other commodities whatsoever, above the value of six pounds for the forbearance of £100 for a year, and so after that rate for a greater or lesser sum or value, or for a longer or shorter time; and the said rate of interest shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid; and all bonds, contracts, and assurances whatsoever, whereupon or whereby a greater interest shall be reserved and taken, shall be utterly void, and every person who shall either directly or indirectly take, accept, and receive a higher rate of interest, shall forfeit and lose, for every such offence, treble the value of the monies, wares, merchandise, and other things lent or bargained for, to be recovered by action of debt in any of the Courts of Common Pleas in this Province, a moiety of which forfeiture shall be to His Majesty, and the other moiety to him or them that will sue for the same."

to look into the evidence.]—The evidence, we apprehend, must be treated as if taken before a jury; and it establishes that no such custom as the Appellants insist exists among merchants in Canada. A large portion of the advances for which the Appellants have [258] taken credit being made by them under a usurious contract, must be struck from the credit of the Appellants in the accounts between them and Hackett and Co., and, if this is done, then there would be a balance in favour of Hackett and Co., more than sufficient to extinguish the debt. *Owens v. Denton* (1 Crom. Mee. and Ros. 711; S.C. 5 Tyrw. 359).

Sir John Patteson.—Their Lordships are of opinion upon the whole case, that the pleas are not proved. Let us look to the pleas and facts of the case, and see what the usurious agreement is alleged to be. In the first plea, the usurious agreement is alleged to be, that having made a note for £1500 and a note for £1000, it was agreed that Ritchie and Co. should advance to Hackett and Co. that amount, and that for so doing they were to receive, when the notes should become payable, the sum of £125. That is the first plea. The second plea states, it was agreed to discount only the note for £1000, for which they were to receive the sum of £50 (that is, five per cent.) when the note should become payable, and that they were also to receive interest, and we will take it for this purpose that the plea means, interest at six per cent. It is not necessarily so, but I assume for the moment it does mean so, and perhaps that is the fair construction after all, that they were to receive six per cent. interest upon the monies which they should advance on the security of those notes. The third, fourth, fifth, and sixth pleas are similar, with but some slight variations.

Now, we have no evidence of any agreement at all [259] between these parties, except from the accounts themselves, and the evidence of one or two witnesses who were called, who know nothing, of their own knowledge, of any specific agreement at all, but only gather it from the accounts themselves, and the course of dealing between parties in the trade; therefore we are reduced to the accounts themselves to see whether they make out the agreement as stated in the different pleas. I confess it struck me very strongly, as I put it to Mr. Temple in the latter part of his argument, that in order to show an agreement to pay £125 when these notes should become due, that is to say, 5 per cent commission by way of cloak for usury, (the notes becoming due on the 28th of September, 1841,) it was very strange that they put in an account which was closed, and the balance made up to the end of the year 1840, nine months before these identical notes became due, and that in that account there is charged 5 per cent., commission on a sum of £3000. When we look to the earlier part of the account, we find some two or three entries in which commission is charged on specific sums previously advanced, namely,  $7\frac{1}{2}$  per cent. on one sum, and 5 per cent. on another; but these are the only entries in which there are those items of 5 per cent upon any specific sum. The first entry is upon a small balance, stating it to be a balance. The entry which is said to include the £125 in question, is in December, 1840, at the close of that year, and is upon the sum of £3000 generally. Now, how is it possible to say that that entry is proof of an agreement to forbear the sum of £2500 on notes dated September preceding, and which had then nine months to run, and to charge 5 per cent upon [260] that sum when the notes should be payable, in September, 1841? It may be, that if any such agreement had actually been made, the accounts might be shown to be not wholly inconsistent with it. I do not know whether incorrectly kept, or whether it might be that it was entered at the close of the year as something which would hereafter have to be done: it is possible, that if there were such an agreement proved, *aliunde*, by sufficient evidence, such entry in the account might be shown to be not inconsistent with such an agreement. But that is not the question here. The question is, whether this entry, and the account itself, proves that such an agreement existed. And looking at all the items, including these charges of 5 per cent. commission, made in the manner stated, their Lordships are of opinion, that those entries do not prove either of the six pleas which state the particular agreement with respect to these promissory notes.

Then, if that be so, the seventh plea is the only one which remains to be considered.

Now, the seventh plea certainly seems open to the objection which was urged at the bar; that it states that which by law cannot be, namely, a collateral agreement



varying the effect of the promissory note upon which the action is brought. The cases cited, particularly the last case of *Webb v. Spicer* [19 L.J. Q.B. 31], are quite abundant to show that a collateral agreement cannot be set up as a defence to a promissory note, so as in truth to vary the terms of such promissory note. That the agreement pleaded has such effect is plain, because the note, upon the face of it, being payable twelve months from the date, the agreement pleaded has the effect of making it not payable until a settlement of accounts should actually be made between [261] Ritchie and Co. and Hackett and Co., and then only payable to the extent of the balance in favour of Ritchie and Co., although it might be less than the amount of the promissory note; clearly, therefore, altogether varying the effect of the instrument, as appearing upon the face of it: the plea therefore, in itself, upon that ground, is a bad plea.

But, again, that plea is not proved, because we have nothing to show that there was any such agreement between the parties that it should so stand over. Even assuming it to be properly pleaded, there does not appear to be any evidence at all in the case to support it with respect to the state of the accounts between the parties. Balances are brought down, and the balances agreed at the time, and when the change of the firm took place in the month of December, 1840, the balance is signed, and agreed to be of a certain amount in favour of Ritchie and Co.; but then it is sought to strike out from the account, as it then stood, certain items by reason of usury.

Then, taking it that the last allegation in the plea was struck out, namely, that the Defendant upon this note was a mere surety for Hackett and Co., the plea would stand alone thus—that the Defendant, in answer to an action brought against him by the indorsees and holders of the note, says, "Oh, but the state of the accounts between you and the persons who indorsed to you was such, you owing them money, and they owing you money, as not to give you the privilege and the right to sue upon that note against a third person." According to English law such an answer could not prevail, but it may be, and probably is, different, according to the custom of trade prevailing in Canada; and, therefore, it must not be taken that [262] this case is decided here upon the ground that the seventh plea is upon this point, on the face of it, bad. The observations which I have made upon it are rather those of an English lawyer, and are not necessary for the decision, which turns upon the evidence in the case, and not upon the law or form of the pleadings.

Then, there is a question, and the great question in this case, which has been raised, and which, we presume, is really and truly the one which it was intended to get the opinion of the Court upon, rather than any other matter, namely, whether or no, supposing there was sufficient evidence of an agreement between these parties that Ritchie and Co. should conduct business for Hackett and Co., and that one should make cash advances as the other should require them, from time to time; that Hackett and Co., also, should carry goods for Ritchie and Co., and should carry them at a freight of 25 per cent. less than what they charged ordinarily to other people, and also allow 6 per cent. interest on all sums, and also that Ritchie and Co. should receive 5 per cent. commission on all cash advances: assuming that all this was proved, then the question is, whether that was necessarily an usurious contract; whether it was a cloak for usury, or whether it could be properly and fairly attributed as compensation to Ritchie and Co., for undertaking the business and making cash advances. Now their Lordships are all agreed, that it is impossible to say that Ritchie and Co., not being mere money-lenders, but having a good deal of business to transact as merchants, as well as lending money to Hackett and Co., and, therefore, of course, having the necessity for a great deal of their own [263] time being employed, and having a large establishment, which it is obvious they must have had, it is impossible to say, but that they might be fairly entitled to make a bargain that they should receive some compensation for their trouble and expenditure. Whether such compensation was 1, or 2, or 3 per cent., they would make a bargain to have some compensation: it is a thing which has been done over and over again. In the case of *Carstairs v. Stein* [4 M. and S. 192], it was held that it might be done, the jury finding it was not intended as a cloak for usury; and it has been done in many other instances, where there was a very great deal of trouble incurred by one of the parties keeping up a large establishment. You may agree, besides charging interest on advances stipulated, that you shall be paid for your trouble. *Palmer v. Baker* (1 Mau. and Sel. 56) is another case to the same effect. There, an

indenture, assigning to the Plaintiffs a contract for the purchase of timber, upon certain trusts, for securing to themselves, out of the proceeds, the repayment of the purchase-money advanced by them, and also of a certain balance before due to them, together with interest thereon at 5 per cent., up to the time of payment; and also the further sum of £200, as and for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expenses which they might be put to on account of the premises, was held not to be usurious upon the face of it; for the £200 allowed for trouble was not necessarily to be intended as a colourable reservation of further interest beyond the legal interest, but as a compensation for trouble not comprehended within the words, costs, charges, damages, and expenses; neither was it held [264] to be so excessive as to be intended usurious on that account.

So, if there had been an agreement here that Ritchie and Co. should receive from Hackett and Co., from year to year, £500, or any gross sum you please, for the trouble they might incur, it would be treated as a fair and reasonable agreement, unless it was made under such circumstances, that a jury in this country, or the Court in Canada, must necessarily see that it was not really intended for compensation for trouble, but was merely a cloak for usury. Then, can it make any difference, if the sum they are to be paid is not a gross sum of money from year to year, but a sum that is to be paid at 5 per cent. upon cash advances? Because the trouble they might have, might, in a great measure, arise from the cash advances they make, and the negotiation of bills, and a great variety of other circumstances of that kind, and it is but a mode of making them a reasonable compensation, if it be reasonable, for the trouble they have had.

We do not, therefore, see upon the facts of this case sufficient to justify us in saying that this was merely a cloak for usury. It lies upon those who set up that defence to show that it was so. The Respondent's counsel say these usurious contracts are almost always made in secret, and, therefore, there is great difficulty in proving any usurious contract, unless you can call the parties themselves; that you must get at it by way of inference from such facts as you can show. Now, there is evidence in this case which, although it would not be good to establish a particular custom in Canada, or to show that because one person does a thing another is justified in doing it also, yet would be very good evidence to show [265] that it was done openly, and not, as the Respondent's counsel say usurious contracts are generally done, secretly; namely, that these charges were ordinary charges, and that there was no concealment in the fact of Ritchie and Co. making these charges, unless the accounts could have been kept secret, which is not suggested. But, in order to make it a cloak for usury, you must go further, and show that it was so unreasonable a compensation in point of amount, and so clearly intended by the parties as really more than interest at 6 per cent., that the jury, if there had been a jury, or the Court (because it was the Court that had to determine upon the facts), ought to have come to that conclusion. Now, their Lordships cannot say, upon the facts of this case, that the Court ought to have come to that conclusion. The judgment of the Court by whom this evidence was originally heard, was that the pleas were not proved. A great deal of this evidence appears to have been taken by way of deposition, and not orally, but whether it was so or not, the Court that originally heard it came to the conclusion that the pleas were not proved, that judgment being in the nature of a verdict, as it were, upon the facts; and the Court of Appeals, also, thought that they were to be the judges of the facts; that they were to look at the evidence as if there had not been a decision of the Court of the First Instance, and, therefore, they were to be judges of the facts: accordingly, they appear to have come to a conclusion in the case on the facts, as a Court of Appeal, contrary to the decision of the Court of Queen's Bench, at Montreal. Still, it will come to the same question, whether or no the facts which are here detailed in evidence are sufficient to satisfy us [266] that this was really a cloak of usury. Now, their Lordships are not satisfied of that, and, if that be so, we must, upon that ground, have felt it to be our duty to reverse the judgment of the Court of Appeals: but also, as I stated in the first instance, we must reverse it, because we are really, upon the facts and papers which are before us, of opinion, that the pleas are not proved; and, therefore, even supposing it were usurious, the pleas not being proved, the Plaintiff is entitled to a verdict;



and the judgment of the Court of Appeals must be reversed. We consider, that the Appellants should have the costs of both the Courts in Canada, but we cannot give the costs here.

[Mews' Dig. tit. USURY; 2. USURIOUS TRANSACTIONS.]

[267] ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

YORICK JONES MURROW.—*Appellant*: CHARLES JAMES FIFE STUART,—*Respondent* \* [Feb. 3, 1853].

Bill of Exchange drawn by M., under the name of M. and Co., upon and accepted by J. and Co., payable six months after sight to order of M. and by M. indorsed to B., and by B. indorsed to C., "value in account with the Oriental Bank," and by C. indorsed to S.

Action by S., as indorsee, against M., as drawer, upon the bill being dishonoured. Demurrer that the indorsement preceding that to S. was restrictive. Held by the Supreme Court of Hong Kong, that there was nothing upon the indorsement by B. to preclude C., the restricted indorsee, from making an assignment of the bill, so as to give the subsequent indorsee a right of action for the benefit of the restraining indorser, or *c'estui que trust*, as the case may be. Such decision on appeal, affirmed by the Judicial Committee of the Privy Council.

This was an action brought by the Respondent, as indorsee, against the Appellant, as drawer, of a Bill of Exchange for £1154 15s. 7d. The bill was drawn by the Appellant, under the name and style of "Murrow and Co.," upon and accepted by Messrs. Johnson, Cole and Co., payable six months after sight to the order of the Appellant, and by the Appellant indorsed to one Burn, and by Burn indorsed to W. W. Cargill, "value in account with the Oriental Bank," and by Cargill indorsed to the Respondent. Burn was the manager of the Bank at the time of the indorsement to him, and the Respondent was the manager at the time of the indorsement to him.

The declaration stated, that Stuart (the Plaintiff), the manager of the Oriental Banking Company, [268] carrying on business in Victoria, in the colony of Hong Kong, complained of the Defendant in an action on promises; for that the Defendant, using the name and style of "Murrow and Co.," on the 23rd of April, 1847, made his Bill of Exchange, and directed the same to Messrs. Johnson, Cole and Co., and thereby required them, six months after sight, to pay to Messrs. Murrow and Co., or order, £1154 15s. 7d. value received, and place the same to account of shipment of rhubarb. That Messrs. Johnson, Cole and Co. accepted the bill, and that the Defendant indorsed the bill to H. P. Burn, manager, who afterwards indorsed the same to one W. W. Cargill, "value in account with the Oriental Bank," who indorsed the same to the Plaintiff, and, after averring dishonour, and due notice, assigned for breach the non-payment by the Defendant.

To this declaration the Defendant filed a general demurrer, the point stated in the margin being, that the indorsements preceding that to the Plaintiff were restrictive.

The Plaintiff having joined in demurrer, the case was argued on the 3rd of October, 1851, before the Supreme Court.

The Defendant, upon the argument on the demurrer, finally relied upon two objections: First, That the Plaintiff sued in a representative capacity, as manager of the Oriental Bank, and that an action in that capacity could not be sustained upon a cause of action accruing in right of the indorsement of a bill to him in his

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

individual capacity. Second, That the indorsement to W. W. Cargill, "value in account with the Oriental Bank," was restrictive; and that W. W. Cargill appeared by the declaration to be in-[269]-capable of conferring any title to the bill by indorsement.

The Court reserved judgment, which was afterwards pronounced, on the 1st of November, 1851, the material part of which was as follows:—

"Two objections were taken to the declaration: First, That the Plaintiff being described as the manager of the Oriental Bank, was constrained to sue in that character, inasmuch as the 14th section of the general rule of this Court, of Easter Term, 10 Vict., 1847, directs that the declaration shall state truly and concisely the name and description of the party suing, and the right in which he sues, and that the Oriental Bank, not being an incorporated company, had no right to sue in the name of its manager. Secondly, That the indorsement by Burn to Cargill was a restrictive indorsement, and that Cargill could not indorse the bill so as to give a right of action thereon.

"As to the first objection, I think it sufficiently apparent, on the face of the declaration, that the right in which the Plaintiff sues is that of indorsee of the bill in question, and not that of manager of the Oriental Bank.

"As regards the second objection, which is one of much greater importance, involving as it does the right of transfer of a negotiable instrument, it was admitted, on the part of the Plaintiff, that the indorsement was restrictive so far as to make a subsequent indorsee a mere trustee or agent for the Oriental Bank, but no further. On the other hand, it was contended for the Defendant, upon the authority of Bayley 'On Bills,' and Byles 'On Bills,' that the restricted indorsee could convey no right of action [270] whatever to a subsequent indorsee. The words 'or order' are omitted in the declaration in setting out the indorsement by Burn to Cargill, although in the indorsement on the back of the bill the words used are 'pay to the order of W. W. Cargill, etc.'; but it was admitted by the Defendant's counsel that this omission did not affect the question, and, indeed, after the cases *More v. Manning* (Comyn's Rep. 311), *Acheson v. Fountain* (1 Str. 557), and *Edie v. The East India Company* (2 Burr. 1216, 1 W. Bla. Rep. 295), recognised by Tindal, Chief Justice, in *Cunliffe v. Whitehead* (3 Bing. N.C. 828, 5 Scott, 31), it could not well be contended otherwise, the bill being in its original form payable to the Defendant, or order, and consequently transferable.

"The law regarding restrictive indorsements is thus laid down by Mr. Justice Bayley, in his excellent work on Bills (pp. 128-9, 5th edit.): A restrictive indorsement precludes the person in whose favour it is made from making a transfer so as to give a right of action against either the person making it or any of the antecedent parties; and if payment is made to the person to whom such transfer is made, the party paying may, under circumstances, be liable to pay the money a second time, *Robinson v. Kensington* (4 Taunt. 30), or the person receiving it may be liable to refund, *Archer v. Bank of England* (Doug. 615, 637). In Byles 'On Bills' (p. 114, 5th edit.), after stating what are restrictive indorsements, and citing the case of *Archer v. Bank of England* (Doug. 615, 637), *Edie v. The East India Company*, *Evans v. Cramlington* (Carth. 5), *Cramlington v. Evans* (2 Vent. 296), and *Treutell v. Barandon* (8 Taunt. 100), it is said, 'A holder who takes a bill, the circulation of [271] which is restricted by a restrictive direction or indorsement, cannot sue the drawer or acceptor upon it, but holds the bill, or the money received by him, as the trustee of the restraining party, and is liable to refund the bill, or money received upon it, to the party making the restrictive indorsement.' As between the restraining indorser and the immediate indorsee or the drawee, the words, 'to my use,' or the like, are of no effect. But as between the restraining indorser, and a subsequent indorsee, they are a notification that the restricted indorsee has no property in the bill; that he is a mere agent or trustee for his principal; and that he can appoint no sub-agent, except for the purpose of holding the bill, or the money, upon a similar trust. The subsequent indorsee, therefore, being himself also a mere agent, can have no action on the bill, if it is dishonoured, nor hold it, or the money received upon it, against the principal; and if, instead of paying the money to the principal, he chooses to pay it to the immediate agent, he becomes responsible for its misapplication.



" But for these authorities, I should have entertained no doubt as to the Plaintiff's right of action. The respect, however, due to any opinion expressed by Justice Bayley, made me anxious to take a more careful review of the cases cited than I was enabled to do during the argument, before I ventured to come to a contrary conclusion. Having minutely examined these cases, I feel myself bound to adhere to the opinion I expressed at the time of the argument; that they do not support the position laid down by Justice Bayley and Serjeant Byles, that a restricted indorsee can convey no right of action to a subsequent indorsee. With but one exception, the question as to right of [272] action has never so much as been raised in the cases brought forward. They have turned upon the question as to the appropriation of the proceeds of the bill when discounted or paid, and whether, in fact, the directions of the restrictive indorsement have or have not been complied with. All that can fairly be collected from the cases is this, that if from the plain and unequivocal terms of the indorsement, the party either discounting or paying the bill is informed that the proceeds of the bill are to be paid to B., for the use of A., he cannot pay or appropriate them to the use of B. But how does this affect the right of B. to sue for the benefit of A., in the event of non-payment? Mr. Serjeant Byles says, that the restricted indorsee, being a mere agent and trustee for the restraining indorser, cannot appoint a sub-agent, except for the purpose of holding the bill, or the money, upon a similar trust. Agreed. But suppose the acceptor to refuse payment, how is this sub-agent, or subsequent indorsee, to recover the amount of the bill so that he may hold it for the benefit of the restraining indorsee, or, as in the present case, the *cestui que trust*, the Oriental Bank! The exceptional case to which I have alluded is that of *Evans v. Cramlington* [Carth. 5], and *Cramlington v. Evans* [2 Vent. 296], cited by Serjeant Byles. It was there expressly held that a bill payable to B. for the use of A. vested the legal interest in B., and that consequently he might indorse so as to give a right of action to the indorsee. *Smith v. Kendall* (6 Term. Rep. 123) is to the same effect.

" In Chitty 'On Bills,' pp. 232, 233 (9th edit.), where all the cases on this subject are collected, I find no such broad doctrine laid down, as that the restricted indorsee cannot transfer the bill so as to give [273] a right of action, but merely that by a restrictive indorsement the indorsers may stop the currency of the bill, and prevent the indorsee from indorsing or transferring so as to convey any interest (that is beneficial interest) in the bill, to himself or a third party; the principal case cited being that of *Sigourney v. Lloyd* (8 Barn. and Cr. 622, 2 Moo. and Pay. 58), affirmed on error in the Exchequer Chamber (5 Bing. 525, 3 You. and Jer. 220). Unquestionably, by this mode of indorsement you do, in a commercial sense, put a check to the negotiability of the instrument, inasmuch as it ceases to represent any property in the holder, and consequently is not transferable in the usual and ordinary course of mercantile transactions. Again, in Story 'On Bills,' pp. 234, 235, after alluding to the difficulty that may exist in particular cases in defining what is or is not a restrictive indorsement, it is said, 'that such an indorsement restrains the negotiability, except for the purposes indicated in the indorsement. In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof, and if he voluntarily assents to, or aids in, any other appropriation, it will be a wrongful conversion thereof, for which he will be responsible.' (Citing the authorities and cases already mentioned.) To the doctrine as thus laid down, I entirely subscribe, finding in it nothing to preclude the restricted indorsee from making an assignment of the bill, so as to give the subsequent indorsee a right of action for the benefit of the restraining indorser, or *cestui que trust*, as the case may be.

" Great stress was laid, in the course of the argument, upon the double responsibility to which the De[274]-fendant would be subjected, if the Plaintiff in the present action was allowed to recover. I confess myself at a loss to discover the force of this argument. If the Defendant thinks proper to disregard the nature of the indorsement, and to pay or appropriate the money secured by the bill to the private use or account of the Plaintiff, he will, and most justly so, be liable to pay the money over again to the Oriental Bank. But if he obey the terms of the

indorsement, and pay the money to the Oriental Bank, there is, as I conceive, an end to his responsibility. There must, therefore, be judgment for the Plaintiff."

Against this judgment the present appeal was preferred.

The appeal raised two questions: first, whether the indorsement to Cargill, "value in account with the Oriental Bank," was a restrictive indorsement; and secondly, whether Cargill did not appear by the declaration, to be incapable of conferring any title to the bill by indorsement to the Respondent.

Mr. Serjeant Byles, and Mr. Field, for the Appellant; and Mr. Serjeant Channell, for the Respondent.—It was contended by the Appellant: First, that the words "value in account with the Oriental Bank" expressed a trust for the Oriental Bank, and showed Cargill to be a mere agent to receive for the benefit of the Oriental Bank; and, secondly, that the indorsement of such an instrument to Cargill in trust for the Bank being restrictive, destroyed the negotiability of the instrument, and conferred upon [275] Cargill no power of indorsing the instrument so as to give a right of action to any one.

On the part of the Respondent it was submitted, that the propositions urged by the Appellant were untenable, as the words "value in account with the Oriental Bank" did not necessarily import that the Bank had the beneficial interest in the bill; although, in point of fact, the Bank were the beneficial owners, and the action was brought by the Respondent on behalf of the Bank. And also, that the second ground was unsustainable, as the very object of the trust would be defeated, if the trustee was not permitted to indorse over the bill; as there was no reason why the trustee, on the ground of some danger to his *cestui que trust*, which could only exist if the trustee be dishonest, should be shorn of the ordinary power of transfer, which belonged to the holder of a negotiable instrument. And lastly, that the declaration showed a good cause of action by the Plaintiff, as indorsee, against the Defendant as drawer of the bill.

The following authorities were referred to upon these points: *Evans v. Cramlington* (Carth. 5), *Cramlington v. Evans* (2 Vent. 296), *Cox v. Troy* (5 Barn. and Ald. 474; S.C. 1 D. and R. 38), *Ancher v. The Bank of England* (Doug. 637), *Edie v. The East India Company* (2 Burr. 1216; S.C. 1 W. Bla. 295), *Treuttel v. Barandon* (8 Taunt. 100), *Snee v. Prescott* (1 Atk. 249), *Sigourney v. Lloyd* (8 Barn. and Cr. 622), Byles "On Bills of Exchange," pp. 108-9, 114 (5th edition), Chitty "On Bills of Exchange," p. 232 (9th edition).

[276] Sir John Patteson.—Their Lordships are of opinion that there is no doubt at all upon this point. The words "value in account with the Oriental Bank" is not such a restrictive indorsement as precluded the Plaintiff from suing upon this bill. If the parties meant to make a restrictive indorsement, they should have stated it in plain and intelligible language. The appeal must be dismissed with costs.

[Mews' Dig. tit. BILLS OF EXCHANGE; F. NEGOTIATION; 1. *Indorsement*; c. *Conditional or Restrictive*. As to restrictive indorsement, followed in *Buckley v. Jackson*, 1868, L.R. 3 Ex. 135; and see *National Bank v. Silke* (1891), 1 Q.B. 435, and ss. 32 (6) and 35 of Bills of Exchange Act 1882 (45 and 46 Vict. c. 61), and Hong Kong Ordinances, No. 9 of 1885, ss. 32 (6), 35.]



## ON PETITION FROM THE SUPREME COURT AT CALCUTTA.

*In re* SIENARAIN GHOSE \* [Feb. 8, 1853].

Where this Court grants leave to appeal, under the general jurisdiction of the Queen in Council, it will impose such terms upon the party applying as the special circumstances of the case require.

Appeal admitted from an order confirming the report of Commissioners in a partition suit, although the appealable value was under Rs. 10,000, the amount prescribed by the Order in Council of the 10th of April, 1838. The Petitioner (the Plaintiff) had offered to compensate the Defendant, if the report of the Commissioners was varied. The Judicial Committee, in granting leave to appeal, put the Petitioner upon terms of lodging in the Council Office, within four months, a certificate of recognizance to the Queen, in the sum of £1500, for such compensation and costs as might be awarded.

This was a petition for leave to appeal from certain orders of the Supreme Court at Calcutta, made in a partition suit brought by the Petitioner against one Holladhur Doss. The petition alleged, that the Petitioner and one Holladhur Doss were jointly seised as tenants in common of a piece of land at Jorebagdun, [277] in the town of Calcutta, containing twelve cottahs: that the Petitioner instituted a suit on the equity side of the Supreme Court at Calcutta against Holladhur Doss, for partition of the land: that the cause was heard by the Supreme Court, who made the usual decree for partition, and that a commission of partition was issued under such decree, authorising the commissioners to make such partition: that a return was made by the Commissioners on the 19th of September, 1851, by which they recommended that the piece of land should be divided into two shares, by a line directly north and south, and thereby allotted to the Petitioner five half equal twelfth parts, to be enjoyed by him in severalty; and also allotted to the Defendant for his share, to be held in severalty exclusive of the Petitioner, all that portion on the west which abutted on one of the houses and premises of the Petitioner, namely, the house which contained the zenana or female apartments of his family, so as to separate and divide the opposite house and premises of the Petitioner, being the public dwelling-house of himself and family, whereby the Petitioner was excluded from a passage to the house containing the zenana. That the Petitioner filed exceptions to this return, urging that the partition was opposed to the justice of the case and to his claim to have the last-mentioned piece of ground to the extreme west, or that portion of it which would afford the Petitioner a passage from his own house to the other; that this last-mentioned part was of no more value to the Defendant than any other portion, but that the same was of great and peculiar value to him. That the exceptions were called on for argument, but that in consequence of the absence of his counsel to argue [278] the exceptions, the same were overruled, as of course; and that on the 13th of January, 1851, an order was made confirming the Commissioners' return. That on the 29th of March, 1852, he petitioned the Supreme Court that the order of confirmation should be set aside, and the exceptions restored to the Board, for the purpose of being argued before the Court, and having the whole matter explained, the Petitioner offering to pay the costs of the Defendant which might be incurred by the rehearing, which he thereby offered to expedite, but that the Court refused his petition, on the 29th of March, 1852, and proceedings were had before the Master to settle the draft conveyances. That the Petitioner presented a petition to the Supreme Court within six months, for leave to appeal to England, submitting, as a cause of appeal from these orders, that on examining the plan annexed to the return, it would be found, that by the partition which the Commissioners had made, all communication was stopped between the Petitioner's family house and his dwelling-house, that is, between his *Boytuckhannah* and the house containing the female apartments; that each of these two buildings was

\* Present: The Chief Justice of the Court of Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

worth more than Rs. 50,000, and, therefore, such a partition not only exposed him and his family to the greatest inconvenience, but also largely deteriorated the value of his property; that he was ready and thereby offered the Defendant Rs. 800 for each of the six cottahs allotted to him, although the Commissioners had, on the evidence before them, valued each cottah at only Rs. 400; that the loss and inconvenience to the Petitioner had been occasioned by the Commissioners drawing the line of division north and south, and assigning to the Defendant the whole of [279] the land abutting on the female apartments, which, consequently, excluded him from any passage to that house; and the Petitioner submitted, that the line of division was erroneous, and ought to have been drawn in a different direction; and that, if the partition proposed by him was detrimental to the Defendant, the Petitioner was willing to make such compensation to him, in double the value of the land, as the Commissioners might award; that the Court, by an order dated the 1st of July, 1852, refused leave to appeal, on the ground that the property in dispute was under Rs. 10,000, the amount prescribed by the Order in Council of the 10th of April, 1838 [see now, letters patent of 28th Dec. 1865, art. 39 (Stat. R. and O. Rev. iv. p. 93)]. The Petitioner then applied by special petition to the Queen in Council, for leave to appeal from the return of the Commissioners, dated the 19th of September, 1851; and from the order of the Supreme Court, confirming the same, of the 13th of January, 1852, and the order of the 29th of March, 1852.

Mr. Leith, in support of the petition, now moved for leave to appeal.

The Supreme Court was precluded by the Order in Council of the 10th of April, 1838, from admitting an appeal, as the subject-matter involved was under the prescribed appellate value, but this Court has power to admit an appeal notwithstanding, if the circumstances justify the admission. The present is a case of great hardship. The Commissioners grossly erred in judgment in making such a division; they ought to have ascertained, not only the relative value of the property, but also the respective situations of [280] the parties in relation to the property, before the partition took place. *Story v. Johnson* (1 You. and Coll. 538) is directly in point, and shows that a Court of Equity will set aside an adjudication made by Commissioners of partition, in circumstances like the present.—[Sir John Jervis.—You must undertake to save the other party harmless. It may be, that the order confirming the return of the Commissioners has been acted upon. If you come here for an indulgence, asking the rule prescribing the appealable amount to be relaxed, it ought not to be granted but upon terms (see *In re Mushadee Mahomed Cazum Sherazee*, 7 Moore's P.C. Cases, 391). The party Respondent will have to come here to support the order of the Supreme Court, upon a point which you omitted to argue in the Court below; you must undertake to indemnify him from any loss you may put him to, as well also for compensation, if it is necessary to make any variation of the Order confirming the report of the Commissioners upon that point. What is the form of an indemnity given on appeal?—The ordinary mode is by a recognizance in the Exchequer.—[Sir John Jervis.—Would that give a right of action against the obligor? A recognizance in the Exchequer, if etreated, becomes a forfeiture to the Crown].—The Petitioner can enter into a recognizance with sureties in India; this Court can award the proceeds of a recognizance so forfeited.

The Right Hon. Dr. Lushington.—Their Lordships are disposed to allow this appeal, but it must be upon terms of the Petitioner entering into a recognizance in the Court of Exchequer, in [281] the sum of £1500, to abide such order as may be made; such security to be made within four months from the date of the Order in Council.

The following report was made, which was confirmed by Her Majesty:—

“ Their Lordships agree humbly to report to your Majesty, as their opinion, that the Petitioner, Sibnarain Ghose, ought to be at liberty to enter and prosecute his appeal against the return of the Commissioners of partition, dated the 19th of September, 1851, and from the order of the Supreme Court of Judicature at Fort William in Bengal, of the 13th of January, 1852, confirming the return, and from the further order of the Supreme Court, of the 29th of March, 1852, upon lodging in the Council Office, within the space of four calendar months from the date of Her Majesty's Order in Council on this report, the certificate of recognizance



to Her Majesty in a penalty of £1500 sterling, to be entered into by some proper person (to be approved of by the clerk of the Council), before one of the Barons of Her Majesty's Court of Exchequer, conditioned to stand and abide such determination whatsoever as may be come to by this Committee on this appeal, and to pay such compensation as their Lordships may think fit to award, and likewise to pay such costs as may be awarded in case the appeal be dismissed," etc.

[S.C. 5 Moo. Ind. App. 322. See *Sibnarain Ghose v. Hulodhur Doss*, 1854, 9 Moo. P.C. 354, and *Wilson v. Callender*, 1854, 9 Moo. P.C. 100; and generally, as to special leave to appeal in civil cases, note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125].

[282]

*In re* BODMER'S PATENT \* [April 12 and 13, 1853].

Where Letters Patent (for improvements in machinery, tools, or apparatus for cutting, planing, turning, drilling, and rolling metals) embraced several subjects, one only of which, namely, the rolling of metals, had been worked out, and that part of the Patent was affected by subsequent patented improvements by the same Patentee, and could not be effectually used without such subsequent improvements; the Judicial Committee, before recommending an extension of the term of the first Patent, put the Petitioner upon terms of disclaiming all the parts of the original Patent not worked out, and restricted the prolongation to the unexpired term of the subsequent Patents [8 Moo. P.C. 286, 287].

The provisions of section 25 of the Statute, 15th and 16th Vict., c. 83, enacting that Letters Patent obtained in the United Kingdom for patented foreign inventions are not to continue in force after the expiration of the Foreign Patent, apply only to Patents granted in the United Kingdom subsequent to the passing of that Statute [8 Moo. P.C. 286].

This was an application for a prolongation of Letters Patent, granted to John George Bodmer, of Manchester, in May, 1839, for certain "improvements in machinery, tools, or apparatus for cutting, planing, turning, drilling, and rolling metals, or other substances;" and of certain other Letters Patent granted to Bodmer, dated the 16th of October, 1839, for "certain improvements in machinery or apparatus for cutting, planing, turning, drilling, and rolling metals and other substances." The petition was presented by Thomas Hornby Birley, the assignee of the Patentee. The petition stated, that the invention consisted in a certain arrangement of machinery, whereby the tire of railway and other wheels, rings, hoops, or cylinders, might be rolled at a red or welding heat, and thereby made, enlarged, compressed, or hardened to one uniform shape, according to the particular gauge required, and of various arrangements of apparatus or tools for facilitating the working of metals. [283] The Petitioner alleged, that he had not been remunerated for the expenditure and trouble in bringing the Patent into use. A caveat was entered by George Worsdell, of Warrington, iron manufacturer, and in his objections he denied that the inventions were new, and stated, that the Petitioner was the subject of a Foreign power or State, and had obtained a Patent or Patents, or like privileges, for the exclusive use of the inventions, or some of them, in Foreign countries, and the term during which such last-mentioned Patent or Patents continued, or was in force, had expired, and that new Letters Patent could not lawfully be granted pursuant to the prayer of the petition, and ought not, with reference to public policy, to be granted. That the Patentee in the specification described and claimed, as part of his invention, the making of tires, wheels, rings, hoops, or cylinders, whereas the invention was applicable only to the enlarging, improving, or finishing of such tires, rings, hoops, or cylinders, when previously

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

made, or in great measure made, according to the means ordinarily in use, before the dates of the Letters Patent, or either of them, and that the invention had, in fact, been used and exercised by the Patentee and the Petitioner only for such last-mentioned purposes, and not for the making of such tires, rings, hoops, or cylinders. That the specifications embraced and claimed as of the invention of the Patentee, a great number of distinct matters or subjects, many of which were of no practical utility, and which had not been used by the Patentee or the Petitioner, except for the purpose of obstructing improvements in the manufacture of such tires, rings, hoops, or cylinders, and the other subject-matters of the inventions; and the Objector further stated, that [284] the alleged want of remuneration was solely the fault of the Patentee and the Petitioner in not properly working the patent.

Witnesses were examined by the Petitioner. The evidence given was confined to the fact of the public utility of the tire, made by the process of rolling, over the ordinary manner in which they were manufactured. It appeared from the evidence, that the old mode of forming the tire of a railway-wheel was to bend a bar of iron into a circular shape, and, having welded it, to place it on a lathe to remove the inequalities on the surface, and so produce a perfect circle. This process was not only expensive, but, by taking away the skin of the iron, removed the most valuable part of the metal. By Bodmer's invention, two rollers were brought to bear on the tire, which operated by pressure on the inside and outside, and at the same time restored the fibre of the iron to the natural position. The principal advantage of the tires thus made, were the durability of the wheels, and the safety to railway passengers. That the invention was not in more general use, was accounted for by the fact of the expense required to adopt ironworks to the working of the Patent, and the prejudice against anything new. It was, however, stated, that the use of the tire was now becoming general on the railways. It was also shown, that the Petitioner and the Patentee had been in partnership, and that on the death of the Patentee, in 1845, there was due to the Petitioner, on the working of that and a great many other patents of Bodmer, the sum of £123,000, but which sum was afterwards greatly reduced, and there had been great losses. That a licence had been granted to one Jackson, who had been instrumental in bring-[285]-ing the invention into notice, and who had expended £8000, in building a mill to carry out the invention. It was further shown, that subsequent Patents had been taken out by Bodmer in 1842 and 1843, for improvements, and that the old invention was not used in its original shape. That the Patents of 1839, except so far as they related to rolling tires, had never been carried out, and, in fact, were abandoned. It further appeared, that Bodmer had taken out, in 1841, a Patent in France, for the Patents of 1839, but that the same failed, as he did not comply with the requisites of the French law, by bringing his invention into work within two years from the time he obtained his Patent in France (*a*).

Mr. Atherton, Q.C., and Mr. Webster, in support of the Petition, contended, that the fact of great improvements having been made by the subsequent Patents on the original Patent formed no ground of objection to the extension applied for. Galloway's Patent (1 Webs. Pat. Cases, 725-7).

Mr. Russell, for Worsdell, took two objections to an extension. First, that as the Letters Patent for France had expired, no power existed in the Committee, under the Statutes, 5th and 6th Will. IV., c. 83; 2nd and 3rd Vict., c. 69; and the 15th and 16th Vict., c. 83, s. 40, authorising their Lordships to recommend an extension; as it was enacted by section 25 of the Statute, 15th and 16th [286] Vict., c. 83, that Letters Patent obtained in England for patented foreign inventions, were not to continue in force after the expiration of the Foreign Patent.—[Dr. Lushington.—The Statute, 15th and 16th Vict., c. 83, applies only to Foreign Patents granted subsequent to that Act.]—Secondly, upon the merits, he insisted, that the original machine as patented never having been used by itself, but only by

(*a*) By the Patent Law, passed in France, on the 5th of July, 1844, chapter iv., section 32, Patentees are deprived of their rights, if they do not put their invention or discovery to work in France, within two years from the date of the signature of the Patent, or shall have ceased to work the same during two consecutive years, unless they shall assign good reason for so doing.



means of the subsequent Patents, the Patents of 1839 ought not on such ground to be prolonged, the more so as only a portion of them had ever been tried, the rest having been abandoned.

The Attorney-General (Sir Alexander Cockburn), for the Crown, submitted, First, that as only a part of the Patents of 1839 had been applied and brought into use, the other parts having been abandoned by the Patentee, the renewal, if granted, ought to be confined to that part only. Second, that the extension of the Patents of 1839 ought not to exceed the unexpired term of the subsequent Patents of 1842 and 1843.

Lord Justice Turner.—Will the Petitioner abandon all those parts of the Patents of 1839, an extension of which is now applied for, as do not relate to rolling tires? —[The Petitioner undertook to disclaim those parts, and to consent to such disclaimer being made a condition of the new Letters Patent.]

The Judicial Committee, upon the undertaking of the Petitioner to disclaim all other parts of the Patents of 1839, recommended an extension of the Patents so far as related to the rolling of tires, for the term of five years.

This being the first instance in which a part only [287] of a Patent has been extended, the Order in Council made upon the report of the Judicial Committee is appended, which was in the terms following:—

“It is hereby ordered, that the Right Honorable the Lord Chancellor, upon the receipt hereof, do cause new Letters Patent, according to the tenor and effect of this Order, to be made and sealed for such parts of the United Kingdom of Great Britain and Ireland as the said original Letters Patent extend to and are available in England, Wales, and for the town of Berwick-upon-Tweed, for such part of an invention, for certain improvements in machinery, tools, and apparatus for cutting, planing, turning, drilling, and rolling metal and other substances as described in the Letters Patent granted to John George Bodmer, bearing date at Westminster, the 20th day of May, 1839, and likewise for Scotland, for such part of an invention of certain improvements in machinery and apparatus for cutting, planing, turning, drilling, and rolling metal and other substances, bearing date and sealed at Edinburgh, the 8th day of November, 1839, as relates to improvements in machinery, tools, and apparatus for rolling metals, as contained in that part of the said specification, which has not been disclaimed and is now described, in pursuance of a memorandum of alteration entered by the said Thomas Hornby Birley, as an inventor of certain improvements in machinery, tools, and apparatus for rolling metals, a disclaimer having been entered by the said Thomas Hornby Birley of other part of the said invention, in the form provided by law, and that such new Letters Patent be granted for the further term of five years from and after the expiration of the terms granted by the original Letters Patent respectively, whereof the [288] Lord Chancellor, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.”

[Mews' Dig. tit. PATENT; F. CONFIRMATION, etc.; 2. *Renewal and Extension*; a. *Generally*; c. *Foreign Invention*. As to (i.) extension of patent for invention patented abroad, cf. *Aube's Patent*, 1854, 9 Moo. P.C. 43; *Bett's Patent*, 1862, 1 Moo. P.C. N.S. 49; (ii.) partial extension, cf. *Lee's Patent*, 1856, 10 Moo. P.C. 226; *Napier's Patent*, 1881, 6 A.C. 174; *Church's Patent*, 1886, 3 R.P.C. 102. As to extension, generally, see now s. 25 of the Patents Act 1883 (46 and 47 Vict., c. 57) and Privy Council Regulations of 26th Nov. 1897 (Stat. R. and O. 1899, p. 1837).]

## ON APPEAL FROM THE COURT OF CHANCERY OF THE ISLAND OF BARBADOES.

CHARLES TURNER and Others,—*Appellants*; THOMAS FRANCIS COX, the WEST INDIA BANK, and Others,—*Respondents* \* [April 13 and 14, 1853].

S. was seised of real estate in the Island of Barbadoes. S. was indebted to T. in a sum secured by S.'s bond, and at the death of T., in the lifetime of S., such bond debt was due. T., by his Will, appointed S. his executor, who proved and acted in the trusts thereof. S., after T.'s death, regularly entered up his books, debiting himself, not only with the principal but the interest of this debt annually as it accrued. In this state of affairs, S. died, being at the time indebted to B. H. and Co., of Liverpool, and having by his Will devised his real estates in Barbadoes to trustees for sale, subject to his debts, and directed them to consign the crops of such real estates to B. H. and Co., until the several debts due by him to them should be paid in manner therein described. Held, (affirming the judgment of the Court in Barbadoes, in a creditor's suit, in marshalling the assets of S.).

First. That the fact of T. appointing S. his executor, did not, in equity, change the character of the debt due to T., and that such debt remained a specialty debt, as though a stranger had been appointed executor, and retained its priority [8 Moo. P.C. 315].

Second. That the Statute, 5th Geo. II., c. 7, s. 4, made real estates in the West Indies legal assets, in such a way as to give the same priority to specialty creditors against real estate, as they previously had against personal estate, and that it was not competent to a Testator by devise, to change the legal distribution of his assets, by directing a distribution equally among his creditors [8 Moo. P.C. 317].

*Quære?* Whether the direction in the Will of S., that the produce of the real estates should be consigned to B. H. and Co., in Liverpool, until the debt due by him to them should be paid off and discharged, created a lien by S. in B. H. and Co.'s favour upon the proceeds of those estates directed by the will to be sold, for any debt which, at the time of the death of S., might be owing to B. H. and Co.? Such point not having been raised in the Court below by the exceptions to the Master's report, or at the hearing of the exceptions, the Judicial Committee, as a Court of the last resort, declined to entertain the question [8 Moo. P.C. 315-16].

The case of *Charlton v. Wright* (12 Sim. 274), which ruled that real estates in the West Indies might, since the passing of the 5th Geo. II., c. 7, s. 4, be devised, so as to make them equitable assets, observed upon and overruled [8 Moo. P.C. 316-17].

The Appellants, in this case, were the assignees of the estate and effects of Higginson and Deane, [289] merchants and copartners trading in Liverpool, under the firm of Messrs. Barton, Irlam and Higginson, and in Barbadoes, under the firm of Messrs. Higginson, Deane and Stott. The appeal was brought from an order of the Court, dated the 20th of November, 1851, made in a creditor's suit, instituted in Barbadoes, by the Appellants as such assignees, on behalf of themselves and the other creditors of William Sharp, late of that Island, against the Respondents, Cox and others; by which order certain exceptions taken by the Appellants to the Master's report upon the priority of Sharp's debts were overruled.

The suit was brought under these circumstances: Sharp in his lifetime executed a bond to John Tapin, late of the Island, deceased, dated the 29th of March, 1825, for securing the sum of £1500 currency, which bond remained due at the death of Tapin, who died in the lifetime of Sharp, having by his Will bequeathed his

\* Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



residuary estate to certain persons, and appointed Sharp executor, who proved the Will, and acted as such executor. Sharp, being indebted to Higginson and Deane, for money lent by them to him, to secure the payment of part of his debt, and interest thereon; on the 28th of December, 1843, confessed a judgment to them on a declaration filed in the Court of Common Pleas for Barbadoes, for the sum of £5000 sterling, [290] with interest at £5 per cent., from the 18th of December, 1843, on which execution issued on the 28th of December, 1843. Being further indebted to Higginson and Deane, Sharp, on the 4th of May, 1844, confessed a subsequent judgment to them on a declaration filed in the same Court, for a further sum of £5000, with interest at the rate of £5 per cent., from the 4th of May, 1844, on which judgment execution issued on the 4th of May, 1844. He was also largely indebted to them for money lent, and for goods sold by them to him for the supplies of his estate, and for money paid by them on his account. Sharp was also indebted to the West India Bank upon a bond, dated the 14th of November, 1845, whereby the Respondent, together with Cox and George Sharp, became bound to the Bank in the penal sum of 26,000 dollars for securing the several sums of money therein mentioned.

Sharp died on the 9th of May, 1846, seised of certain plantations in the Island, called "Claybury" and "Brewsters," with the appurtenances and the stock and effects thereon, and entitled to personal estate, having made his Will, dated the 23rd of October, 1845, by which, after bequeathing certain legacies and annuities, he devised his house at Claybury, with its offices, gardens and pleasure grounds, and his sugar-work, plantation and lands adjoining, in the Island of Barbadoes, with the appurtenances and the live and dead stock thereon, and in general, every article, matter and thing, including all the produce of the plantation at the time of his decease, and the several chattels in his Will described, and every removable article, except silver and plated articles, monies and securities for money about his mansion-house at the time of his [291] decease, unto and to the use of his son, George Sharp, and his son-in-law, Cox, their heirs, executors, administrators and assigns, subject to the payment of such of his debts and legacies as should not be paid and liquidated by the means and in the manner thereafter mentioned, upon trust, so long as one of his four single daughters, Sarah Sharp, Henrietta Sharp, Elizabeth Clarke Sharp and Wilhelmina Sharp, should live and be unmarried, to permit and suffer such of them, as should so remain unmarried, to reside in and occupy the mansion-house, etc., free of rent, and to have the use of his chattels therein mentioned; and he thereby empowered his trustees, as long as any of his daughters should be unmarried, to cultivate and manage his plantation: and to apply the annual produce of the estate: first, in payment of the costs incurred in the trusts as therein mentioned: secondly, in keeping down the interest, and gradually liquidating such of his debts and legacies as should not be paid off and discharged by the means therein-after provided for the payment thereof; and afterwards, upon certain trusts therein mentioned, with powers of sale and investment, for the benefit of the testator's four daughters. And he further authorised the trustee or trustees, for the time being, of his Will, if any of his debts or legacies left unpaid by the means thereafter provided for payment thereof, should be called for at a time when they should be unable to meet the payment thereof, to borrow so much money as would enable them to pay off and satisfy the same, and to charge his plantation called "Claybury," and the lands, buildings and appurtenances thereto belonging, with the payment thereof; and he directed, authorised and em-[292]-powered his executors and executrixes thereafter named, or any or either of them who should qualify to that his Will, as soon as convenient after his death, to sell and dispose of his plantation called "Brewsters," in the Island, with the lands, buildings and appurtenances thereto: and also a piece or parcel of land situate in the parish of Christ Church, and to execute conveyances thereof and give receipts for the purchase-money thereof as therein mentioned: and such purchase-money when received, together with all debts which might be due to him at the time of his death, save and except the debt due to him from Cox, which he bequeathed upon certain trusts, and all other property of which he might die possessed, not thereinbefore mentioned, he directed to be paid and applied by his said executors and executrixes, qualified as aforesaid, in payment of the debts due from him at the time of his death, and the legacies

thereinbefore bequeathed: and all such debts and legacies as should not be paid by the sale of his plantation "Brewsters," the piece or parcel of land and other effects and property as aforesaid, he thereby charged on his plantation called "Claybury," with the lands, buildings and appurtenances thereto belonging. And when the plantation called "Claybury" should be sold, under the provisions contained in his Will, he directed the chattels therein mentioned to be sold, and the proceeds thereof to be equally divided amongst his daughters, Sarah, Henrietta, Elizabeth Clarke and Wilhelmina, or such and so many of them as should be living. And he directed that the crops of the plantations "Brewsters" and "Claybury," until the same should be sold, should be shipped and consigned to the house of Messrs. Barton, Irlam, and Higginson, of Liverpool, [293] until the debt due from him to them should be paid off and discharged. And the rest, residue and remainder of his estate and property, real, personal, and mixed, there and elsewhere, whether in possession, reversion, remainder or expectancy, he gave, devised and bequeathed unto his son George, his heirs, executors, administrators and assigns. And he appointed his son George, his son-in-law, Cox, and his four daughters, executors and executrices of his Will, thereby declaring that the appointment of them as such executors and executrices should not discharge or exonerate them from any debts or debt which should be due to him from them or any or either of them.

The Testator died on the 9th of May, 1846, leaving George Sharp, his son and heir, him surviving.

George Sharp and Cox proved the Will in the Island, and entered into possession of the estates, and received the rents thereof.

On the 13th of November, 1847, a fiat in bankruptcy was issued against Higginson and Deane, and the Appellant, Turner, was appointed official assignee, and the other Appellants, Shand, Imrie, and the Bookers, were chosen creditors' assignees of their estate and effects.

The Appellants, as such assignees, brought an action in the Island against Cox as executor (Sharp being then absent from the Island), for the recovery of the debt due to the firm from William Sharp; and Cox confessed judgment thereon, for the sum of £10,075 14s. 8d., with interest, from the 29th of May, 1846, on which judgment a writ of execution issued on the 21st of August, 1849. On the same [294] day, Cox, as such executor, confessed judgment to the West India Bank, in an action brought by them on the bond for the sum of £2708 6s. 8d., interest and costs, and execution issued on the same day.

The "Claybury" and "Brewsters" plantations were not sold by the executors.

On the 15th of January, 1850, the Appellants, Turner, and the other assignees of Higginson and Co., filed a creditors' suit in the Court of Chancery of Barbadoes against Cox and others, praying that an account might be taken of the monies due to them as such assignees, for principal and interest, from the estate of William Sharp, on the several judgments, and also an open account of the other debts owing by Sharp at the time of his death; and also an account of his personal estate and effects received by his executors, Sharp and Cox; and also an account of the rents and profits of the real estate whereof he died seised, and which had come to the hands of his executors; and should it appear by the answer of Sharp and Cox, that the personal estate of Sharp would be insufficient to pay his debts, and that it would be necessary to sell all the real estate whereof he died seised, that the plantations called "Brewsters" and "Claybury," with the lands, buildings, stocks and appurtenances thereof and thereto respectively belonging, and the pieces or parcels of land, in the parish of Christ Church, directed by his Will, might be sold, and all other his real estate might be ordered and adjudged and decreed to be sold by one of the Masters of that Court, according to the course and practice of the Court, and that the monies arising by such sale, and all the personal estate of Sharp, might be applied in a due course of administration, and thereout that the [295] Plaintiffs might be paid what the Master should report to be due to them on account of the several judgments and other claims of the Plaintiffs, as such assignees; and that all proper parties might be directed to join in the sales of the plantations and real estates and premises.

The Defendants by their answer, set forth that the personal estate was insufficient. The cause came on to be heard on the 14th of November, 1850, when it was, by



consent, ordered and decreed, that the Master should take the usual accounts and put up for sale the two plantations "Claybury" and "Brewsters."

On the 19th of December, 1850, the Master made his report, whereby he reported, that in pursuance of the decree he had caused an inventory to be taken of each of the sugar plantations called "Claybury" and "Brewsters," with the lands, buildings, cattle, quick and dead stock, plantation implements and utensils thereon, and thereto respectively belonging, and on the 28th of November, 1850, by the estimation on oath of seven substantial and indifferent freeholders of the Island, that he had valued "Claybury" plantation, stock and premises, at £18,928 15s. 2d. sterling, and that on the 24th of November, 1850, by the estimation on oath of six substantial and indifferent freeholders of the Island, he had valued "Brewsters" plantation, stock and premises, at £9837 19s. 10½d. sterling. That in the course of the time limited for the sale of the above-mentioned plantations called "Claybury" and "Brewsters," Charles F. Lyall, Esq., offered and bid the sum of £22,750 currency of the United Kingdom of Great Britain and Ireland for "Claybury," and that he had sold to Lyall, the "Claybury" plantation, stock and premises for £22,750 [296] sterling, and delivered possession thereof, and that he had sold "Brewsters" plantation to Nathaniel Riston, Esq., for £13,654 sterling, and delivered possession thereof to him.

By the Master's further report, dated the 25th of December, 1851, he reported, that in obedience to the decree, he called before him by public advertisement the proprietors of the several demands and incumbrances which were liens on and affected the plantations, with their papers, vouchers, documents and witnesses, touching and concerning the same; and having duly examined the same, he proceeded to rank and class the demands in their due course of priority, according to the nature thereof respectively, which several debts, liens, and incumbrances were set forth and shown in a schedule annexed to his general report, and which he prayed might be taken and considered as part thereof.

The schedule thus annexed set forth the various debts and incumbrances according to their legal and equitable priority, which were general liens affecting these two plantations, and ranked and classed the debts due from the estate; and, among others, the Master found that three sums were general liens against the two plantations "Claybury" and "Brewsters," and due in manner and order following:—First, to the residuary legatees under the Will of the late John Tapin, a sum of £1500 currency and interest, or £1938 18s. 10d. sterling, due on the bond, dated 29th March, 1825, granted by the Testator William Sharp to John Tapin; Secondly, to the West India Bank, a sum of £3168 15s. 4d. for principal and interest, on a judgment and execution, dated 21st August, 1849, confessed by Cox, the ex-[297]-ecutor of the Testator, upon a joint and several bond of the Testator and others, dated 14th November, 1845, given to the West India Bank to secure such principal and interest; Thirdly, to the Plaintiffs, as assignees of Messrs. Higginson and Deane, a sum of £11,075 11s. 10d. principal, interest and costs, confessed by Cox as such executor, on the 21st of August, 1849, and on which judgment execution had issued.

The Appellants took two exceptions to this report: First, that the Master had ranked the sum of £1938 18s. 10d. sterling, reported by him to be due to the residuary legatees of John Tapin deceased, by virtue of the bond dated the 29th of March, 1825, made by Sharp, whereby Sharp bound himself, his heirs, executors, administrators and assigns, to pay Tapin, his heirs, executors, administrators and assigns, the sum of £1500 late current money of the Island, with legal interest thereon from the day of the date of the bond, until the whole and every part thereof should be paid and satisfied as payable out of the purchase-money arising from the sale of the sugar-work plantations "Claybury" and "Brewsters," prior and preferable to the sum of £11,075 11s. 10d. reported to be due to the complainants under the judgment confessed by Cox, executor of Sharp, on the 21st of August, 1849, to the assignees of Higginson and Deane, bankrupts, on which judgment execution issued on the 21st of August, 1849: whereas the Master ought to have reported the sum of £11,075 11s. 10d., due by virtue of the judgment and execution, prior and preferable to the sum of £1938 18s. 10d. stated in the Master's report to be due on the bond, if the purchase-money arising by the sale of the plantations be legal assets, but if such purchase-money should be [298] deemed equitable assets, then the Master should

have ranked the same equally with the sum of £1938 18s. 10d.; and, as a further exception, they alleged, that the bond became released and extinguished by reason of Tapin having, by his Will, appointed Sharp an executor thereof, who, after the decease of Tapin, qualified himself to act as such executor. Secondly, that the Master had by his report ranked the sum of £3168 15s. 4d., reported to be due to the West India Bank, under a judgment and execution, dated the 21st of August, 1849, confessed by Cox, as executor of Sharp, and stated in the report to have been confessed upon the bond dated the 14th of November, 1845, whereby William Sharp, together with Cox, and one George Sharp, became jointly and severally bound to the West India Bank in the penal sum of 26,000 dollars, for securing the principal sums of money, interest and stocks, amounting to the sum of £3168 15s. 4d., before the sum of £11,075 11s. 10d., and under the judgment confessed by Cox as executor of Sharp to the complainants: whereas the Master ought to have reported the sum of £11,075 11s. 10d. due under the judgment and execution to the complainants, to rank equally with the judgment and execution of the West India Bank, the same bearing even date with each other.

These exceptions came on for argument before the Court of Chancery in Barbadoes, on the 20th of November, 1851, and after hearing the arguments, the Court reserved its judgment.

Previously to giving judgment, it was referred to the Master to ascertain whether the executors of the Testator appeared to have known of the bond debt of [299] Tapin. The Master reported that the amount of the bond debt was entered up in the Testator's books as against himself, both principal and interest; and moreover that the Master had the bond in his possession.

The Court overruled both exceptions.

The material part of the judgment of the Court, overruling the exceptions, was in these terms:—

“The questions which are raised and have been argued on these exceptions, are—First, whether the purchase-money arising from the sale of the estates is to be considered and administered by this Court as legal or equitable assets; and Secondly, whether a specialty debt, a debt on bond against the Testator, his heirs and assigns, is, according to the law of this Colony, and the course of administration of assets in the payment of debts by this Court, to be ranked below a debt on simple contract against the Testator at the time of his death, because his executor has confessed to such simple contract creditor a judgment for its amount.

“It is admitted, that this is the first time this question has been raised in this Court, and the question must be considered on general principles and the law of the Colony, as well as it is affected by the terms of the decree in the cause.

“It appears that the whole assets of the Testator consist, with the exception of some plate, of the purchase-money for these estates, and that having all come into the hands of the Master, the Court is called on to administer them instead of the executor, to use the language of the bill, ‘in a due course of administration.’ The decree, which is by consent, directs the Master ‘to take an account of all the debts, demands, and incumbrances which are liens on and [300] affect these plantations, and to rank and class them in a due course of preference, according to the legal priorities and nature thereof respectively,’ to ascertain which it authorises the Master ‘to examine, if necessary, the parties and their witnesses, on oath, and their vouchers and documents touching the same.’ This is the usual decree that has been passed by this Court for a series of years in such cases: the practice under it, therefore, is well established. What then is that due course of administration? It cannot be denied that, in administering the assets of a Testator, this Court has invariably followed the rules of law, that it has always applied such assets exactly as the executor by law is bound to do in liquidation of a Testator's debts; and that, in the Master's office, in ranking the debts of a deceased party, that officer has uniformly followed in his reports the rules of priority, which, according to their several degrees, the law has established respecting the payment of debts. Is there anything in the nature of this property, which the Court is called on to administer instead of the executor, which ought to induce it to vary from these rules of legal priority, which are not only in accordance with the law of the Colony and the



established practice of the Court, but in strict obedience to the terms of the decree in the cause!

"One of the grounds of exception taken to the Master's report has raised the question, whether the purchase-money of these estates is to be considered in the hands of the Master as legal or equitable assets; and as this is the first time this doctrine has been mooted in this Court, it is proper to inquire into its origin and application to this Colony.

"By the common law of England, it is true that [301] specialty creditors had no lien on the lands of the debtors before judgment, and simple contract creditors had no rights against real estate; and before the Statute of Fraudulent Devises (3 and 4 Will. and Mary, c. 14) Testators could by Will disappoint their creditors of all resort to their freehold estate, by devising it away from them; and it was from the exercise of this power that a necessity for the introduction of the doctrine of equitable assets arose in the Courts of the mother country. It has been well remarked by a recent commentator on English law, that 'few defects in English jurisprudence are more surprising, because more repugnant to the natural sense of justice, than this exemption of landed property from debts.' The redress, however, though late, and effected by slow degrees, is now complete under the provisions of the Imperial Act of the 3rd and 4th Will. IV., c. 104.

"But this was a principle of the common law, which, if it ever had any operation in this Colony (and I can find no trace of it), was soon set aside as wholly unsuited to its condition and circumstances, and real estate made liable for simple contract debts, and this without at all interfering with the rights of specialty creditors to enforce their claims according to their legal priorities. This is evident from the preamble of the Act of the Colony, No. 189 (Hall's Laws of Barbadoes, p. 340), in which it is stated, that 'all lands have ever been looked upon as chattels for the payment of debts, though what remains afterwards to descend to the heir-at-law, or go to the devisee, and on that principle, or perhaps by virtue of some express law not now to be found, it has been customary for marshals to extend estates both of [302] land and negroes, and to execute bills of sale for the same in fee or otherwise, according to the interests debtors had therein, although executions did in truth issue on judgments obtained only against executors or administrators; and whereas, proceedings of the like nature have also, from time to time, been had with regard to decrees obtained in the Court of Chancery, as well as on the equity side of the Court of Exchequer, and writs of execution issuing thereon, all which have appeared not very regular to such as are unacquainted with the laws, constitution, and practice of this place. To the end that the law may be explicit and certain for the future in these respects, it enacts, that such proceedings shall be deemed, and they are hereby declared to be good, valid, and effectual, to all intents and purposes whatsoever.' This Act was passed in 1745, and shows that the land in this Colony has ever been liable by law for simple contract debts, as well as specialty, being ever looked upon as chattels for their payment, and this whether in Courts of equity or Courts of law. The like necessity, therefore, for the introduction of the doctrine of equitable assets never existed in this Colony, for, by the practice of this Court, and by means of such suits as the present, the claims of every class of creditors have always been effectually secured according to their legal rights and priorities out of the purchase-money obtained by the sale of real estate under its decrees. It is not unimportant to remark, that this was the law of the Colony, irrespective of the Imperial Act, 5 Geo. II., c. 7, s. 4, which made real estate in the Colonies assets for the satisfaction of debts, in like manner as estates are by law in England liable to the satisfaction of debts [303] due by bond or other specialty. The Act of Geo. II. was passed in 1732, and the Law 189 (Hall's Laws of Barbadoes, p. 340), in 1745. Yet it not only does not refer to the Act of Parliament, but it declares that land has ever been looked on as chattels for the payment of debts in this Colony. This principle is to be traced in all our local laws and in the records of this Court. In an Act passed in 1835, to regulate the sale of lands attached under executions issuing out of the several Courts of Common Pleas, or the Court of Exchequer, or the Court of Chancery, 'the provost-marshal is directed to execute a conveyance of the property so sold, and such conveyance shall be good and effectual in the law for the purpose of conveying all the estate, right, title and interest of the debtor

in and to the property so conveyed, and that such property shall not be subject to be redeemed by the debtor, or his heirs, any law, usage or custom to the contrary notwithstanding.' An equity of redemption, or any other equitable or legal interest in land, may be taken in execution under a writ of execution. In fact, there never has existed in this Colony any different rule for the payment of debts in this Court, and, in the Courts of common law, all are paid according to legal priority, as ascertained in each Court respectively; and whenever parties, in order to secure a priority for their debts, have in the lifetime of the Testator had the precaution to place them on a basis of stronger obligation, it has been a rule in the administration of assets by this Court, that all creditors by specialty, in which the heir is bound (as in this case), shall be paid the full amount of their debts before any payment is made to creditors by simple contract. [304] This is now the state of the English law, under the provisions of the 3rd and 4th Will. IV., c. 104; but all acquainted with the practice of this Court know that it has always been the law of the Court, its decrees and reports abundantly prove it, and the same point as that now under discussion was recently settled in the cause of *Hardy v. Hollinside*, and in which a bond of the Testator is ranked prior to a debt secured by the judgment of the executor; and, on looking to the record, I find the bill signed by the same counsel, and endorsed with the names of the same solicitors as in the present suit; and in that case, as in this, the assets in the hands of the Master were the purchase-money arising by the sale of a landed estate, under a decree of the Court, couched in the same terms as the decree in this cause. It is also to be remarked that assets are not made equitable in the Courts of the mother country by being recoverable in a Court of Equity, for that is the case with trust estates, neither are they by being capable of administration in such Courts alone; for instance, as in the case of traders in satisfaction of their simple contract creditors: but they must consist of mere equitable property, such as is liable only to the payment of debts by the help of a Court of Equity; there is no property of a debtor, equitable or legal, in this Colony, which may not be taken under our writs of execution at Common Law, still less can it be said that the property in the hands of the Master in this cause could only be reached by the aid of this Court, the whole of it being expressly liable at law, under the writ of execution on the judgment confessed by the executor to the assignees. Lastly, it is only necessary to add, that such being the rights of cre- [305] ditors by the law of the Colony, it is incompetent to any Testator, by any disposition in his Will, to deprive his creditors of the right to resort to his real estate for payment of their debts strictly, according to their legal priorities, where his assets are insufficient for the complete satisfaction of all his debts. I cannot, therefore, consider the purchase-money of these properties, in the hands of the Master, as equitable assets, and say that they ought to be administered as such by the Court, contrary to the law of the Colony, the practice of the Court, and the terms of the decree assented to by the parties to the suit.

"The next question is, the priority to be given in this Court between a bond debt of the Testator, in which his heirs, executors, administrators and assigns are bound by himself, in his lifetime, and a judgment confessed by his executor, on a simple contract debt of the Testator. It has been already stated that the Court, in this suit, is to administer the assets of the Testator in precisely the same way as the executor is bound to do, that the debts respecting which the questions of priority arise on the exceptions must be paid, if at all, or in part, out of the purchase-money of the estates; that that purchase-money is applicable to their payment 'in a due course of administration,' which the bill prays for, and it is admitted that the executor had due notice of these debts. The only point, therefore, is one of legal priority. Now, the duty of the executor in this matter is quite clear; he is bound to observe, in paying the debts of the Testator, those rules of law as to priority, according to the several degrees or nature of the debts which have been established at law, although he has a right among several creditors of equal degree, to prefer [306] and pay any one before another, even though there should remain nothing to satisfy that other. Yet here his authority ends, he has no right to pay the debts out of their legal rank; nay, when sued for a debt of inferior degree he is bound to resist its payment if there be not property enough to satisfy the debt of higher degree; and that if, having notice of such debt of higher degree, he does not resist,



but pays it, he is personally liable for the amount so paid to the injury of the prior creditor. This is the principle which must guide the Court in this question.

"The executor, no doubt, has a right to confess judgments for the debts of his Testator, and they will bind the lands of the Testator, which are assets, as chattels in his hands, for the payment of debts: these judgments are, in truth, an admission of assets by Cox, though it appears by his answer that he knew the estate to be insolvent when he confessed them; but the executor, by giving judgments, cannot alter the relative positions in which the Testator, at his death, left the different classes of his creditors: his power of preference is limited to creditors of the same class, and debts of equal rank: he cannot, by thus acting, give priority to junior creditors over those whose debts are of higher degree, and whom he was bound to pay before those to whom he has confessed these judgments, because by so doing he transgresses a rule of law, and fails in his duty; and, therefore, it is, that the judgments of an executor are held to be of a different nature to those against a Testator. All the old authorities concur in this, and the point is well laid down in Williams' *On Executors*, who writes, that a judgment against the executor himself is not [307] to be considered within the same class as those which are recovered against the deceased, it stands altogether on a different footing; and, with respect to other creditors of the deceased, a creditor who has obtained a judgment against an executor has no priority, except with regard to debts of equal degree with that upon which he has obtained judgment, such being the order in which the executor was bound to pay these debts; such being the nature of the judgments confessed by the executor, being, of truth, of little value, save as an admission of assets as against himself, the land being previously liable, the Court, in administering these assets, can only permit these judgments to have the effect which the executor was legally authorised to give them; they will rank above the debts of all those creditors who, at the death of the Testator, were creditors by simple contract, and to whom the executor has not confessed judgments. To give them operation beyond this, would be to invest the executor with an authority which the law denies him, to the injury of those creditors whose legal rights would be thus taken from them.

"But, assuming that such was the effect of these judgments, wrongfully given by the executor, but on which no payment had been made, and, as in this case, the whole of the assets of the Testator are brought into this Court for administration, it cannot be supposed that this Court, in performing this duty, if it is discovered that the executor had given a security which, whether intentional or not, would, if sustained, deprive a creditor of his just and legal priority, and if paid, defraud him of his debt, would hold itself bound by the wrongful or mistaken act of the executor. Having a complete remedy in its [308] power, by being possessed of all the assets of the Testator, it would not hesitate to apply it so as to do injustice to no one, and wholly regardless of any inchoate wrong of the executor, it would take care that a due course of administration was carried out by the Master.

"But, if this question were not so completely settled, as it appears to me, by known principles and rules of law, as well as the practice of the Courts, I think the Master must, from the terms of the decree by consent, have ranked the bond creditors before those simple contract creditors of the Testator who had executorial judgments for their debts. Creditors take rank according to their respective classes as against the Testator's assets, when administered in this Court, according as they stood at the time of the death of the Testator; the executor has his course of duty laid down for him in paying them, and this Court has always enforced it in that order: but the Master has not been left, in this instance, to the general rule of law: the decree expressly enjoins him to rank and class these debts, liens, and incumbrances, and to pay them out of the purchase-money, 'according to their legal priorities and nature thereof respectively,' arming him with large power to discover their nature and right of preference. It is admitted that he has rightly described these debts in his report, and I am of opinion that he has rightly classed and ranked the bond debts of the Testator above the simple contract debts of the Testator, although the executor has given judgments for those debts. Nor do I think the fact of the executor having given a judgment to the West India Bank, for their bond debt, deprives them of the priority they had at the time of the

Testator's [309] death; for the Court is bound to take notice of, and the Master enjoined by the decree to inquire into, the nature of each debt, and to rank it accordingly, that is, according to its priority at the time of the Testator's death against his assets: it, therefore, is to be viewed as the bond debt of the Testator, and is properly ranked by the Master as such.

With respect to the bond debt of Tapin's residuary legatees, which the exceptions claim to be considered as released, by reason of Sharp having been the qualified executor of Tapin, it is admitted that Sharp, in his lifetime, always considered this a valid debt against himself, and it appears to have been duly entered as such in his books, and the interest annually debited against him, which books the executor gave to the Master. It is quite true that, at law, the nomination of a debtor as an executor, by his creditor, is not merely a suspension of his right at law to recover his debt, since he cannot sue himself, and that where a personal action is once suspended by the voluntary act of the party entitled to it, the right is discharged, and thus the debt itself released. Yet, in this Court, that rule is held to operate only as between a Testator and his debtor; for, as between the debtor-executor and the creditors of the Testator, it is an established rule in equity that the executor shall be accountable for the amount of his debt as assets, and this not merely for the payment of the Testator's debts, but also for his legatees, general or residuary, and for his next of kin. This debt having been always dealt with by Sharp as existing against himself, the exception, founded on the rule of law, cannot prevail."

From this decision Turner and others, the assignees of Higginson and Deane, appealed to the Queen in Coun-[310]-cil. The Respondents, the residuary legatees of Tapin, and the West India Bank, lodged separate cases.

Mr. Rolt, Q.C., and Mr. Pryor, for the Appellants.—The first question turns upon the effect of the Will of Tapin, the obligee in a bond, who has appointed the obligor his executor. At law the appointment of a debtor as executor is a release of the debt. *Freakley v. Fox* (9 Barn. and Cr. 130), *Wankford v. Wankford* (Salk. 299), *Cheetham v. Ward* (1 Bos. and Pul. 630). Although in equity it is not so, as the executor is treated as a trustee for payment of debts, *Berry v. Usher* (11 Ves. 87), yet we submit, that though in equity the debt is not extinguished, yet its priority as a specialty debt is taken away, and that in this case it ought to have been postponed to the Appellants' judgment, confessed by Cox, as executor of Sharp, in favour of the Appellants, which, according to the law in the Island of Barbadoes, is entitled to priority over all other debts of the Testator. But, independently of the question of priority, a lien was created in the Appellants' favour by the direction for the consignment of the produce of the Testator's estate to Higginson and Co. until the debt should be discharged, which a Court of Equity would enforce. Thus, in *Thompson v. Grant* (note, 1 Russ. 540), Sir Thomas Plumer decided, that an executor of an executor was entitled to, retain, out of the balances of the produce of the original Testator's West India plantations, received by him as consignee appointed by the Court, debts due from the Testator to him, either in his own right, or as [311] executor of the deceased executor.—[The Lord Justice Knight Bruce.—This question of lien does not appear to have been raised by the exceptions, or at the hearing. No mention of it is made in the judgment.]—Even if the Appellants' debt is not entitled to such priority, still the purchase-money arising from the sale of the Testator's estates, under the direction of his Will, must be considered as equitable assets, and the Appellants are entitled to rank and be paid out of the produce of such sale, rateably and equally, with the other creditors. The question of legal or equitable assets depends upon the Statute, 5th Geo. II., c. 7, s. 4, which enacts, that houses, lands, negroes, and other hereditaments and real estates, situate in the plantations, shall be liable to, and chargeable with, all just debts, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies in any court of law or equity for seizing, extending, selling or disposing of such houses, lands, negroes, towards the satisfaction of such debts, etc., and in like manner as personal estates in any of the plantations respectively are seized, extended, sold, or disposed of for satisfaction of debts. This Statute was passed in the year 1732, and is clearly not affected by the Colonial Act, No. 189, of 1745 (Hall's "Laws of Barbadoes," p. 340), which declares that



lands in the Colony are deemed chattels and liable for payment of debts, for the Colonial Act makes no reference whatever to the British Statute. Now, the words in section 4 of the 5th Geo. II., c. 7, "in like manner as real estates are by the law of England," [312] refer to, and must be construed by, the Statute of Fraudulent Devises, 3rd Will. and Mary, c. 14, which was passed for relief of creditors, and contains provisions for real estate being made equitable assets for payment of debts, for lands fraudulently aliened have been held to descend to the heir as assets (see Cases collected in Evans's Statutes, vol. i., p. 462, and see *ib.* 374, 2nd ed.). We submit, therefore, that by the Statute, 5th Geo. II., c. 7, s. 4, it was competent to a Testator seized of real estate in Barbadoes to direct an equal distribution of his estate, in the manner the Testator in this case has done. The authorities upon this construction are conclusive. Thus, in *Charlton v. Wright* (12 Sim. 274), the very question now in dispute arose upon this Statute, and the Vice-Chancellor Shadwell held, that real estate in the West Indies could under that Statute be made equitable assets.—[The Lord Chief Justice Knight Bruce.—In *Lyon v. Colville* (1 Coll. 449), decided since *Charlton v. Wright* [12 Sim. 274], the contrary was ruled.]—That case was confined to the compensation money given by the Slave Emancipation Act, 3rd and 4th Will. IV., c. 73. A direction in a Will to pay simple contract creditors before specialty creditors is good, being within the exception in the Statute of Fraudulent Devises, 3rd Will. and Mary, c. 14, *Millar v. Horton* (G. Coop. 45).

Dr. Lushington.—Their Lordships are of opinion, that the Respondents' Counsel need only confine themselves to the construction of the Statute, 5th Geo. II., c. 7, s. 4, as to how far it was competent for a Testator seized [313] of real estates in the West Indies, by a disposition in his Will, to make them equitable assets.

Mr. Lloyd, Q.C., and Mr. Hislop Clarke, for all the Respondents.—The argument being limited to that one point, the simple question then is, whether the purchase-moneys arising from the sale of the plantations of the Testator are, under his Will, equitable assets. Our contention is, that real estate in Barbadoes is, by law, made legal assets for the payment of debts, and we submit, that the Testator was incapable of devising them so as to make them equitable assets, and that his debts, whether by specialty or simple contract, are payable thereout, according to their legal priority. This is apparent upon a sound construction of the Statute, 5th Geo. II., c. 7, passed for the more easy recovery of debts in the plantations in America. The fourth section enacts, that real estate may, by law, be extended and sold for payment of debts in like manner as real estates are, by the law of England, liable to satisfy debts due by bond or other specialty. From a local Act of Barbadoes, passed in 1745 (Hall's "Laws of Barbadoes," p. 340), subsequently to this Statute, it appears that real estate had ever been looked upon in that Island as chattels for payment of debts, though what remained went to the heir-at-law or to the devisee.—[Dr. Lushington.—In the first report of the West India Commissioners upon the island of Barbadoes, p. 226, the then Chief Justice of Barbadoes gives an account of the state of the modern Statute laws of the Colony, from which it appears that there are many laws not printed, and not known to the Chief Justice. This must induce caution before determining what the law upon this question [314] really is.]—The Statute, 5th Geo. II., c. 7, introduced no new law into the West Indies, for, prior to and independently of that Statute, real estate in Barbadoes could be sold, and was assets for payment of all debts by simple contract as well as specialty. *Blankard v. Galby* (4 Mod. 226). That Statute must, therefore, be considered as confirmatory only of the then existing law (Woodcock, "Laws of the West India Colonies," p. 211, edit. 1838). The judgment of the Court below clearly treats it in that light, and states that it has been the usage of the Courts of law and equity in Barbadoes to treat real estates as chattels for payment of debts. In *Lyon v. Colville* (1 Coll. 449), the provisions of this Statute were discussed, and the Court held, that the compensation money for slaves, which is real estate, as representing the slaves, in Jamaica was to be distributed as legal and not as equitable assets. The case of *Charlton v. Wright* [12 Sim. 274], so strongly relied upon by the Appellants, if examined, will be found not to be an authority entitled to much weight. From what appears from the report it may have been a short cause, and taken by consent.—[The Lord Justice Knight Bruce.—I was Counsel in that case; I have an indistinct idea that it was not argued hostilely; I strongly think that was the fact.]—The

words of the Statute, 5th Geo. II., c. 7, sec. 4, are clear, and it is impossible to conceive how legal assets made by that Statute could have been converted by the Court into equitable assets. The case of *Millar v. Horton* does not apply, as the question in that case turned upon the construction of the Statute of Fraudulent Devises, 3rd Will. and Mary, c. 14, in a case where the Testator directed all his debts to [315] be paid, giving, however, a preference to the simple contract creditors, which was held not to be in fraud of the Statute. Here, nothing turns upon that point. Although the 5th Geo. II., c. 7, sec. 4, makes real estate liable to debts, it says nothing as to the priority. The principle which governs such a case is shown, by the judgment of the Court below, to be according to the several degrees or natures of the debt as in England.—[Dr. Lushington.—How is it that the Respondents, the residuary legatees of Tapin and the West India Bank, put in separate cases?—They have distinct interests derived from separate titles.

Mr. Pryor in reply.

The Lord Justice Knight Bruce.—Three points have been made in support of this appeal, as to two of which their Lordships did not think it necessary to hear the Respondents' counsel. Of those two, one was the question of the effect of the Will of an obligee in a bond making the obligor his executor; and it was contended that the effect, though not to destroy the debt, was to take away priority from it, as a specialty debt. We are dealing with this question only as an equitable question: the law of the case, therefore, is, on the present occasion, immaterial; and their Lordships are of opinion, that in equity, and, therefore, in substance, the debt remained exactly as it was, exactly as it would have done, if a stranger had been the executor.

The second point on which their Lordships did not think it necessary to hear the Respondents' Counsel was, as to the lien said to have been given to the house of Higginson, Irlam, and Co. for their debt, by the direction in the Will, for the consignment of the pro-[316]duce of an estate of the Testator to them, until their debt should be discharged.

Their Lordships, who are of opinion that this is a point open to reasonable argument, do not give any judgment upon it. They think it not necessary to say how they would have dealt with it, if the question had been properly before them, for they are of opinion that it is not so. There is not the least trace of the point having been taken before the Master, or before the Court, and it would be too much to say that, when the case is before the ultimate Court of appeal, upon exceptions merely, such a question, raised as I have said, neither before the Master nor before the Court, should be capable of being brought into controversy. There is, therefore, no ground of appeal so far.

The remaining ground, that upon which the Respondents' Counsel were heard, was the question of equitable assets, a question dividing itself into two branches; one, whether the effect of the Statute of 5th Geo. II., c. 7, was to render the real estate necessarily applicable to the payment of all the creditors equally; and, if not, whether it was competent to a Testator seised of such property to direct an equal distribution among his creditors, which, in effect, the Testator has done in the present case, if he could.

Their Lordships have considered this question with all the attention due to it upon its own account, and by reason of the manner in which it seems to have struck a distinguished Judge, now deceased, before whom the point was brought, and who appears, according to a printed report, to have given an opinion upon it. I allude to the case of *Charlton v. Wright* [12 Sim. 274]; with reference to which, however, I may say, that, [317] unless my memory misleads me, the argument there was not adversely conducted before that learned Judge, who, probably, had not the benefit of such a discussion as would have taken place if the instructions, under which the Counsel proceeded, had been of an adverse nature.

Their Lordships are of opinion, that, according to the true construction of the Statute of [5] Geo. II. [c. 7] (taking both branches of the fourth section together), the legal priority of debts was not intended to be interfered with; they think that making, declaratorily or otherwise, real estate in the West Indies applicable to the payment of debts generally, the Legislature meant to do so in such a way as to give



or secure the same priority to specialty creditors against real estate that they always have had against personal estate.

Much attention is, they consider, also due to the fact (as their Lordships believe historically true), that no time has ever existed in which, in the Island of Barbadoes, real estate was not assets applicable to the payment of simple contract debts. There can be no doubt, that treating land there as mercantile property, or as merely subsidiary to trade, or in some other way which it is unnecessary to investigate closely, those who administered the law in that Island from the time when it became an English dependency have uniformly so dealt with real estate there.

Upon these grounds, whether taken together or separately, their Lordships come to the conclusion, that the real estate in this case was by law applicable, as well as the personal estate, to the payment of specialty debts, in the first instance, and, therefore, in preference to simple contract debts, and that it was not competent to the Testator to disappoint the rule [318] of law in that respect. If it had been competent to a Testator so to disappoint the rule of law, this Testator has done so; but we are of opinion, I repeat, that it was beyond his power to do so; that it was as much beyond his power with regard to the real estate, as, according to universal confession, it was with respect to his personal estate. In that sense, his real estate and his personal estate stood on the same footing.

Their Lordships are of opinion, therefore, that the appeal is groundless, and must be dismissed with costs.

The circumstance that there are separate cases on the part of the Respondents seemed, in the first instance, to give rise to some ground for remark; an explanation upon this subject has been given at the bar, which seems satisfactory, nor has the point been pressed against the Respondents on the part of the Appellants. Their Lordships, though not relying on the latter reason, do not think it right to recommend to Her Majesty to direct any difference to be made with regard to the costs on that ground.

Their Lordships cannot, however, wholly part with the case without observing that, as it seems to them, the petition of appeal is open to a remark of the same description, as to which there does not seem, at present, to be any sufficient explanation. Had their Lordships not been of opinion that the appeal must be dismissed with costs, it would probably have been necessary to make some remark, and some provision, indeed, with respect to that circumstance (the petition was of an unusual length, setting out the pleadings and proceedings in the cause, *in extenso*).

Appeal dismissed with costs.

[Mews' Dig. tit. COLONY: II. PARTICULAR COLONIES: 22. *West Indies*. See *Bullen and Richey v. A'Beckett*, 1863, 1 Moo. P.C. N.S. 223; 9 Jur. N.S. 973.]

### [319] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

MUTTYLOLL SEAL,—*Appellant*; LAUNCELOT DENT and Others.—*Respondents* \*  
[May 10, 1853].

Where Bills of Exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realised by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at Calcutta) that the remitter was entitled to recover the value of the bills in assumpsit, upon an indebitatus count, from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent.

This was an action of assumpsit, brought by the Respondents, merchants at Hong Kong, against the Appellant, a banker and merchant at Calcutta, to recover the value of six bills of exchange.

\* Present: The Lord Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

The plaint contained six counts. The two first counts were upon a guarantee (the first two counts were abandoned at the trial), the third count was an *indebitatus* count, as follows: that the Defendant was indebted to the Plaintiffs in Rs. 80,000, the price and value of divers goods and securities for money, to wit, six bills of exchange, for the payment of divers large sums of money, to wit, £6000 of British money, of great value, to wit of the value of Rs. 80,000, by the Plaintiffs, sold and delivered to the Defendant, at his request. The fourth count was for money had and received by the Defendant to the use of the Plaintiffs; the fifth count was for interest, and the sixth [320] count was on an account stated. To this plaint the Defendant pleaded six pleas. The first was *non-assumpsit* to the whole plaint. The remaining five pleas were all pleaded to the two special counts upon the guarantee.

The facts of the case, as they appeared in evidence at the trial, were these:—The Appellant was the Banian of Oswald, Seal and Co., who carried on business as merchants at Calcutta, and had dealings with the Respondents; the Appellant supported that firm with his credit, and with funds provided by him, having supplied a portion of its capital, and being in the habit of making advances to it from time to time, to enable it to meet its engagements. His son, Heeraloll Seal, was a partner and member of the firm of Oswald, Seal and Co.; and the Appellant was well acquainted with its affairs and transactions. In the year 1845, he had given to the house of the Respondents, as it was then constituted, a guarantee for the due investment and employment of such funds as might be entrusted by them to the firm of Oswald, Seal and Co., for the purchase of opium, and had engaged to promote the trade of the Respondents' house, on condition that they reciprocally promoted that of Oswald, Seal and Co.; and, at the time of the transaction in question, as well as subsequently, that firm was very largely indebted to the Appellant. On the 29th of October, 1847, the Respondents transmitted to the firm of Oswald, Seal and Co. the bills of exchange, which were the subject of the action, with a letter, which was in part as follows:—"By our No. 19, we remit you £10,000, to be passed to credit to our opium account. We have now the pleasure to enclose the under-mentioned bills on [321] England, which please realise to credit of the same account. Dated Hong Kong, 27th October, 1847, drawn by ourselves on G. T. Braine, Esq., in our own form and blank endorsed." Then followed the particulars of the bills for £6000. It then proceeded: "We now give you an order for a further quantity of Bengal opium, to be purchased at the second sale, say about fifty chests, in proportions of three quarters Patna and one quarter Benares, and we hope that prices," etc. This letter, with the bills, was received by Oswald, Seal and Co. in December, 1847, and it appeared that at that time, or shortly afterwards, the Appellant was made acquainted with its contents, and with the purpose for which the bills were transmitted. The bills were deposited in the hands of the Appellant, whilst Oswald, Seal and Co. endeavoured to dispose of them, by advertising for a purchaser, in order to carry out the instructions of the Respondents. The Respondents had, on previous occasions, had various transactions with Oswald, Seal and Co., both in the purchase of opium, and in the purchase of cotton, and the accounts relating to the opium and those relating to the cotton were kept separately in the books of the firm, to which the Appellant had access, and he was apprised of the remittances which from time to time were made. He had himself made the purchases of opium, which Oswald, Seal and Co. had bought for the Respondents, and he was cognizant of the state of the accounts between the two houses at the period in question, those accounts being at that time balanced and even, with the exception of these bills. Oswald, Seal and Co. had no specific lien upon these bills, nor any authority to deal with them, otherwise than according to the direc-[322]-tions contained in the above letter of the Respondents. It appeared that they at once advertised the bills in the Calcutta Gazette, but the time when such advertisements were made was not proved. Soon after they received them, namely, on the 11th of December, 1847, Fergusson, one of the partners of the firm, pledged them with the Agra bank, as a security for a loan of Rs. 55,000, made by that bank to the firm, and they were then endorsed to the bank in the name of the firm. Whether this was done with the knowledge of any of the other partners did not appear; but one of the partners, Brown, was not privy to it. The bills were pledged to the Agra bank as a collateral security only for the loan, the firm of Oswald, Seal and Co. having given,



as the primary security, a promissory note of the firm, which became due on the 7th of January, 1848, and consequently, until default was made in the payment of this note, the Agra bank was not entitled to negotiate the bills. At the time when the bills were thus pledged with the Agra bank, or immediately afterwards, the Appellant was made acquainted with the fact, and he was in daily communication with Oswald, Seal and Co. upon the subject of their engagements, and particularly of their debt to the Agra bank, and the obtaining of funds to discharge it. The bank pressed for payment, and, in order to meet the demand, the Appellant agreed with the firm of Oswald, Seal and Co. to supply the money. He accordingly paid the Rs. 55,000 to the Agra bank, on behalf of Oswald, Seal and Co., the bank only dealing with the firm, and knowing nothing of the Appellant in the whole transaction. The bills were accordingly given up to the Appellant, as the agent of the firm, without any endorsement by [323] the bank, and he retained them in his hands until the month of April following, when it was agreed between him and the firm that he should become the purchaser of them, at the price of Rs. 60,000, with interest, as upon a sale made upon the 7th of January preceding. This arrangement was afterwards communicated to the Respondents by the firm of Oswald, Seal and Co., by a letter, dated the 26th of April, 1848; and of this letter the Appellant was at the same time apprised by the firm. The bills were not endorsed to the Appellant by the firm; nor did the Appellant pay any money to the firm on account of the bills, but he was debited with the price of them in the books of the firm. At the time of, or immediately after, the sale of the bills to the Appellant, he appeared to have agreed with the firm of Oswald, Seal and Co. to send on to the Respondents a quantity of opium, equal in amount to the price at which he took the bills. This, however, he did not do, nor did he in any other way pay to the Respondents the price or value of the bills. It further appeared, that the Appellant subsequently sold the bills again to the firm of Oswald, Seal and Co., and received the amount of them in cash.

The cause came on for trial on the 21st of December, 1849, when the Supreme Court, without calling on the Defendant, nonsuited the Plaintiffs, reserving to them liberty to move. The Plaintiffs applied under the leave reserved, and obtained a rule *nisi*, to set aside the judgment of nonsuit, and to enter a verdict for Plaintiffs for the amount of the bills of exchange, with interest, on the common count for the bills sold, inasmuch as it appeared upon the evidence that the bills were sold to the Defendant, by Oswald, Seal and Co., as agents for the Plaintiffs, with notice to the De-[324]-fendant that such agency existed, and that the sale was solely on the Plaintiffs' account, and that there was sufficient privity between the Plaintiffs and the Defendant to entitle the former to sue the latter upon his non-payment of the bills; or, that a new trial should be had upon that ground, or upon the ground of improper rejection of evidence.

The rule *nisi* came on to be argued on the 22nd of March, 1850, when the Supreme Court ordered that the judgment of nonsuit should be set aside, and that a new trial should be granted.

The cause was again tried by the Supreme Court, on the 17th of July, 1850, when the above facts appeared in evidence, and the Court gave a verdict for the Plaintiffs, for Rs. 60,000, the value of the bills of exchange, on the common *indebitatus* count, for goods and securities sold and delivered, reserving liberty to the Defendant to move to enter a verdict on a nonsuit, or to reduce the damages; with liberty for the Plaintiffs to move on the common count for money had and received by the Defendant to their use.

The Appellant applied for and obtained a rule *nisi* to show cause why a verdict should not be entered for him, on the ground that the sale of the bills of exchange was from Oswald, Seal and Co., and not from the Respondents; or why a new trial should not be had on the ground that the verdict was against evidence, or why the verdict should not be reduced to Rs. 5000. The Respondents also obtained a cross-rule, to show cause why they should not enter a verdict for the Plaintiffs, on the common count for money had and received, in case the verdict for the Plaintiffs should be set aside on the count for goods sold, on [325] the ground, that the proceeds of the bills were received by the Defendant for the use of the Plaintiffs, and that a verdict should be entered for the Plaintiffs on the count upon an account stated;

and that the damages should be increased, by the amount of interest on the sum of Rs. 60,000, from the 7th of January, 1848, at the rate of 6 per cent.

These rules were argued before the Supreme Court, on the 5th of August, 1850, when the same were respectively discharged without costs, whereby the verdict, delivered in favour of the Respondents, on the common *indebitatus* count for goods and securities sold and delivered by the Respondents to the Appellant, was maintained.

The judgment of the Supreme Court, delivered on discharging these rules, was pronounced by Sir Lawrence Peel, Chief Justice, as follows:—

“We propose first to state our view of the principal facts, and then to apply the law to those facts. The Plaintiffs are merchants residing at Hong Kong. Oswald, Seal and Co. were merchants in Calcutta. The Defendant carried on the house of Oswald, Seal, and Co., that is, supported it with his credit and funds, and the firm of Oswald, Seal and Co. were, at the time of this transaction, and subsequently, largely indebted to the Defendant. The Defendant was well acquainted with the affairs of the house; he had given a guarantee in October, 1845, to the house of Dent and Co., which guarantee is one of the exhibits in this cause, for the due investment and employment of funds to be entrusted by Dent and Co. to the firm of Oswald, Seal and Co., for the purchase of opium, and at the time of this transaction that guarantee was erroneously supposed by Oswald, Seal and Co., and the [326] Defendant, to be in force. It appeared subsequently, that by a change in the firm of Dent and Co., after the guarantee was given, it became unavailable for the new firm of Dent and Co.; that part of the plaint, therefore, which is founded on the guarantee, was abandoned at the trial. It was proved by Fergusson, that the Plaintiffs in this action constituted the firm of Dent and Co., from October, 1847, until April, 1848, and, therefore, if there is the privity of contract on which they insist, they, as constituting the firm of Dent and Co., at the time of the contract of the sale of the bills, are competent to sue on it. The Plaintiffs forwarded a letter to Oswald, Seal and Co., which letter is one of the exhibits in this cause, dated Hong Kong, 29th of October, 1847, and which was duly received by Oswald, Seal and Co., and on the terms of that letter depends the first question in this cause, viz. whether the bills for £6000 were specifically appropriated to a particular account. The terms are these—[the learned Judge here read the letter].—There were other transactions between the Plaintiffs and the firm of Oswald, Seal and Co., and this account was kept as a distinct account; it appears to us, reading this letter, as a letter on business between merchants should be read, that it does amount to an appropriation of the bills to the opium account, and that they were remitted for sale, and that the proceeds were to be applied in the purchase of opium by Oswald, Seal and Co., on account of the Plaintiffs. The cases of *Exp. Dumas* (2 Ves. Sen. 582); *Tooke v. Hollingworth* (5 Term. Rep. 215) (and the opinion even of the dissentient Judge in that case, if applied to such a case as the present, would support the same conclusion); and *Buchanan v. Findlay* (9 Barn. and Cr. 738), with many other cases, [327] fully establish the point of the specific appropriation of these bills, and of their proceeds by the remitters. These cases show, that if bills of exchange are remitted for a specific purpose, to which the proceeds of them, whether by sale or discount, are to be applied, the property in the bills remains in the remitter until the purpose is satisfied. Here, by the terms of the letter, Oswald, Seal and Co. are constituted the agents of the Plaintiffs for the special purpose of realising these bills, and investing the proceeds in the purchase of opium, to be shipped on account of the Plaintiffs, for to that purpose only could the funds to the credit of the Plaintiffs on the opium account be applied by Oswald, Seal and Co., consistently with their instructions. The direction to carry to a separate account, according to the judgment of Lord Hardwicke, in *Exp. Dumas*, would of itself constitute such an appropriation; see also, *Haynes v. Foster* (2 Crom. and Mee. 237), *Bastable v. Poole* (1 Crom., Mee. and Ros. 410), *Foster v. Pearson* (1 Crom., Mee. and Ros. 849), *Moore v. Barthrop* (1 Barn. and Cr. 5). These cases are not quoted as identical with the present, but merely as establishing the general rule, that a bill of exchange, though indorsed in blank, and given over, or remitted for a special purpose, is, till the purpose is satisfied, the property of the remitter, and that if the purpose is unfulfilled he may recover it back, or, waiving the tort, sue for its proceeds received by one in privity as to the wrong with the wrong doer. Oswald, Seal and Co. had no lien on these bills,



and their authority to deal with them flowed from the mandate, and was circumscribed by it. Very shortly after they were received by Oswald, Seal and Co., Fergusson, a partner in that firm, without the knowledge of his co-partner [328] Brown, but whether with the knowledge of the other partners does not appear, committed a gross breach of trust by pledging the bills with the Agra Bank as a security for a loan to their firm. This pledge, it was contended, created even a criminal liability under 9 Geo. IV., c. 74, s. 102. For obvious reasons we decline expressing any opinion on this point, but we may remark that on this point there was some inconsistency in the argument for the Defendant, for if there was no appropriation, there was no indictable offence. The evidence of Fergusson was strongly commented upon, and it was contended, that it was untrustworthy evidence. One of the learned counsel for the Defendant contended, that the Court ought not to rely on the evidence of a witness who, having committed an indictable offence, was seeking to avert the danger of a prosecution, by giving his evidence too favourably to the Plaintiffs: upon this reason, for discrediting the witness, it is to be observed, that assuming him to be liable to be indicted, others may originate such a prosecution, and that the right to prosecute in the name of the Crown is not limited to the actual sufferer. The transaction with the Agra Bank was this: the bank advanced a large sum (Rs. 55,000) to the firm of Oswald, Seal and Co., on the security of their promissory note, and took, as a collateral security, the bills in question. The loan was originally for a few days only; it was subsequently renewed for a short time, and the promissory note of the firm fell due on the 7th of January. The bank held the bills in pledge on deposit as a collateral security, and had, therefore, no right to negotiate the bills before default in payment of the note. *Roberts v. Eden* (1 Bos. and Pul. 398). The bank pressed Os-[329]-wald, Seal and Co. for payment of their note, who had not the means ready for meeting it, and payment of it was obtained, after some pressure, by the bank agreeing to take, and taking, a cheque of the Defendant's on the Bank of Bengal for Rs. 40,000, which was paid, and by a short draft of the Defendant's for the remainder, which was also honoured at maturity. The evidence of Neilson, the agent of the bank, is explicit, that he dealt with Oswald, Seal and Co. alone, and knew them alone in the transaction. If the promissory note was paid, the bank had no further interest in the bills, and they accepted payment of the note in the mode stated, and released the collateral security, that is, the bills; it was, therefore, no sale or assignment by them of their title to the Defendant, but merely a restoration to Oswald, Seal and Co., on a redemption of the pledge by them. The facts admit of no other construction than that it was a redemption by Oswald, Seal and Co., by means of a loan to them from the Defendant, for the bank had then no right to sell the collateral security. The bank, as Neilson clearly proved, dealt only with Oswald Seal and Co., who borrowed from them, and did not know the Defendant in the transaction; consequently the bills, when redeemed, were redeemed by Oswald, Seal and Co., who had no authority to obtain a loan for this purpose to the Plaintiffs from the Defendant; and as the monies were not the monies of Oswald, Seal and Co., but those of the Defendant, and were not lent by the Defendant to the Plaintiffs, and were plainly lent to somebody, it was necessarily an advance to those who redeemed the bills with the funds supplied for that purpose. The Defendant does not set up that he took the bank's title, but relies on a purchase of [330] the bills from Oswald, Seal and Co., contemporaneous with that transaction of redemption; and he alleges, that he bought of Oswald, Seal and Co., and not of the Plaintiffs. The bank had a good title against the Plaintiffs, because the bank took for value, and without notice of the breach of trust; but when the bills were redeemed, they reverted to Oswald, Seal and Co., on the original mandate, for a fraudulent agent can acquire no property in himself by his fraud in a bill, any more than in a mere chattel, though, as to a bill, he can confer a good title to another unconscious of his fraud, and giving value; but when the fraudulent agent redeems this property, the original proprietor, the principal, is remitted to his rights; *Taylor v. Plumer* (3 Mau. and Sel. 574), 'an abuse of trust can confer no right on the party abusing it;' see also *Foster v. Pearson* (1 Crom., Mee. and Ros. 855), 'on the removal of that difficulty the Plaintiffs were remitted to their original rights;' and further, as to the remitter of the owner to his property after a sale in market overt, where the wrong doer purchased it back again, see *Viner's Abr.*, tit. 'Market,' (A.) p. 242. It makes no difference

that the agent is enabled to redeem by the aid of another, therefore, the intermediate pledge to the Agra Bank does not affect the title of the Plaintiffs to this property at the time of the sale, and, of course, the sale by Oswald, Seal and Co. vested no property, even for a moment, in Oswald, Seal and Co. The contract of sale is contained in the bills of parcels of the 7th of January. We place no reliance on any evidence opposed to this. Fergusson says, that Oswald told him that sale was not intended to be a real transaction. Oswald's declaration is no evidence. We disregard Fergusson's account of the [331] sale, and of the time of it, and adopt the Defendant's evidence of the sale as contained in the bill of parcels which was put in by him, for the contract is in writing, and signed, and cannot be contradicted by parol testimony. The Defendant relies on it as the contract of sale, and there is no satisfactory evidence that that contract was abandoned, and a new one substituted for it. Brown, who is a witness wholly unimpeached, stated his belief to be, that it was not intended to be a real transaction: he had, however, no knowledge of the transaction, and his belief is also no evidence. The contract contained in the bill of parcels, the Defendant admits, and he produced it as his evidence, and we think that he has a right to insist, that it should be viewed as the contract of sale of these bills. It is not, in the view that we take of the case, necessary to analyse particularly Fergusson's evidence, nor to state how far we agree with, or dissent from, the strictures upon particular portions of it. We are, however, of opinion, that reliance may safely be placed on it to the limited extent to which we apply it; some parts of it are confirmed by other evidence, and other parts by the probabilities of the case; the result of the action in no way depends upon fixing an exact date to the contract of sale, and the general form of the *indebitatus* count would equally support the contract of the 7th, or that which Fergusson's evidence goes to establish. The Defendant insists, that though he bought the bills, he bought of Oswald, Seal and Co., and not of the Plaintiffs, and that there is no privity of contract whatever between him and them. There is no doubt, we think, that he meant to contract with Oswald, Seal and Co., and to buy of them, and not of the Plaintiffs, but we have no doubt that he knew [332] whose the bills were, the agency as to them, and for what purpose they were sent. To this extent we can safely depend on Fergusson's evidence. Brown states, that the Defendant was well acquainted with the transactions of the house; he had guaranteed the due employment and investment of such funds, and was not then aware that the guarantee was not in force; he had a son in the firm, and was then its Banian, and we think it most natural and probable that Fergusson should show him the letter. The Defendant's intention to buy of Oswald, Seal and Co. is not, under the circumstances, in our opinion, any bar to the claim of the Plaintiffs. It was urged that we ought also to conclude that Oswald, Seal and Co. meant to sell as principals; if, by that, is meant no more than that they meant not to disclose their principals, the answer is, that the Defendant knew who the principals were: if more be meant than this, then there is no ground for inferring anything of the kind. The presumption ought to be, that they meant to do their duty to their principals, and to sell according to their instructions, that is, as agents in the right of their principals, whether they disclosed or not who those principals were; and this presumption is not the less to be made because Fergusson, one of the partners, had violated his duty in a particular instance. The sale of the 7th was made by another partner, Oswald. An agent may so contract, in fact, as when he contracts under seal, or names himself untruly as owner or principal, in a written contract, that by some technical rule of procedure, or rule of evidence, see *Humble v. Hunter* (12 Q.B. Rep. 316), the principal may not have the right to intervene and sue on the contract; he may, if he be a factor, sell in his own name, without vio-[333]-lating any duty; but on a contract, whether verbal or in writing, and though made by a factor or an agent less intrusted, and whether it relate to goods and chattels in the most limited sense of the term, or to goods and chattels in the widest sense of the term, or even to sales of freehold estates, or to contracts of insurance, or the like, the principal has a right, though not named in the contract, and not known or disclosed at the time of the contract, to intervene and sue on the contract, as principal; and from this right to intervene and sue, no mere intention or understanding of the agent and the other contracting party can exclude him; for assuming any such to exist between the agent and the buyer



on such a contract, the agent would be acting both against the general law of principal and agent, and his actual authority; and the other party, knowing him to be an agent, must be deemed, of course, cognizant of the violation of authority, and that it would be a fraud on the rights of the principal; therefore, on such a contract, the agent may not exclude the principal from the right to sue, though he do not disclose the principal. Here the agency was known; there is no evidence whatever to show that Oswald, Seal and Co. meant to sell in any other character than their real character, or to assume any powers beyond what belonged to them, or that they meant to exclude their principal. The principal was known, and had they meant any exclusion, their act would have been ineffectual, supposing the general right of a principal to intervene and sue to apply to a case of agency circumstanced as the present. No authority has been quoted to show, that there is any such limitation of the general rule as that contended for by the Defendant, viz. that [334] a principal can in no case sue for the price on a sale of his bills of exchange by his agent; on the other hand, the Plaintiffs can cite no reported case of an action on a sale of his bills by an agent brought by a principal for the price; the case must, therefore, be considered by us on principle, independent of authority. Bills of exchange, like Exchequer bills, are the object of sale; that they are daily sold, everybody knows; but they are objects of sale as much in law as in fact, see Lord Tenterden's judgment in *Woolkey v. Pole* (4 Barn. and Ald. 20); there are many cases in which the contest has been, whether the transaction was a sale of the bills; if sold, they may be unpaid for, and it may be necessary to sue for the price of them. The sale may be transacted by an agent, as indeed it often would be by a bill-broker. On what principle must the action for the price be brought in his name in all such cases? The defence on a bill often is, that the Plaintiffs are but agents, and their title to sue is impeached by impeaching that of their principal, see *Lee v. Zagury* (1 Moore's Rep. 557); *Solomons v. Bank of England* (13 East, 135): the same defence is often pleaded under the new rules. The judgment of Baron Parke in *Bastable v. Pool* (1 Crom., Mee. and Ros. 412) may be consulted on this point. His observations are general, and tend to show that there is no such distinction as that contended for. No limitation is to be imposed on his words, either by the context or the reason of the thing. As, then, the general law of principal and agent applies as well to bills as to mere chattels, what is the general impediment to a principal's right of suit? The answer is in the nature of the instrument and of the property in it, and of the rights of a taker of that species of [335] property to treat the apparent as the real title. One who takes a bill endorsed in blank, for value and without notice, is quite independent of the real title of the holder; he takes his title under the law merchant, and is not in the position of the assignee of a chose in action, not assignable at law. He exactly resembles in his position that of one who purchases in market overt without notice, and for value, an ordinary chattel, under the common law, from one who has no title to it or to sell it. It is the ignorance of the real state of the title which protects both. Where there is knowledge of the real truth, and that the apparent title is nothing, then the purchaser is unprotected in either case. In such a case, the purchaser of a bill stands on no better footing than the purchaser of a mere chattel, and it is immaterial in such a case that the bill is transferable by delivery, as it would be in the other case that the sale was in market overt, *Viner's Abr.*, tit. 'Market'; the knowledge removes the bar which might be otherwise, in certain cases, interposed by the nature of the instrument, and if there be a continuing property in the principal in the bills, and agency in another as to the transfer of the bills, then a constructive privity of contract is established in the ordinary way, and the bar being removed, the principal is not precluded by anything from intervening to sue on a sale of his bills for the price of them. If the law were otherwise, this consequence would result, that a principal whose bills, endorsed in blank, were sold by his agent, by his directions, to one who knew who the principal was, and that the actual seller was only an agent, could not, if the latter proved fraudulent and untrustworthy before payment, himself sue for the money, if the [336] notice were disregarded and the money not paid, though he might insist by notice to the buyer on payment to himself, and so stop payment to any other, see *Lee v. Zagury* (8 Taunt. 114). Therefore, where bills, as these were, are specifically appropriated, and the property in them is in the remitter.

and they are sold by his agent, being an agent for the sale of them, and the buyer has notice of the real title, we think, notwithstanding the endorsement in blank, that the general rule of law applicable to principals and their agents on contracts, not under seal, will enable the principal to establish a privity of contract on the ordinary foundation of his property in the things sold, and through the agency as the channel which conducts the privity to the principal. This has no application to bills made payable to A., or order, and endorsed in full. Where the bill is endorsed in full, the law of merchant, according to Pothier, in his *Traité du Contrat de Change*, places the property in the endorsee, and certainly a title can be derived only through endorsement. An endorsement in blank, with delivery, is an ambiguous act. It may be intended to convey property to the party to whom delivery is made, or merely to make the bill transferable by delivery over. The bill may be delivered, in fact, to a mere servant or messenger, still *prima facie* the state of the bill, and the possession, constitute a perfect title in the holder. But the real title may be shown and must prevail, except against those whom the law merchant protects, but the protection given to ignorance cannot be claimed by knowledge, nor an apparent title asserted against a real, with a knowledge always of the real state of the title. We mean to limit our opinion to those cases only [337] where these two foundations exist of constructive privity of contract, viz. property in the bills, and agency as to the sale of the bills: bills may be held without consideration, without there being any agency as to their transfer; the bills may be held adversely and tortuously, and there can be no ratification except where the act was done, on the assumption of an agency, *Heath v. Chilton* (12 Mee. and Wels. 632). Neither does our decision in any way extend to bills sent by one merchant to another, on a general account, though without precedent consideration; nor to bills endorsed in full, nor to any in which the property in the bills is not in the Plaintiffs, nor to any bills for the transfer of which there was no agency, nor to any bills as to which it can be predicated that the holder took *bona fide* on the apparent title and without notice, being entitled to consider by the law merchant the actual dealer with the bills as the owner of them. To consider a merchant who is the holder of a bill sent blank, endorsed on the general account, though the balance be against him, as having not the general property in the bill, would be to constitute him a mere factor as to bills, and to do away with the distinction between a banker holding the bills of his customer, and a merchant holding bills sent by his correspondent on the general account. The bills held by the merchant in such a case pass to the assignees of the merchant on his bankruptcy, and those held by the banker, having no lien on them, and no authority to dispose of them, would not pass to the assignees of the banker, because the banker is a factor as to bills. We admit that the cases quoted do none of them come up to this. In this sense we said in our former judgment that we went one step beyond those [338] cases, the purpose being in this case fulfilled by sale, and not as in those, violated or unperformed; but the principles on which we decide this case are, as we consider, well established, and though new in this instance, so far as we know, the action in our judgment may be supported on the broad principle of the general right of the principal, whether disclosed or not, to sue on a parol contract of sale of his property made by his agents, where no bar exists to its exercise. The cases in which an action for money had and received have been maintained for the proceeds of bills knowingly and tortuously acquired, fall short of this, for they are supportable on the same grounds as the case of *Taylor v. Plumer* (3 Mau. and Sel. 574), on the title to the proceeds following the title to the property, and the equitable nature of the action founds a consideration on the unconscientious retention of another man's money: on this the privity of contract in those actions is founded. But a contract of sale requires a real privity of contract, and we think it important not to evade this rule, nor to go beyond the known principles of the law of principal and agent: these principles we consider to be founded on reason, and to promote the convenience of mankind, and to be favourable to commerce, wherein so many transactions must necessarily be done through the agency of third persons. In our opinion the common form of *indebitatus assumpsit* is applicable. A bill for this purpose might be well described as 'goods,' Comyn's Dig., tit. 'Biens,' (C.) or as wares and merchandize. In fact, it is by the law merchant that it has its assignable quality, differing from ordinary



choses of action. As it passes a legal right, no difficulty arises about the consideration. In confirma-[339]-tion of our opinion, on the form of the count, it is to be observed that the case of *Lawton v. Hickman* (9 Q.B. Rep. 563) is an express authority, that the words, 'goods and chattels' in a common *indebitatus* count have not a narrow sense, but convey the general meaning of the terms. In that case they were held to include shares: nor is this at all opposed to the case in which it was decided that a sale of shares was not within the Statute of Frauds; the words in that Statute bear a limited meaning, because the context shows that to have been the intention. It was not necessary to declare specially, since the real contract says nothing which makes a special assumpsit necessary. The argument that the contract ought to have been specially declared on, was founded on the hypothesis that there was nothing to act on but the agreement of April deposed to by Fergusson. We are, however, of opinion, that it would not have been necessary to declare specially, even on that contract. Mr. Morton contended, that the Court should construe the contract of the 7th of January, as including special terms as to payment. His argument that a contract, if adopted, should be adopted *in toto*, treats the contract as containing terms which it does not include: he would have it construed in substance as amounting to this,—in consideration of my advancing to you funds to enable you to redeem the bills, you shall sell them to me, and take payment by my writing off the debt from you to me *pro tanto*; in other words, we are called upon to add to and vary the written contract by inference from facts. This is as much opposed to the rules of evidence as if the variance was to be made by direct testimony. That no such variation could be made by direct testimony is clear, see [340] *Ford v. Yates* (2 Scott, N.R. 645), and *Sharlah v. Benecke*, in the Common Pleas, April 27, 1850, reported in the "Law Times" of May 25, 1850. If the law permitted this variation, still the facts are not strong enough for the inference. It was contended, that this must have been the contract, viz. that payment was to have been made by writing off the debt *pro tanto*, from Oswald, Seal and Co. to the Defendant, because the time was a time of great commercial distress; and the Defendant, though a wealthy man, was somewhat pressed himself, and unwilling to make larger advances, and, therefore, that he would not make an unsecured advance; but, on the other hand, it is to be observed, that this mode of payment would have been anything but satisfactory to the Plaintiffs, who could not be expected to be quiet under it; that the guarantee was then supposed to be in force, under which, if in force, liability would have attached upon the Defendant in respect of this transaction, unless the evil was repaired; that he had a great interest in the stability of the house in which one of his sons was a partner, and which was largely indebted to him, and which might possibly, if it had been able to avert the dangers of its then position, have become ultimately able to secure the Defendant from loss, and perhaps might have become prosperous; and that the refusal of this assistance might, and probably would, have caused them to suspend payment, for it is in proof that they were greatly indebted, were much distressed for money, and were unable to take up their promissory note given to the Agra Bank. As these terms do not form a part of the contract, the argument fails. There is no plea of payment on record; and, if there had been one on the record, [341] such a plea could not have been supported on the facts on which this argument proceeds, see *Todd v. Reid* (4 Barn. and Ald. 210), and *Bartlett v. Pentland* (10 Barn. and Cres. 760); and on the same points the case of *Barker v. Greenwood* (2 You. and Coll. 414) may be consulted; as also, Sir E. Sugden's *Vendors and Purchasers*, vol. i. p. 74 (tenth edit.). Any man buying of an ordinary agent must be presumed to know that he cannot pay the principal by giving credit in account to the agent, for the private debt of the agent to himself; that would be, as the Court said in *Todd v. Reid*, "an attempt to pay the debts of one person with the money of another;" for like reason he must be presumed to know that if he assists by an advance a fraudulent agent for sale, who has improperly pledged his principal's goods, to redeem and get back the goods, and then purchases the same of the agent, he cannot pay for them by writing off that advance by himself to the agent. The principal might as well remain subject to the first lien as the new, and unless it be a transfer of the lien it cannot stand against the principal. The ignorance which protected the first dealer does not exist in the case of the second.

Set off is out of the question, as the agent was known throughout to be an agent. It is necessary to say a few words in this case on the evidence. Fergusson's evidence, taken *de bene esse*, and on the first trial, was put in by the Defendant to establish a contradiction between his testimony then, and on this last trial. Being evidence, the facts stated in all the examinations are before the Court. A book of the Defendant's, which was not properly admissible, was tendered in evidence, to prove an entry or entries signed by Oswald. The attention of the Court was [342] called to these entries. Mr. Ritchie was proceeding to object to the reception in evidence of the book and of the entries, contending that the agent's subsequent declarations were not evidence, when the Chief Justice, observing on the particular nature of them, remarked, that as they were consistent with the Plaintiffs' case, there seemed to be no use in objecting; on this Mr. Ritchie withdrew the objection. This, however, did not make other entries in the same book evidence; and Mr. Ritchie states, and we have no doubt truly states, that he was not cognizant of the other entry, or assenting to its being received in evidence. Certainly the Court did not decide on the admissibility of any entry, and would, if the objection had been pressed, have rejected those first tendered in evidence; and if it were of any importance to decide on the point, we should hold that entry not in proof; but in our view of the evidence, the contest about these entries, and their correct import, is beside the real question in the cause, because the Defendant does not contend that he paid Rs. 60,000, the price of the bills, *plus* Rs. 55,000 advanced for the redemption, but only one sixty thousand in all, viz. Rs. 55,000 advanced for the redemption, and five thousand carried to the credit on account of the firm of Oswald, Seal and Co. with the Defendant. If this could avail as payment, it should have been pleaded; but for the reasons already given we think it could not have been so pleaded. Two objections yet remain to be noticed; the first, advanced by Mr. Morton, that the indorsement by Oswald, Seal and Co., on the bill prevented the Plaintiffs' suing, since the Defendant purchased as much on that indorsement as on the drawer's and first indorser's title. This argu-[343]-ment, though ingenious, appears to us unfounded; the indorsement by Oswald, Seal and Co. was to the Bank; the bills coming back to the agents, the property in this bill reverted to the principals, notwithstanding the indorsement on them, they incurred liability, but did not obtain property in themselves by it; therefore, the sale was still of the Plaintiffs' bill. If it enhanced the value, which does not appear, that is not a point on which a vendee can rely to defeat the action on the bill. If an agent were to induce and advance a sale by giving his own collateral engagement for the goodness of the title or article, it would not in any way affect the principal's right to sue on the contract of sale; and if the argument were well founded, it might equally affect the title to sue by Oswald, Seal and Co., since it might be urged that the Defendant bought as much on the drawer's and first indorser's names, as on that of the second indorser. The other objection was urged by Mr. Dickens, that if a remedy exists, it is in equity, and not at law. It is not necessary to say whether the Plaintiffs might have sued in equity; if they could, it must have been on a different view of the case from that advanced to support this action, in a case of fraud or unfair dealing with the bills, constituting them trustees as to the bills or their proceeds. In our opinion, this legal right to sue on the contract of sale exists, and that is all that we are called upon to decide in this action. We think that the Plaintiffs are entitled to retain their verdict on the count for goods and bills sold. The Plaintiffs have not, in our opinion, made out any case for entering their verdict on any other count. If there was a sale, then the money received by the Defendant on a re-sale by him, [344] was money received to his own use, and not to that of the Plaintiffs; and as to the account stated, Brown speaks uncertainly as to the amount; nor is it clear whether the admission refers to this contract of the 7th of January, or to that alleged by Fergusson to have been the real contract."

From this judgment the present appeal was brought.

The Appellant submitted that the judgment, so far as regarded the rule obtained by him, ought to be reversed, for the following reasons:—

First. Because the Respondents, by indorsing and remitting the bills of exchange to Oswald, Seal and Co., transferred to them both the possession and property in the bills, and the latter indorsed and negotiated the same for value.



Second. Because the effect of the advertisement of Oswald, Seal and Co., the holders, was to induce the public to believe that they had power to sell, indorse and negotiate the bills: which they accordingly did to third parties, and the Appellant became afterwards the purchaser under the indorsement of Oswald, Seal and Co., *bona fide*, and for value.

Third. Because the Respondents were not entitled to recover, and ought not to have recovered, anything under the count for goods sold and delivered.

On the other hand, the Respondents submitted, that the judgment of the Supreme Court ought to be affirmed.

First. Because the bills having been transmitted to the firm of Oswald, Seal and Co. by the Respondents, and held by that firm as their agents, they were en-[345]-titled to adopt the sale made by the firm to the Appellant as made by themselves, and on their account, and to recover the price from the Appellant, as vendee, the firm of Oswald, Seal and Co. having no lien upon the bills, as against the Respondents, and being bound to dispose of them on the Respondents' account, and for their benefit.

Second. Because, as the Appellant well knew all the circumstances under which the bills were transmitted to the firm of Oswald, Seal and Co. by the Respondents, and, under which they were held by that firm, he could not set up, as against the Respondents, any right in the firm of Oswald, Seal and Co. to sell them on their own account, and in contravention of the right of the Respondents, as he would thus become a party to a fraud upon the Respondents, and be enabled to take advantage of his own wrong.

Third. Because bills of exchange, and other securities for money, being the subjects of sale, the principles applicable to the sale of goods and chattels must be applicable to the sale of such instruments, and when sold by an agent must be deemed to be sold subject to the rights of the principal, so as to entitle him to the benefit of the contract.

Fourth. Because, the judgment having been entered generally upon the whole record, enough was shown upon the evidence to entitle the Respondents to retain that judgment upon some one or more of the other counts of the plaint, even if the Appellate Court should be of opinion, that there is not sufficient to support the judgment upon the count for goods and bills of exchange sold and delivered to the Appellant.

They also prayed, that the damages might be in-[346]-creased by adding the amount of interest, at 6 per cent. upon the sum of Rs. 60,000, from the 7th of January, 1848.

The Attorney-General (Sir A. Cockburn), and Mr. Leith, for the Appellant.—It cannot be questioned, that the Respondents, by remitting the bills in blank, authorised Oswald, Seal and Co. to dispose of them, in their discretion, as principals, and that power they exercised; first, by depositing them with the Agra Bank for an advance of money, and afterwards by indorsing and selling them to the Appellant for a *bona fide* consideration. Although it is perfectly true, that if bills are put into the hands of a party for a specific purpose, he is bound to deal with them in the manner directed, yet, in the present case, Oswald, Seal and Co. were not directed to deal with the bills in any particular way; they were to put them in the market and apply the proceeds. The letter remitting the bills amounts to no more than a direction from one merchant to another to sell bills, indorsed by the sender on the sender's account, and to carry them to the sender's general account. It was a letter of advice and direction, and such notice in no wise bound the Appellant to see that the directions with respect to the application of the proceeds was carried into effect. However reprehensible Oswald, Seal and Co.'s conduct may be in neglecting to apply the proceeds to the purchase of the opium, that cannot affect the Appellant, a third party; he treated Oswald, Seal and Co. alone as principals; there was no privity of contract between the Appellant and Respondents, he did not buy the [347] bills from Oswald, Seal and Co. as the bills of the Respondents. The bills were advertised for sale, and he became the purchaser. The action was wrong in form, it ought to have been upon a special contract, but in any circumstance the Respondents were not entitled to recover under the count for goods sold and delivered.

They referred to *Bolton v. Puller* (1 Bos. and Pul. 539), *Wookey v. Pole* (4 Barn.

and Ald. 1), *Collins v. Martin* (1 Bos. and Pul. 648), *May v. Chapman* (16 Mee. and Wels. 355), and *Buchanan v. Findlay* (9 Barn. and Cr. 738).

Sir Frederick Thesiger, Q.C., and Mr. Badeley, for the Respondents, were not called upon to support the judgment.

They, however, submitted, that the Respondents were entitled to have the damages increased, by allowing interest upon Rs. 60,000, from the 7th of January, 1848, as the contract was for sale of the bills, with interest from that date.—[Sir John Jervis: Have we any power to increase the verdict? There are no facts to raise such a question. The contract you refer to is between Muttyloll Seal and Oswald, Seal and Co. The bills do not bear interest at the date, but at the maturity. When was that?—Six months after sight.—[Sir John Jervis: That depends upon the presentment, and you have no proof of its maturity.] (As to the power of the Judicial Committee, under its common law jurisdiction, to give subsequent interest on a judgment debt, see *The Bank of Australasia v. Breillat*, 6 Moore's P.C. Cases, 152.)

[348] Sir John Jervis.—We are of opinion in this case, that the judgment of the Court below should be affirmed. It is not necessary, in the view which we take of the case, to enter at any length into the circumstances of it, in order to ascertain whether, if the count for goods sold and delivered could not have been supported, the verdict might have been retained on any other part of the record; nor to enter into an examination of the various cases which were collected or cited by the learned Chief Justice in the Court below, because we think, upon a very short and clear ground, that the verdict was right, and that the judgment ought to stand on the count for goods sold and delivered.

The Appellant's counsel have argued upon four grounds: first, that there was no privity of action in the contract between the parties; second, that the form of action upon the common count of *indebitatus assumpsit* is misconceived; third, that the house of Oswald, Seal and Co. were entitled to act as principals; and fourth, that the title which the Agra Bank had, was transferred to Muttyloll Seal; and that, therefore, he is not affected by anything that took place originally between the parties. The two last are merely illustrations of the first proposition, as they put them forward as points of pleading.

Now, we think we must assume, not only upon the evidence of Fergusson, but upon the probabilities of the case, that Muttyloll Seal knew of the transactions that had taken place between Oswald, Seal and Co., and Dent and Co., because Fergusson swears distinctly, that he communicated to Muttyloll Seal, who was the agent of that firm, at Calcutta, from time to time, what occurred: that he communicated the letter [349] sent by Dent and Co., dated the 29th of October, 1847, and that Muttyloll Seal knew that the opium account was squared, with the exception of this sum, amounting to £6000. And further, it is highly probable, that such should have been done, because Muttyloll Seal was under guarantee, that their business should be properly carried on. Therefore, we must assume that he knew of the letter, and the answer of the 27th, which was sent to him, and that satisfies us that the bills were sent, in the terms of the letter, to realise and the proceeds to be placed to the opium account, and was answered in these respects by the letter of the 28th of December; the bills, therefore, were sent to them with a specific appropriation, to be realised, either by discount or sale, and the proceeds were to be placed to the credit account. Muttyloll Seal, therefore, knowing that such was the case, and knowing that Oswald, Seal and Co. were the agents of Dent and Co., it becomes unimportant to consider, whether he purchased the bills on the 7th of January, as one party says, or on the 11th of April, with a fraudulent ante-dating of the contract, as the other party says; because it is quite plain that with a knowledge of the fact, and knowing that Oswald, Seal and Co. were the agents of Dent and Co., he did purchase the bills. It is quite plain, looking at the transaction, with the invoice and the debit note on the one side, that he takes credit for the amount of these bills sold, and debits them on the other side with the price paid for them; that it was a transaction for the sale of these identical bills, and that being so, it is plain, that the count for goods sold and delivered is supported, because there is a sale by the agents entitled to sell, and the [350] simple question then would be, what has been the consequence? Although it is true that Oswald, Seal and Co. had authority to sell,



yet, having sold, the person who is the purchaser must account to the principals for the proceeds. If he honestly paid over the proceeds to Oswald, Seal and Co., that would be a payment to Dent and Co. It should have been pleaded, if he had a set off, and for any other transaction that would have been a good set off. But there were no pleas on the record to meet such fact. That is sufficient to dispose of this case. It is useful, however, to observe, in order that it may not be supposed that we are proceeding on technical form or grounds, that the question raised on the pleadings in this case substantially affects the justice of the case: if there had been a plea of payment, which the facts of this case would not support, the effect of that plea nobody could doubt. These bills having been pledged with the Agra Bank, when the time for taking them up arrived, Muttyloll Seal did not become indorser for value of the bills, but in truth lent money to Oswald, Seal and Co., to whom he was under guarantee, for the mere purpose of redeeming the bills. As he knew they were remitted for the specific purpose of purchasing opium, he had no right, with the knowledge of that fact, to apply them for the purpose of paying the debt of Oswald, Seal and Co. Therefore, that would not have been sufficient evidence to support the plea of payment, and in no event would the judgment have been affirmed for the Plaintiff in error. Looking to the judgment in the Court below, therefore, we are of opinion, that such judgment must be affirmed, but that there is no ground for giving in-[351]-terest, even if we were inclined to do so; there are no facts which could be the basis of any such judgment. The judgment of the Court below must, therefore, be simply affirmed, with costs.

[Mews' Dig. tit. BILLS OF EXCHANGE, A. FORM AND OPERATION, 9. *Sale of bills, o. APPROPRIATION OF SECURITIES: Remittances and Bills*; tit. MONEY COUNTS, C. FOR MONEY HAD AND RECEIVED; 4. *Receiver's Knowledge of title to money or appropriation*; tit. PAYMENT, B. APPROPRIATION OF PAYMENT; 1. *By debtor*. S.C. 5 Moo. Ind. App. 328, cf. *Litt v. Martindale*, 1856, 18 C.B. 314.]

#### ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

ROBERT CASTLE JENKINS and Others.—*Appellants*; HENRY HEYCOCK,—*Respondent* \* [June 14, 1853].

The warranty of seaworthiness in a time policy, at the commencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. So held by the Judicial Committee, affirming the judgment of the Supreme Court at Calcutta, in an action brought for a total loss, by stranding, within the time of the running of the policy, after leaving an intermediate port, the defence being, that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage.

*Example*.—There is no implied warranty of seaworthiness in a time policy [8 Moo. P.C. 359, 360].

This was a question of marine insurance, the point involved being, whether, in a time policy, the vessel being seaworthy at the commencement of the risk, any unseaworthiness, by reason of the insufficiency of her crew, at a subsequent time, avoided the policy.

The action was upon a policy of insurance upon the steam ship *Emma*, brought by the Respondent and one Stewart (since deceased), the registered owners, and parties assured, against the Appellants, the under-[352]-writers. The declaration

\* Present: The Chief Justice of the Common Pleas (Sir John Jervis), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

was for a total loss by stranding. The Defendants pleaded eight pleas to the declaration: the material pleas were the seventh, that the ship was not seaworthy, and the eighth, that after the making the policy, and before the time covered by the policy had expired, and whilst the steamer was lying safely at anchor, to wit, in the Madras roads, the steamer became unseaworthy, not by reason of any of the risks or perils covered by the policy of insurance, but by reason of the desertion of a great number of her crew, and not otherwise. And that, after the steamer had become in manner aforesaid unseaworthy, and before any necessity had arisen for the steamer leaving her anchorage in the Madras roads for any other port or place, the master might, by reasonable care and diligence, have procured, at Madras, a fit and proper crew for the due navigation of the steamer, in the place and stead of those who deserted from the steamer as aforesaid; but that he wholly neglected so to do. And that afterwards, and whilst the steamer was so incompletely manned and equipped, and before any necessity had arisen for the steamer leaving her anchorage at Madras, the steamer proceeded on a voyage from Madras to Vizagapatam; and that, whilst the steamer was so proceeding on her voyage, the steamer, by reason of her being so improperly manned and equipped, and of there not being fit and proper persons on board the steamer to take fit and proper soundings during her last-mentioned voyage from Madras to Vizagapatam, was run ashore and wholly lost, in manner in the plaint alleged.

The Plaintiffs joined issue on all these pleas, except the eighth, to which they filed the following [353] demurrer:—That the eighth plea did not disclose any defence to the action, inasmuch as it merely alleged that, after the making the policy and the commencement of the risk, the master and crew of the ship neglected their duty, and the ship, by reason thereof, became unseaworthy; whereas the policy of insurance did not contain, nor does the law imply, any warranty on the part of the assured for the continuance of the seaworthiness of the vessel after the commencement of the voyage or risk, or for the performance of their duty by the master and crew during the whole of the voyage, or period insured; and that the plea did not aver or show that the Plaintiffs, or the persons interested in the insurance, had any notice of the alleged desertion of the crew, or of the vessel having been improperly manned upon her voyage from Madras to Vizagapatam; and that the plea did not sufficiently show that the loss of the steamer was attributable to the alleged negligence or misconduct of the master or crew, or how and by what means it was so attributable.

The point marked for argument was, that the law did not imply any warranty on the part of the assured, for the continuance of seaworthiness after the commencement of the voyage or risk.

The demurrer was argued on the 4th of July, 1850, before Sir Lawrence Peel, Chief Justice, and Sir James Colville, when judgment was given for the Plaintiff. On the 18th of February, 1851, the cause was tried. It appeared from the evidence at the trial, that the policy was a time policy, and the insurance was to endure for a period of four months; namely, from the 14th of April, 1849, until the 14th of August following. During the period covered by the policy, the [354] *Emma*, which was a coasting vessel, made several voyages from Madras to the northern and southern ports of the Coromandel coast. And, on her last voyage, she departed from Madras for the northern ports on the 12th of June, 1849. Two lists of seamen, comprising the crew of the *Emma*, before the date of the policy, and on the 20th of April, 1849, were put in evidence. The evidence was conflicting, some of the witnesses, including the master and chief mate of the *Emma*, thinking the crew sufficient in number and force, while other witnesses deposed that the lists themselves showed an insufficient crew. On the question of the number of men which would constitute a sufficient complement for the proper navigation and service of the *Emma*, much evidence was taken in the cause. It further appeared that the *Emma*, after her last arrival at Madras on the 5th of June, lay there until the 12th of June; and that, before she left the Madras roads on that day, nearly the whole of the seamen were discharged, the officers, firemen, servants, and a single lascar only remaining. Some other men appeared to have been taken on board before the ship left, but the number with which the *Emma* departed, it was insisted by the Defendant, were not sufficient for the navigation of the ship. It was not in dispute, that the number of the crew had been materially diminished since the preceding voyage, and the



cause of the discharge of the greater part of the crew at Madras was not explained. The Captain, in his evidence, stated, that the discharged men were not under contract to go on, and that he might have prevented them from leaving by giving them higher wages. It was not suggested that the men left the ship [355] owing to any complaint in respect of wages, or even any dissatisfaction with the wages they received; on the contrary, the chief mate stated, that the reason of the discharge was to reduce the crew, with a view to diminish the expense, and that it was intended to replace them with other men at a future time; and it was proved that a further crew was ordered to be engaged to join the ship at Coringa by the time she arrived there. On the 13th, the day after the *Emma* left the Madras Roads, she ran aground, on her passage to Monsoorcottah, in fair weather, on a sandy beach. Efforts were made for some hours to get her off, but her hull became imbedded in the sand, and the ship became a total wreck, and was abandoned. The loss was attributed to the insufficiency of the crew, there not being hands enough to work the vessel.

Upon this evidence a special verdict was found on the seventh plea, that the ship was not seaworthy; namely, that she was seaworthy at the time the policy was entered into, and had a competent crew, but not seaworthy at the time of her last departure from Madras, and at the time of loss; the number of the crew so altered being such, as to render her unseaworthy; with liberty to the Plaintiffs to move on such last-mentioned issue: and a verdict for the Defendants on the other issues for the amount assured, and interest.

The Plaintiffs, on the 11th of March, 1851, in pursuance of the liberty given to them, obtained a rule, calling upon the Defendants to show cause why the verdict entered for the Plaintiffs on the issue joined on the seventh and last plea should not be set aside, and judgment entered for the Defendants on [356] that issue, on the ground following: that the policy being a time policy, it was necessary for the Plaintiffs, in order to establish seaworthiness, to prove either that a sufficient crew was engaged for the whole period included in the policy, or to prove that the crew, at the time of the commencement of each successive voyage, or of each fresh departure from port, was a sufficient crew; and that both alternatives were negatived by the finding of the Court.

The rule *nisi* came on for argument on the 19th of March, 1851, and on the following day the Supreme Court gave judgment, discharging the rule with costs. The judgment of the Court, after referring to the cases of *Dixon v. Sadler* (5 Mee. and Wels. 405) and *Sadler v. Dixon* (8 Mee. and Wels. 895), proceeded in these terms: "The judgments in these cases affirm this position, which no subsequent authority in the least degree impeaches, that the implied warranty of seaworthiness is not one for continuing seaworthiness, but only of seaworthiness at the time of the risk commencing or attaching. A vessel may be seaworthy, though in a state unfit for sea, if she be for the ordinary risk to which she then is exposed, as on a policy at and from a port where the risk attaches on her whilst in harbour; but she must, ere she departs on her voyage, be made in all respects equal to the ordinary sea risks; and in like manner her due complement of hands may vary at different stages of the navigation insured, either as to number or the quality of the crew, according to the ordinary risks and the ordinary usage of the navigation. Thus she must, to fulfil the implied warranty, take on board a pilot in certain places: but it [357] would be preposterous to say that she must sail from the Hooghly with a Thames pilot, or from the Thames with a Hooghly pilot. The implied warranty as to crew is, in its nature, nevertheless the same as the implied warranty as to the hull of the vessel, its sails, furniture, equipments, etc.: it is not a warranty in a case for continuing seaworthiness." And, after referring to, and commenting upon, *Law v. Hollingsworth* (7 Term Rep. 160) and *Hollingsworth v. Brodrick* (7 Add. and Ell. 40), proceeded: "The remote causes are not regarded, but the proximate cause is merely a peril of the sea, though caused or aggravated by their neglect; in other words, the owner insures as well against sea risks so occasioned, as inevitable sea risks. If the owner did expressly warrant that the ship should in all respects continue seaworthy, he would be liable, from whatever cause her subsequent unseaworthiness proceeded; since, by our law, one who makes a positive unqualified covenant, which he might have qualified, is bound generally, because he did not limit it; therefore the owner would, in effect, become a re-assurer to his own insurers, *pro tanto*—and, therefore,

the warranty, which arises by implication of law, is properly limited by the law to the commencement of the risk. In the case of *Forshaw v. Chabert* (3 Brod. and Bing. 158), the vessel sailed originally with an incompetent crew, having sailed with three only for the port of destination, ten being the lowest number for that port. The implied warranty is a condition precedent, not a condition subsequent; and, on general principles, if it be once fulfilled, the contract cannot be got rid of on the ground of some subsequent omission bringing about that state of things, [358] which, if it had preceded existed, would have annulled liability under the contract."

The judgment against the Appellants was subsequently signed for Rs. 47,767. 7. 3 damages and costs.

Against which judgment the present appeal was brought.

Mr. Hare, and Mr. Paterson, (Sir F. Kelly, Q.C., with them,) for the Appellants. —In the contract for insurance there is an implied warranty of seaworthiness on the part of the insurers, and a competent and sufficient crew at the departure of the ship for sea is essential to such seaworthiness. It was necessary, in order to establish the seaworthiness of the ship, for the Plaintiffs to prove, either that a sufficient crew was engaged for the whole period included in the policy, or to prove that the crew, at the time of the commencement of each successive voyage, or at each departure from port, was a sufficient crew. Now it was proved at the trial, and found by the verdict, that when the ship departed on her voyage she was not seaworthy, by reason of the incompetency of her crew, and that she was lost from that cause. It must be admitted that seaworthiness is a condition precedent to the validity of a policy. Park (Ch. xi., p. 322, 7th Edit.) in his treatise on Insurance, thus states the rule: "There is in the contract of insurance a tacit and implied agreement that everything shall be in that state and condition in which it ought to be, and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy, for he ought to [359] know that she was so at the time he made the insurance. The ship is the substratum of the contract between the parties; a ship not capable of performing the voyage is the same as if there were no ship at all; and although the defect may not be known to the person insured, yet the very foundation of the contract being gone, the law is clearly in favour of the underwriter, because such defect is not the consequence of any external misfortune, or any unavoidable accident arising from the perils of the sea, or any other risk against which the underwriter engages to indemnify the person insured." *Douglas v. Scougall* (4 Dow. 269) is an authority in support of this principle.—[Sir John Jervis: Here there is no contract to argue upon. If the insurer impliedly warrants that the ship is seaworthy, he does not impliedly warrant that she shall continue so; there is no mention of such a contract in this policy. He does not contract that she shall be seaworthy at her departure from every intermediate port, that would be going to a greater extent than there would be in a voyage policy.]—The competency or incompetency of the crew is to be determined, from time to time, according to the nature and exigency of the voyage.—[Mr. Pemberton Leigh: Lord Campbell, in *Gibson v. Small* (4 H.L. Cases, 353), expressed his opinion, that there is not in a time policy, effected on a vessel when abroad, any implied condition whatever as to seaworthiness; not even as to the time when the vessel sailed on the voyage during which the policy attaches.]—*Gibson v. Small* is distinguishable from the present case, for there the ship was at sea at the day when it was in—[360]—tended that the policy should attach. The question of warranty of seaworthiness was not necessary to be decided in that case, and the opinions of the Judges in the House of Lords must, therefore, upon that point be considered as extra-judicial.

Mr. Serjeant Channell, and Mr. J. Wilde, for the Respondent, were not called upon to support the judgment appealed from.

Sir John Jervis.—We do not think it necessary to hear the Respondent's counsel.

My Lords are of opinion in this case, that the judgment of the Court below must be affirmed.

In truth, the case is concluded by the decision of the House of Lords in *Gibson v. Small* [4 H.L.C. 353]. The learned counsel for the Appellants, who have argued this case with great ability, have in vain endeavoured to distinguish it from that



case. The judgment in *Gibson v. Small* puts the decision higher than it is necessary to do in the present case; because, although, if it were necessary to determine that in a time policy there is no warrant of seaworthiness, my Lords would possibly be inclined to adopt the opinion of Lord Campbell and the Judges to the full extent, namely, that there is no warrant of seaworthiness in a time policy. It is not necessary to decide that point to the full extent, because if, as was contended for by the Appellants, in a time policy there is a warranty of seaworthiness at the time the vessel started on her original voyage, this vessel is found by the Court below to have been seaworthy at such a time. Then [361] comes the question, assuming she was seaworthy when she started on her voyage, is there a further warranty that she shall be seaworthy at every intermediate port she touches at, pending the progress or continuance of her voyage, which is to last for a specified time? Now, if it had been a voyage policy, there is no question, although there had been a warranty of seaworthiness when she started on her voyage, there would be no warranty that she should be seaworthy at an intermediate port at which she touched, which port she is endeavouring to make intermediate; and if it were to be held (as I took the liberty of pointing out in the course of the argument) that there was a warranty in a time policy that the ship shall be seaworthy at her departure, and at every intermediate port during the currency of the time policy, it would be holding that there is a warranty to a greater extent in a time policy than there would be in a voyage policy.

Therefore, I apprehend in this case, as in all cases, we must abide by the general rule, that a policy of indemnity, being a written instrument, the terms of that instrument must be construed subject to certain conditions, one of which is, that in a voyage policy, custom and decision have annexed to that contract a warranty of seaworthiness, and that there is no custom and no decision which warrants the Court in saying, that in a time policy any such warranty attaches. If it were necessary for the decision of the case, we should be inclined to go to the full extent of what Lord Campbell says in the House of Lords. It is unnecessary, however, to do so in this case; be-[362]-cause, if there was a warranty, it was satisfied at the time the voyage commenced, and there was no warranty at any intermediate port; and, therefore, upon that, which is a lower ground, the judgment must be affirmed, and with costs.

[Mews' Dig. tit. SHIPPING, B. MARINE INSURANCE, VI. *Warranties*, 3. *Seaworthiness*, b. *On Time Policy*. S.C. 5 Moo. Ind. App. 361, 1 C.L.R. 406. See *Dudgeon v. Pembroke*, 1875, 1 Q.B.D. 125.]

### [363] ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

JOSEPH MAXWELL and Others,—*Appellants*; FREDERICK DURANT DEARE and BERNHARD and DIETZ,—*Respondents* \* [June 15, 1853].

D. and Co., merchants at the Cape of Good Hope, by a letter to M. and Co., merchants at Rio de Janeiro, ordered a quantity of coffee to be shipped and sent to them at the Cape of Good Hope, which D. and Co. proposed to pay for by a bill drawn by M. and Co. on Messrs. R., I. and Co., London, the general agents for both D. and Co. and M. and Co. The coffee was received by D. and Co. in due course, and a bill of Exchange was drawn by M. and Co. R., I. and Co. received it, and credited the account of M. and Co. in their books with the amount of the bill, and debited the account of D. and Co. with a like sum. R., I. and Co. accepted the bill, but before it arrived at maturity,

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., the Right Hon. Sir John Jervis, Knt., and the Right Hon. Sir John Patteson, Knt.

they stopped payment, and the bill was protested for non-payment. M. and Co. then brought an action in the Supreme Court of the Cape of Good Hope against D. and Co. for the price of the coffee shipped to their order. The Supreme Court were of opinion, that M. and Co., having agreed to execute the order in the terms proposed by D. and Co., and accepted in satisfaction of their demands the credit which was to be opened in their favour by D. and Co. with R., I. and Co., such credit was to be considered as money paid by D. and Co., and placed to the immediate disposal of M. and Co.

Upon appeal, held by the Judicial Committee (reversing such judgment):

First. That the effect of the arrangement between D. and Co. and M. and Co., to substitute a bill of Exchange for cash payment was only to be considered as payment by the bill being honoured at maturity.

Second. That the entry of the amount of the bill of Exchange in R., I. and Co.'s. the joint agents', books, to the credit of M. and Co., and the debiting of D. and Co. with a like amount, was not a payment for the coffee, and that M. and Co. did not by such entry accept in satisfaction of their demand the credit opened by the purchasers with R., I. and Co.

Cause remitted to the Court below to calculate interest upon the debt according to the Dutch Roman Law in force in the Colony.

The Appellants were merchants, carrying on business at Rio de Janeiro, under the style of "Maxwell, [364] Wright and Co.," and the Respondents were also merchants, carrying on business at Port Elizabeth, at the Cape of Good Hope, under the style of "Deare and Dietz."

On the 25th of May, 1847, after some previous correspondence between the parties, the Respondents sent the following letter from Port Elizabeth to the Appellants, at Rio de Janeiro.

"Gentlemen,—We received, in succession, your favour of the 7th of December, and circulars of the 28th of January and 28th of February, as well as *pro forma* invoices of coffee and sugars alluded to in the first, and for which we would offer you our best thanks.

"Having, in conjunction with some neighbours of ours, chartered the brig *Susan*. Captain H. Pryce, to load a cargo of coffee of about 1200 bags direct to this, and in which vessel we have one-fourth of the ship's room, say, for about 300 bags for ourselves, we take the liberty of handing you the following order, trusting that the same will be agreeable to you, and that you will be enabled to ship our parcel of coffee on board the said vessel without delay." And then, after specifying the quality of the coffee they [365] required, the letter proceeded:—"For the cost of said order we have opened a credit in your favour with our mutual friends, Messrs. Reid, Irving and Co., London, and in drawing upon them for your invoice amount as customary, you will please to hand them duplicate invoice of bill of lading, with order to insure our interest, forwarding also the enclosed letter to said friends. We trust this mode of reimbursement will meet your approval, as it is the only one, with the exception of sending specie (and which, as the vessel is first touching at Table Bay from this, would not offer any advantage), we could have adopted."

On the same day the Respondents wrote to Messrs. Reid, Irving and Co. the following letter:—"Gentlemen—Having transmitted to Messrs. Maxwell, Wright and Co., Rio de Janeiro, an order to ship for our account on board the brig *Susan*, Captain Pryce, about 300 bags of coffee, we hereby make free to open a credit in their favour for the cost of said coffee to the extent of £650 sterling; and in valuing upon you for our account at usual sight, Messrs. Maxwell, Wright and Co. will hand you duplicate B. Lading, and invoice of our parcel of coffee, and also order to cover the same by insurance, as customary."

This letter was inclosed in the letter from the Respondents to the Appellants, and was the letter therein referred to as written by the Respondents to Messrs. Reid, Irving and Co.

Messrs. Reid, Irving and Co. were, at the date of these letters, the agents and correspondents in London both of the Appellants and Respondents.

The Appellants received the letter from the Respondents, with its inclosure, and, on the 12th of [366] July, 1847, wrote to the Respondents a letter, containing these



passages:—"We have to acknowledge receipt of your esteemed favour of 25th of May, handing us memorandum of brig *Susan's* charter-party, and directing us to ship on board of said vessel 300 bags coffee for your account, which we have done, and enclosed beg to hand you invoice and B. Lading of the same. This parcel of coffee is as near the quality of the samples you sent as could be obtained, and we hope on arrival it will turn out well and give you satisfaction. It costs 27s. 6d. on board.

"Enclosed also, please find account current, balancing this transaction to a point, by our drafts on Messrs. Reid, Irving and Co., London, for £588 ls. 3d."

The coffee was shipped about this date, and was duly received by the Respondents.

On the 21st of August, 1847, the Respondents wrote to the Appellants as follows:—"Gentlemen,—We beg to acknowledge the receipt of your favour of the 12th ultimo, in losing B. Lading and invoice of 300 bags coffee shipped for our account on board the *Susan*, the cost of which, amounting to £588 ls. 3d., including all charges (free on board), and which sum you mention to us as having drawn for our account on Messrs. Reid, Irving and Co., London, at 60 D/s., to balance this transaction, all of which goes in order.

"We beg now to mention to you that we are obliged to you for the attention you bestowed on this small order, the execution of which has given us every satisfaction."

The Appellants had in the meantime, and in pursuance of the letter of the Respondents of the 25th of May, 1847, drawn upon and transmitted to Messrs. Reid, Irving and Co., a bill of Exchange, being one of [367] a set of three bills, as customary, for the amount of the coffee. This bill was in the following form:—

"No. 11,052. Exchange for £588 ls. 3d. Rio de Janeiro, 10th of July, 1847. At sixty days' sight pay this second of exchange (first and third not paid) to the order of yourselves the sum of five hundred and eighty-eight pounds, one shilling and three-pence, sterling, for value in account, which place to account of Messrs. Deare and Deitz, of Port Elizabeth, Algoa Bay, as per advice.

"Maxwell, Wright and Co.

"To Messrs. Reid, Irving and Co., London."

This bill of Exchange was received by Reid, Irving and Co., in London, on the 28th of August, 1847, and was by them marked as accepted, but as it was made payable to themselves, and, remained in their own possession, they did not formally accept it, but, on the same day they carried and entered the bill in their books to the debit of the Respondents, as due on the 30th of October, 1847, and made a similar entry in their books, placing the same amount to the credit of the Appellants. It appeared from the evidence that at that time, Reid, Irving and Co. had not in their hands assets of the Respondents sufficient to cover the liabilities for the Respondents, including the amount of this bill of Exchange.

On the 7th of September, 1847, Reid, Irving and Co. sent to the Respondents a letter, of which the following is an extract:—"On the other hand, you advise your drafts on us for £450 and £300, at 60 days' sight, of J. Jamieson and Co., which we have honoured to the debit of your account, as we have also done Messrs. Maxwell, Wright and Co.'s draft upon us from Rio de [368] Janeiro for £588 ls. 3d. due 30th of October next." An account current was inclosed in that letter, in which the Respondents were debited with the amount of the bill.

Messrs. Reid, Irving and Co. stopped payment on the 17th of September, 1847, and on the 30th of October following the bill became due, and Baring Brothers, and Co., on the part of the Appellants, demanded from Reid, Irving and Co. the bills and securities in their possession belonging to the Appellants, when the bill of Exchange was accepted in the usual form by Reid, Irving and Co., and endorsed by them and delivered to Baring, Brothers and Co. On the same day the bill was presented for payment, and, not being paid, was protested.

At the time of the stoppage of Reid, Irving and Co., independently of the amount of bills of Exchange which they had accepted on account of the Appellants and the Respondents respectively, and which were not paid, they were indebted to both the Appellants and to the Respondents, but neither of them made any proof against the estate of Reid, Irving and Co., in respect of the bill.

Under these circumstances, the Appellants claimed from the Respondents the price of the coffee in question, which claim the Respondents refused to entertain.

The Appellants then brought an action in the Supreme Court of the Cape of Good Hope, against the Respondents, to recover the price of the coffee. The declaration stated, that the Respondents owed to the Appellants the price of 300 bags of coffee, shipped by the Appellants to the Respondents' order, and for their account and risk, and certain charges thereon; and also the costs and charges of the protested bill [369] of Exchange drawn by Appellants upon Reid, Irving and Co. for the price of the coffee. To this declaration the Respondents pleaded that the goods had been paid for by a transfer of credit in the books of Reid, Irving and Co., the common agents of them and the Appellants, in pursuance of an arrangement between them; which plea the Appellants denied, and thereupon issue was joined.

A commission was issued for the examination of witnesses in England, under which Elsworth, a clerk of Reid, Irving and Co., was examined on the part of the Respondents. The deposition of this witness was read at the trial, together with the documents before referred to. The Appellants, at the trial, tendered evidence of merchants, for the purpose of showing that the entry made in the books of the house of Reid, Irving and Co. to the credit of the Appellants, was, in mercantile understanding, conditional on the payment of the bill of Exchange when due in October, and they also tendered mercantile evidence in explanation of the intention of the parties, which the Court rejected.

The Court took time to consider their judgment, and, on the 26th of June, 1851, the full Court, consisting of the Chief Justice, Sir John Wylde, and the Puisne Judges, Musgrave and Bowles, unanimously gave judgment for the Respondents. The following reasons were afterwards given by the Judges for their judgment:—

1. "That this case bore no analogy to that in which a bill is given by the purchaser of goods, which is accepted on presentment, and subsequently dishonoured in consequence of the failure of the acceptor.

[370] 2. "That the Plaintiffs in this case appeared to have agreed to execute the order in question upon the terms proposed by the Defendants in their letter of the 25th of May, 1847, and to accept in satisfaction of their demand the credit which was opened in their favour for the amount of it by the Defendants with Reid, Irving and Co., of London, who were the agents of both parties in the transaction.

3. "That such credit, when so opened, was to be regarded as so much money set apart by the Defendants from their other funds, and placed at the immediate disposal of the Plaintiffs, of which the Defendants could no longer avail themselves for the purposes of trade, and which was, therefore, as entirely at the risk of the Plaintiffs as any other money which they had in the hands of the agents at the time of the bankruptcy.

4. "That the Plaintiffs, having executed the order upon the faith of such credit, were at liberty to appropriate the amount of the cost of such order immediately after such credit was opened; and, as they drew for such amount upon and in favour of Reid, Irving and Co., who were their own agents as well as their paymasters under the contract, and their Bill was duly honoured and passed to their credit and to the debit of the Defendants in the books and accounts of the house on the day on which it was received in London, the credit in favour of the Plaintiffs was thus effectually opened in fulfilment of the engagement of the Defendants, and the amount of the costs of such order thus virtually appropriated by the Plaintiffs under such credit.

5. "That Reid, Irving and Co., being the agents of both parties, and at once the drawers and payees of [371] the bill, having thus treated it as payable on presentment, according to the view which they would seem to have taken of the real nature of the transaction, would, if they had not become insolvent, have doubtless afterwards arranged the matter by discount in the settlement of their accounts with their respective principals.

6. "That, as the Plaintiffs were not restrained by the terms of the contract from drawing for the costs of the shipment by a bill payable on presentment, and would, if they had so drawn, have doubtless realised their demand, they had, as against the Defendants, whose liability on the contract they had no right to protract, incautiously incurred an unnecessary hazard by drawing, as they did, at sixty days after sight, and ought, therefore, in point of equity, to bear the loss which had arisen from the intermediate failure of the house. See *Bolton v. Richard* (6 Term. Rep.



139; S.C. 1 Esp. 106); *Eyles v. Ellis* (4 Bing. 112); *Bodenham v. Purchas* (2 Bar. and Ald. 39); *Wade v. Wilson* (1 East, 195); 3 Burge's Comm. on Col. and For. Laws, 795.

"The Plaintiffs tendered evidence for the purpose of showing that 'the entry of the 28th of August to the credit of the Plaintiffs, and the debit of the Defendants, was conditional on the payment of the bill when due in October, and that in fact it was the practice of some houses to make such entries on the days of acceptance for the sake of convenience; whereas others did not credit or debit bills until after payment.' They also tendered mercantile evidence in explanation of the intention of the parties.

"But the Court having taken a distinct view of the [372] nature and legal construction of the special contract in question, upon the face of a particular correspondence, in which the intention of the parties was unambiguously expressed, and looking at the ostensible acts of the agents on whom the bill was drawn, in as far as they stood connected with that special contract, without deciding as 'to the effect which ought, in ordinary transactions, between principal and agent, to be given to the mere debiting and crediting of Bills in account before they are actually due,' considered that the evidence which the Plaintiffs proposed to adduce as to the usage and opinion of the merchants of this Colony was, under the circumstances of this case, irrelevant and inadmissible in point of law, and rejected it accordingly. See *Edie v. East India Company* (2 Burr. 1216); *Gabay v. Lloyd* (3 Barn. and Cr. 793); *Palmer v. Blackburn* (1 Bing. 61); *Syers v. Bridge* (2 Doug. 527); *Yates v. Pym* (6 Taunt. 446); *Cross v. Eglin* (2 Bar. and Ad. 106); *Anderson v. Pitcher* (2 Bos. and Pul. 168); *Hodgson v. Davies* (2 Camp. 530)."

From this judgment the present appeal was brought.

Sir Frederick Thesiger, Q.C., and Mr. Cowling, in support of the appeal.

The Court below has entirely misunderstood the question at issue. The Judges appear to have founded their judgment upon an erroneous principle; they conceived that as credit was opened with Reid, Irving and Co., the vendors had a right to draw against that credit, by a bill payable at presentment, which, by their laches, they had neglected to do. They treated it as an immediate payment. But Reid, Irving and [373] Co., in fact, had not at the time of receiving the bill, sufficient assets of the Respondents in their hands to discharge the bill. There was no money set apart, or placed at the immediate disposal of the Appellants. The case, however, is substantially that of a vendor of goods receiving from the purchaser an acceptance of a third party, which turns out unproductive, without any default of the vendor, and which, consequently, does not amount to payment or satisfaction. The coffee was to be paid for by a good bill, in which case the general rule of law applies, that if no bill is given, or a bill is given but not paid, the parties on whose credit the goods were supplied are liable, *Brown v. Kewley* (2 Bos. and Pul. 518). In *Exp. Blackburne* (10 Ves. 206-7), Lord Eldon held it to be clearly settled, "That if there is an antecedent debt, and a bill is taken, without taking an endorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to." *Taylor v. Briggs* (Moo. and Mal. N.P. 28, and see note thereto) is to the same effect. The circumstance of the name of the drawee of the bill being mentioned in the order for the goods, and of the drawee being the agent in England of both buyer and seller, does not constitute anything material to take the case out of the general rule. In the reasons of the Judges they treat the case as one in which a credit had been opened in the Appellants' favour previously to the order, with Reid and Co., and, accordingly, they refer to the rule laid down in 3 Burge's Comm. on Col. and For. Laws, p. 795, that "If A. owe money to B., and B. owe the same sum to C., and the parties agree to the transfer, it is [374] equivalent to a loan by C. to A." which is the same as laid down in *Wade v. Wilson* (1 East, 195), cited by Mr. Justice Holroyd in *Bodenham v. Purchas* (2 Bar. and Ald. 47). This doctrine is indeed unquestionable, but the letter of the 25th of May, 1847, to Reid, Irving and Co., which accompanied the order, is entirely overlooked by the Judges. That letter shows that the credit was only about to be opened, consequently, that there could not have been any such agreement as that Reid, Irving and Co. could have become the debtors instead of the Respondents. If the Judges were right in their view of the case, then Reid, Irving and Co. became liable to the Appellants, merely on notice that the

latter had supplied the coffee to the Respondents. Again, they say, that the bill not being payable on demand was such laches as discharged the Respondents of all liability. The Judges cite in confirmation of this the case of *Bolton v. Richard* (6 Term. Rep. 139; S.C. 1 Esp. 106), but that case does not apply, for the letters of the 25th of May, 1847, and the 21st of August, 1847, show the contrary; indeed, the latter expressly states, that the drawing on the Respondents' account on Messrs. Reid, Irvine and Co. at sixty days' sight, "goes in order." The Respondents were not prejudiced in any way by the mode in which the bill was drawn; the doctrine laid down by the Court of Common Pleas, in *Smyth v. Anderson* (7 Com. Ben. 21), therefore, is not applicable. The entries in Reid, Irving and Co.'s books were irrelevant and immaterial. They do not show that any credit was given on the 28th of August, 1847, to the Appellants in respect of the sum of [375] £588 1s. 3d. If there was any doubt about the effect of the entries, the mercantile evidence tendered ought to have been admitted to explain it.

Mr. Bramwell, Q.C., and Mr. Phipson, for the Respondents.—The cause has been decided by the Judges of the Court below, as judges both of law and fact, and we submit that their construction of the agreement between the parties was the right one. The intention of the parties appears from the correspondence to have been, that instead of a remittance being made in specie, a mode of reimbursement the nearest to a cash payment should be adopted, and the letter of the 25th of May, 1847, shows, that it was to be effected by a credit opened by the Respondents in the Appellants' favour with Reid, Irving and Co., their common agents, and that such credit should be taken by the Appellants in satisfaction of their demand. This suggestion was adopted, and Reid, Irving and Co. opened a credit in favour of the Appellants as was contemplated, and the entries in the agents' books crediting the Appellants and debiting the Respondents with the amount of the bill of Exchange, effected such a transfer of the funds of the latter, as operated, as between the Appellants and Respondents, as payment of the goods.—[Sir John Jervis: If the bill of Exchange received by Reid, Irving and Co. was a good bill, and productive, no doubt the amount would be assets in the hands of the agents, but not until the bill was productive.]—The amount of the Bill having been carried to the credit of the Appellants, the vendors, they might have immediately drawn against that amount so credited to them by Reid, Irving and Co., [376] which the Respondents could no longer avail themselves of for the purpose of trade. They must be answerable for the loss occasioned by the insolvency of Reid, Irving and Co. They referred to *Bolton v. Richard* (6 Term Rep. 139; S.C. 1 Esp. 106), *Bodenham v. Purchas* (2 Bar. and Ald. 39), *Harmer v. Steel* (4 Exch. Rep. 1).

Sir John Jervis.—Their Lordships are of opinion that the judgment of the Court below in this case must be reversed. The question is narrowed to the construction to be put upon the letter of the 25th of May, 1847. If the Appellants had agreed to have accepted the credit of Reid, Irving and Co., they would have had no case, but it is clear from the correspondence in evidence they never did accept it. The Judges of the Court below seem to have considered, that as the credit was entered in the books of the mutual agents, therefore the vendors had a right to draw a Bill payable on presentation, and that by reason of the vendors drawing a Bill at sixty days after sight, the time of the running of the bill of Exchange was an unnecessary hazard, and that the Appellants had lost their remedy against the Respondents.—[His Lordship here read the reasons of the Judges of the Court below, *ante*, p. 371, and proceeded:]—The Court has obviously been mistaken in their view of the case, in treating the credit as an immediate payment, and, therefore, that the vendors were bound to take upon themselves the risk of their agents' insolvency. Neither can their Lordships agree with the Court below, that from the nature of the transaction the acceptance by the Appellant, [377] of the credit opened with Reid, Irving and Co. by the Respondents was to be taken as a payment. They consider it quite plain, looking at the correspondence, that the object was to substitute a bill of Exchange for a cash payment as a mode of payment, but only to be considered so, if the Bill was duly honoured at maturity, whereby the agents would have released funds in their hands belonging to their employers (the purchasers). Although, Reid, Irving and Co. had entered the amount of the bill of Exchange in



their books to the credit of the Appellants, they had no right to do so as a present payment, without the concurrence of the parties to whom it belonged. They should only have done so if the Bill was honoured at maturity. The result, therefore is, that the judgment of the Court below must be reversed, and a declaration made that such judgment ought to have been entered for the Plaintiffs (the present Appellants) for the sum of £588 1s. 3d., and charges and interest, from the 30th of November, 1847, according to the Dutch law, with all costs in the Court below. No costs of appeal.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, i. *Remitting cause*; tit. PAYMENT, A. WHAT AMOUNTS TO, 2 *By bills and notes*.]

### [378] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

HENRY McKELLAR,—*Appellant*: JOHN WALLACE and JOHN SPENCE,—  
*Respondents* \* [June 17, 20, 1853].

Principles which regulate a Court of Equity in opening stated and settled accounts [8 Moo. P.C. 401].

Accounts of long standing and great complication of a mercantile firm at Calcutta, one of the partners of whom afterwards acted as agent in England, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a Bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancelment of the Bill of exchange, and that the accounts so settled might be opened. The Supreme Court at Calcutta held, that the reserved item being left open, was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master.

Upon appeal, held by the Judicial Committee (reversing such decree and dismissing the bill, with costs) that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the accounts so settled and closed could not, in the absence of fraud, be re-opened [8 Moo. P.C. 414].

The Defendant did not appeal from this interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts; but before the general report was made by the Master, he appealed from such interlocutory decree to England. In reversing such decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's office, and remitted the cause to the Court below, with directions, that the costs payable to the Defendant upon the dismissal of the bill, and the costs payable by him consequent upon his proceedings in the Master's office, should be set off, the one against the other, and the balance paid to the party entitled to the same [8 Moo. P.C. 416-17].

Leave to appeal on an *ex parte* application was, under special circumstances, granted upon terms of the Appellant prosecuting the appeal and giving security for £500. No step was, however, taken by the Appellant to

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson, Knt.

perfect the security or prosecute the appeal. The Respondents, on being served with the Order admitting the appeal, filed a counter petition to revoke the leave granted to appeal. The Judicial Committee, under the circumstances, there having been great delay, made an order putting the Appellant upon terms of lodging his petition of appeal within six weeks, or the appeal to stand dismissed, and enlarged the amount of the recognizance to £1000, to cover the expenses occasioned by the proceedings in the Master's office reserving the costs of the application to revoke the leave to appeal, to the hearing [8 Moo. P.C. 397-8].

In this case, the appeal was brought from a decree, dated the 22nd of February, 1848, and an order, dated the 19th of July, 1849, made by the Supreme Court [379] at Calcutta in two suits pending in that Court. In the first of these suits the Appellant was Plaintiff, and the Respondents, Defendants; and in the second suit the Respondents were Plaintiffs, and the Appellant, Defendant. These suits arose out of the following circumstances:—

Previous to and up to the 6th of June, 1825, the Appellant carried on the business of a clothier and merchant tailor in Calcutta, in partnership with one R. Gibson, under the style of "Gibson and Co." On that day, Gibson retired from business, and the Appellant purchased his share and interest in the stock in trade and the credit of the business, and thereafter carried on the business under the same style, for his own sole use and benefit, until the 1st of January, 1831, when he admitted one Leslie (since deceased), and the Respondent, Wallace, into co-partnership with him in the business, for the term of twenty-one years from that date, admitting them into one-half share, and selling to them one half of the stock in trade of the business; reserving the other half of the business and stock in trade, with power to transfer the same to his brother, Thomas McKellar. At this time there were debts to a very large amount due to the Appellant [380] from his customers. Subsequent to the admission of Leslie and Wallace into partnership, a deed of co-partnership, dated the 29th of May, 1832, was made between the Appellant of the first part, Leslie of the second part, and Wallace of the third part; whereby it was agreed, that the trade should be carried on in their names for their mutual benefit, in the proportions above mentioned, under the style of "Gibson, McKellar and Co.," and it was further agreed, that the Appellant, at any time during the co-partnership, should be at liberty to sell, assign, and dispose of his interest to his brother, Thomas McKellar, and that upon the admission of his brother into the co-partnership he should be considered as the head partner of the firm; and it was further agreed that the firm of "Gibson, McKellar and Co." should collect the debts due to the Appellant, from the customers of "Gibson and Co.," and, as a remuneration for so doing, should have the use of such monies, when collected, up to the end of the current year in which the same should be collected, free of interest, and thereafter at an interest of eight per cent. per annum, and that the money to be collected from customers of the firm of "Gibson and Co.," who were also customers of the firm of "Gibson, McKellar and Co.," should be first applied in payment of the debts due to the firm of "Gibson and Co.," until such debts should be satisfied; and it was further agreed that, in the event of the Appellant disposing of his share and interest in the co-partnership trade, and proceeding to England, the Appellant should be the agent of the firm of "Gibson, McKellar and Co.," in Europe, and that all sums of money remitted to any agent or other person by the partners of the firm for the payment of goods, etc., [381] on account of the joint trade, should be remitted through the agency of the Appellant, and that Leslie and the Respondent, Wallace, in the event of the Appellant proceeding to England, should render to him half-yearly accounts of his private accounts with them, and at the end of every year, when a general account of the stock, etc., should be made, render to the Appellant a summary account or balance-sheet thereof.

Under this deed of co-partnership, the business of the firm of "Gibson, McKellar and Co." was carried on till the 17th of November, 1832, when the Appellant transferred his half share to his brother, as provided by the deed, and from that time the Appellant ceased to carry on the business; T. McKellar, Leslie and Wallace, carrying on the same under the style or firm of "Gibson, McKellar and Co." until



the death of T. McKellar, when the business was carried on by Leslie and Wallace in co-partnership, under the style of "Gibson and Co.," until the death of Leslie after-mentioned.

The firm of "D. McKellar and Son," of Old Burlington Street, London, clothiers, etc., had supplied and shipped all the goods and other merchandise from England required by the firm of "Gibson and Co." for eight or nine years previous to Leslie and the Respondent, Wallace, being admitted into partnership with the Appellant; and the firm of "D. McKellar and Son" were in correspondence with, and had supplied large quantities of goods to, the firm of "Gibson, McKellar and Co."

The firm of "Gibson, McKellar and Co.," by a power of attorney, dated the 22nd of January, 1838, without the knowledge or consent of the Appellant, [382] constituted A. McKellar (brother of the Appellant, and a member of the firm of "D. McKellar and Son"), and also the Appellant, their joint and several attorneys in Great Britain, to get in the debts and money due to the firm of "Gibson, McKellar and Co."

From the year 1833, to the month of April, 1838, various Bills of exchange, promissory notes, etc., in respect of debts due and owing to the firms of "Gibson, McKellar and Co.," and "Gibson and Co.," respectively, were sent by those firms to England, for realisation to the Appellant and also to his brother A. McKellar. A. McKellar, however, was the only person who acted under the power of attorney, except in the instance of two small debts owing to "Gibson, McKellar and Co.," which were got in by the Appellant and handed over by him to A. McKellar, as such acting attorney or agent, and who collected and realised certain of the Bills of exchange and promissory notes, and also the amount of certain debts, and accounted for what he so received to the firm of "Gibson, McKellar and Co." in the consignment accounts of the firm of "D. McKellar and Son," with the firm of "Gibson, McKellar and Co."

The Appellant was appointed by the deed of partnership the agent in England of the firm of "Gibson, McKellar and Co.," for the purpose of selecting for "Gibson, McKellar and Co." the goods and merchandise from England which they might require for the purposes of their trade, but, shortly after his arrival in England, the firm of "Gibson, McKellar and Co." gave instructions to the Appellant to hand over to the firm of "D. McKellar and Son" the indents or orders for goods and other merchandise which they, from time to time, should enclose to him, in order [383] that the firm of "D. McKellar and Son" might apply the goods and merchandise thereby ordered; and, in pursuance of such instructions, from that time all the goods and merchandise specified in the indents or orders of the successive firms of "Gibson, McKellar and Co." and "Gibson and Co.," with the exception only of some of comparatively trifling amounts, were procured and supplied by the firm of "D. McKellar and Son," through the Appellant, as such agent, who merely assisted in selecting such goods and merchandise, and paid for the same as agent under the before-mentioned partnership deed, and charged the firms of "Gibson, McKellar and Co.," and "Gibson and Co.," commission at the rate of five per cent. for acting as agent in selecting and in advancing the money to pay for the goods and merchandise so supplied to them, in respect of which the Appellant, from the latter end of the year 1832, to January, 1839, made advances out of his own monies for those firms to a great amount without settling any account with them up to the latter end of the year 1831.

The members of the firm of "Gibson, McKellar and Co.," after the Appellant retired from the partnership, collected under the powers of the partnership deed, money to a large amount, on behalf of the Appellant, in respect of debts owing to him by the customers of the firm of "R. Gibson and Co.;" but Leslie, and the Respondent, Wallace, after the death of T. McKellar, were charged with having neglected to collect a large portion of the debts so due to the Appellant, which, it was alleged, in consequence of such neglect, were lost.

The Appellant, in November, 1837, executed a [384] power of attorney, appointing one Greenaway, of Calcutta, his attorney and agent, to recover and receive from the firm of "Gibson McKellar and Co." all debts which then were, or thereafter should be, due to the Appellant, not only on account of the firms of "R. Gibson and Co.," and "Gibson, McKellar and Co.," in which he had been a partner, but also

for the monies due to him from the firm of "Gibson, McKellar and Co.," for the goods and merchandise as settled by the firm of "D. McKellar and Son," and paid for by the Appellant, as such agent, and at the same time the Appellant empowered Greenaway to make out and finally settle all accounts between the Appellant and the firm of "Gibson, McKellar and Co."

This power of attorney was received by Greenaway, in February, 1838; but previously to its receipt, and on the 26th of January, 1838, T. McKellar died, having by his Will appointed Greenaway his executor, who proved the Will; and, shortly after the death of T. McKellar, his share in the business of "Gibson, McKellar and Co." was by deed assigned to Leslie and the Respondent, Wallace, by Greenaway as such executor; and by such deed, Leslie and Wallace took upon themselves the payment of all the partnership debts and liabilities to which T. McKellar was liable jointly with them at the time of his death, as a member of the firm of "Gibson, McKellar and Co."

In the beginning of the year 1838, Greenaway, as the Appellant's agent at Calcutta, rendered to "Gibson and Co." the Appellant's account current between him and "Gibson, McKellar and Co.," of all their dealings and transactions in business then remaining unadjusted (other than those which related to the [385] collecting of and accounting for the outstanding debts due to the Appellant), from the month of June, 1832, to the 31st of January, 1838. This account current, numbered 2 in these proceedings, at the time it was so rendered by Greenaway, was objected to by the firm of "Gibson, McKellar and Co.," when Greenaway requested Leslie and Wallace to make out and render to him, as such agent, the accounts in the manner which they were willing to admit the same. They agreed to do so; and, accordingly, they made out and rendered their account current to Greenaway, up to the 31st of January, 1838, which was numbered 3. By such account they admitted a balance of Rs. 491,695. 14s. 3p., to be due from "Gibson, McKellar and Co." to the Appellant, on the 31st of January, 1838.

The difference in amount between the accounts numbered 2 and 3, rendered by Greenaway on behalf of the Appellant, and by "Gibson and Co." respectively, was a sum of £3757 15s. 1 $\frac{3}{4}$ d., but there was no difference whatever in such accounts as to the respective amounts of the sum total charged against "Gibson, McKellar and Co." for the price of each shipment of goods. In the account No. 2, discount at the rate of two-and-a-half per cent. up to the 30th of June, 1836, upon the respective amounts of the sums total charged, was allowed to "Gibson, McKellar and Co.," and from that time to the close of the account, no discount was allowed; and a commission of five per cent. was charged upon the respective amounts of all the sums total so charged. By the account No. 3, "Gibson and Co." claimed to have certain discounts allowed upon amounts total charged against "Gibson, [386] McKellar and Co." for the price of shipment of goods and for commission of five per cent. charged only upon the respective amounts of all the sums total so charged, after first deducting a discount of seven-and-a-half per cent., and the difference of interest consequent upon these differences, and such claims, represented all their objections to the account No. 2.

In consequence of these claims on the part of Leslie, and the Respondent, Wallace, many negotiations and discussions took place before the month of September, 1838, as to their settlement, and at length it was, in September, 1838, finally arranged and agreed between Greenaway, as the Appellant's agent, and "Gibson and Co.," that the firm should pay the Appellant the sum of Rs. 91,695 14s. 3p. in cash, and give a bond for 4 lacs of Company's Rupees, payable quarterly by instalments of Rs. 25,000, and that the disputed item of £3757 15s. 1 $\frac{3}{4}$ d. should stand over for future investigation; and, accordingly, the firm of "Gibson and Co." paid Greenaway that amount in cash, and on the 24th of September, Leslie and Wallace executed and gave their Bond for 4 lacs of Rupees, payable by instalments. This Bond recited, that Leslie and Wallace had examined and investigated the several accounts of the Appellant with the firm of "Gibson, McKellar and Co.," rendered on his behalf, up to the 31st of January, 1838, but that they refused to admit the further sum of £3757 15s. 1 $\frac{3}{4}$ d. claimed as due to the Appellant, until satisfied on further investigation and examination.

In May, 1839, Leslie came to England, bringing with him a power of attorney



from his co-partner Wallace, expressly authorising him to settle the dif-[387]-ferences between the firm of "Gibson and Co." as to the disputed item of £3757 15s. 1½d., and such differences were accordingly finally closed and settled by Leslie giving to the Appellant a Bill of exchange, dated the 31st of August, 1839, drawn by the Appellant upon and accepted by Leslie in the name of the firm of "Gibson and Co.," payable eighteen months after date, for Rs. 30,744. 4a., a lesser sum than the reserved item.

The Bill of exchange was forwarded to Greenaway at Calcutta, who received the same in due course, and informed Wallace of that fact. The Bill not having been paid at maturity, the Appellant, on the 14th of March, 1841, brought an action on the plea side of the Supreme Court at Calcutta against the Respondent, Wallace, and Leslie to recover the amount. To this action the Defendants pleaded, first, that they did not accept; secondly, that the Bill was accepted at the request and for the accommodation of the Appellant, and without any consideration for the same; thirdly, that the acceptance was obtained and procured by the Appellant by fraud and covin; and fourthly, a set off. A commission for the examination of witnesses in England was obtained, but was not returned at the date of the trial, (the 30th of June, 1842,) when a verdict was given for the Appellant, for the amount of the Bill of exchange, and interest at 8 per cent.

Leslie died on the 11th of June, 1841, having by his Will appointed the Respondents his executors.

While the proceedings at law were going on, the Appellant, on the 30th of September, 1841, filed a bill on the equity side of the Supreme Court at Calcutta [388] against the Respondent, Wallace, as surviving partner of the firm of "Gibson and Co.," and also against the other Respondent, Spence, the executor of the late Leslie. The bill stated, among other things, the before-mentioned deed of co-partnership and the collection and realisation, by T. McKellar, Leslie, and Wallace, of certain of the debts due to the Appellant from the customers of the firm of "Gibson, McKellar and Co.," who had been customers of the firm of "R. Gibson and Co.," and that other of such debts had been lost by the neglect of T. McKellar, Leslie, and the Respondent to recover and get in the same, and prayed that an account might be taken of all monies which T. McKellar, Leslie, and Wallace, or any of them, and which the Defendants, as executors of Leslie, or either of them, had collected or received in payment or satisfaction, either wholly or partly, of the debts due to the Complainant as such member of the old firms in which he was so interested as aforesaid; and of the debts which he had purchased or obtained from G. T. Gibson as aforesaid, and of all monies which McKellar, Leslie, and Wallace, or any of them, and which the Defendants, or either of them, as such executors aforesaid, had collected or received from the customers of the new co-partnership firm, and which, according to the terms and provisions of the deed of co-partnership had been applied towards payment of the debts due to the Plaintiff, and paid over to or placed to his credit, which but for the wilful neglect or default of McKellar, Leslie, and Wallace, and each of them, might have been collected in or received by them; and that the Defendants might be decreed to pay him what, [389] upon taking such account, might be found due to him; and that the Defendants should deliver over and deposit with the proper officer of the Court, all the accounts, vouchers, etc., belonging or in any way relating to the old firms in which he was interested as aforesaid; and that in the meantime the Defendants might be restrained from collecting or receiving any of the debts due to him, and for general relief.

The Respondents, on the 23rd of February, 1842, put in a joint answer, admitting that T. McKellar, Leslie, and Wallace collected and received debts and monies to a large amount on behalf of the Appellant, and which were owing to the firm of "R. Gibson and Co.," but they denied that any debts had become irrecoverable and lost to the Appellant by reason of any neglect or omission on their part, as alleged in the bill.

On the 1st of March, 1843, the Respondents filed a cross bill in the same Court against the Appellant. The bill stated, that the Appellant had been appointed as attorney to collect divers sums of money on bills, etc., for the firm of "Gibson, McKellar and Co.," and that he never at any time rendered a true account of the collection of such monies, and by reason of his negligence in not demanding pay-

ment of, or suing upon, certain bills, the same became irrevocable, and barred by the Statute of Limitations; that the Appellant as such agent had charged the firm with the agency commission of five per cent., and the bill charged that the invoices sent were imperfect, incorrect, and false, the Appellant having, in breach of his duty as agent, charged higher prices in his accounts than the price actually paid by [390] him to those from whom he had purchased, and had not allowed them discount when allowed to him, and that the accounts wanted many items which ought to have been credited to the firm of "Gibson, McKellar and Co.;" and that the members of that firm had never obtained a full, true, and faithful account of his dealings, transactions, and purchases as such agent. The bill also charged, that the accounts between the firm of "Gibson, McKellar and Co." were still open and unsettled, and, after charging that the Appellant had in his possession the original invoices, etc., and seeking the production thereof, prayed, that the prior accounts might be opened up and re-adjusted; and for an injunction restraining him from receiving any of the debts, and that the Bill of exchange might be delivered up and cancelled, as it had been obtained by pressure and duress, and the Appellant restrained from issuing execution upon the judgment recovered by him.

The Appellant by his answer insisted, that the accounts were finally settled and closed by the payment and Bond; that after the settlement of the disputed item of £3757 15s. 1 $\frac{3}{4}$ d., when he considered all matters in relation thereto finally settled and adjusted, he had destroyed the greater part of the vouchers and papers relating thereto, as being no longer of any value, and he submitted, that by reason of such final settlement of accounts the Respondents were not entitled to any account of such particulars as were inquired after and prayed for by their bill, previously to the 31st of January, 1838; and he further, by his answer, stated, that he had received from the sellers, from the years 1834 to 1836, in consequence of ready-money payments, a discount varying from 5 [391] to 7 $\frac{1}{2}$ , and that he received a commission of 2 $\frac{1}{2}$  per cent., as a *del credere* commission, from June, 1836, to end of 1837, out of the profits of the parties from whom he purchased the goods.

Witnesses were examined on both sides, and the correspondence between the parties respecting the settlement was filed. The Appellant examined Greenaway, to establish the material issue, that the accounts were stated and settled as he insisted. There was no evidence to show that the Appellant had been guilty of any of the acts of fraud or duress, or that he had been guilty of neglect or default in getting in the debts due to the firms of "Gibson, McKellar and Co." and "Gibson and Co.," as alleged by the bill.

The two causes were heard together in the month of February, 1847, when the Chief Justice, Sir Lawrence Peel, pronounced the judgment of the Court, to the effect, that as there was no ground for impeaching the Bond as fraudulent, it must, therefore, be deemed a settlement as far as it extended; that there was an exception of the sum of £3757 15s. 1 $\frac{3}{4}$ d., which appeared to him to be the only matter substantially in dispute; that it did not appear that the accounts under settlement excluded any of H. McKellar's claims, and the presumption was, that all his claims were included. That the claims against the Calcutta firm appeared to be referable to three heads; the sum agreed to be paid as a valuation of stock, on the admission of the succeeding members to the firm of which H. McKellar was the sole member; the collections in Calcutta to be carried to account of the firm or firms centred in H. McKellar, and the sums advanced by him in England, and his charges on purchases effected by him for the house in Calcutta; and [392] that these on the evidence could not be taken to have been the basis of the proposed settlement. That if, therefore, the Plaintiff in the original suit (the Appellant) was permitted to have an account of the collections from an earlier date than the date of the Bond transaction, it would be in effect re-opening the accounts, of the settlement of which he had taken the benefit. That, therefore, the account, in the original bill, must be confined to transactions subsequent to the Bond. As to the sum excepted and reserved on giving the Bond, the Chief Justice thought that the circumstances which had taken place were such as ought not to preclude the inquiry proposed to be directed, and the Court referred it to the Master to take the accounts upon that footing.

The case was afterwards re-heard, and on the 22nd of February, 1848, the Chief



Justice pronounced the judgment of the Court, "that the nature of the reservation (the sum of £3757 15s. 1 $\frac{3}{4}$ d.) out of the settled accounts was such as to be applicable to all or any of the sums included; and, therefore, they varied the former decree by referring the accounts generally, with direction, that if the Master should find a settled account, he should take the account on that footing."

The Appellant took the initiative in the Master's office, proceeding with the reference ordered by the above decree; and evidence respecting the accounts was entered into.

On the 3rd of April, 1849, the Master made a separate report upon the question, whether the accounts between them was or was not a settled account, and he thereby found, that the accounts between the parties in the suits, and the reserved item [393] of £3757 15s. 1 $\frac{3}{4}$ d. were not, nor was either of them, settled, as contended before him on the part of the Appellant, but that the same were still open and unsettled. To this report, the Appellant took exceptions, first, that the Master had found that the accounts between the Appellant and the firm of "Gibson, McKellar and Co." up to the 31st of January, 1838, were not settled by the Bond, whereas he ought to have found that the whole of the accounts and dealings between the Appellant and the firm of "Gibson, McKellar and Co.," up to the 31st of January, 1838, were closed by the Bond, except as to the reserved item of £3757 15s. 1 $\frac{3}{4}$ d. and two other small sums, and except the amount prayed for by the Appellant's bill; secondly, that he ought to have found the reserved item of £3757 15s. 1 $\frac{3}{4}$ d. settled and closed by the Bill of exchange.

These exceptions were argued before the Supreme Court, and by an Order of that Court, dated the 16th of July, 1849, the same were overruled and the Master's separate report confirmed. The judgment of the Court was delivered by Mr. Justice Colville, to the effect, that the Master was right in finding that there was no settlement of the accounts, in the sense in which that term was understood in a Court of equity, on either of the occasions referred to by the exceptions; and that even the language used by the Appellant himself, in making his claim before the Master, was not that ordinarily used in setting up a settled and closed account; namely, that the accounts were stated and settled, and that thereupon certain payments were made and a security given, on the footing of that settlement; but that the settlement contended for was effected by such payments and the execution [394] of such security, and that these acts, which might be material as constructive evidence of an antecedent settlement of accounts, was treated as constituting the settlement itself. That the Bond, if taken alone, was neither an account stated, nor afforded any satisfactory evidence of an account stated; no balance being agreed upon, it being left an open question, whether the sum admitted to be due was or not to be increased by the sum of £3757 15s. 1 $\frac{3}{4}$ d.; and he was of opinion, that the Plaintiff had failed to establish that, in September, 1838, there was such a settlement of accounts as that which he set up, or that anything was done by which, in taking the accounts directed by the decree, effect could be given to it as to an account stated. That the effect of the acceptance for Rs. 30,744. 4a. given by Leslie in the partnership name of "Gibson and Co." to McKellar, was not such a transaction as ought to be treated as a settlement of accounts between principal and agent, which precluded the former from having the accounts of the latter taken in a Court of equity.

Proceedings were then resumed in the Master's office, and warrants were issued at the instance of the Appellant, in pursuance of the original decree, requiring the attendance of the Respondents before the Master to go into the accounts. Meetings were had, and the accounts gone into, and other proceedings in relation thereto taken.

No appeal was asserted from the Decree pronounced in February, 1848, or the Order of the 16th of July, 1849, made on the Exceptions, but the Appellant's counsel in Calcutta, being of opinion that an appeal might be successfully prosecuted, intimation to that effect was communicated to the Appel-[395]-lant, who was resident in England, and a correspondence ensued respecting the evidence and proof within the Appellant's power to verify and produce. The Appellant also took the opinion of counsel in England, on points relative to the expediency of an appeal, and ultimately having been advised so to do, by letters, dated the 7th and 24th of December, 1849, instructed his agent in India to direct counsel to move for such appeal on his

behalf. The instructions thus sent were, however, not available before the 20th of February, 1850, when the period of six months, the time limited for appealing by the Calcutta Charter of Justice, had expired, and the right to appeal, therefore, lost. Under these circumstances, McKellar presented a petition to the Queen in Council, praying for leave to appeal, notwithstanding the time limited by the Charter had expired.

This petition was heard before the Judicial Committee, *ex parte*, and, being supported by an affidavit setting forth the circumstances above stated, was allowed, upon terms of the Petitioner giving security for costs, and lodging in the Council office a certificate of recognizance in the penalty of £500.

The service of the Order made upon this petition, dated the 25th of June, 1850, upon the Respondents in India, was the first intimation they received of the appeal, and they presented a counter-petition to the Queen in Council to rescind and revoke such Order. It alleged, that no notice of the application for leave to appeal had been given to them, and that proceedings in the Master's office, in the original and cross bill, had been taken by McKellar without any notice of his intended application. That they had no opportunity afforded them of staying proceedings, but [396] were compelled by the steps and proceedings taken by McKellar, as actor, to proceed and incur great expense in the Master's office, since the passing of the Decree of the 22nd of February, 1848, and the Order of the 16th of July, 1849, and that such expenses which they had been so led into could never be recovered, if the appeal was successful, as the whole of these proceedings would be a nullity. That two years had elapsed since the date of the Decree of the 22nd of February, 1848, and the time when the petition was presented to Her Majesty in Council; that the taking of the steps and proceedings, as actor, inducing them to proceed under the reference in the Master's office, was an acquiescence and submission to the Decree and Order, and a waiver of his right to appeal. That if such fact had been known to the Committee, they would have made McKellar give security for the costs incurred by this proceeding. That McKellar had not entered or prosecuted his appeal; that it was a condition precedent by the Order of Her Majesty in Council, that he should lodge a certificate of recognizance, but that he had not done so, and they prayed that such Order in Council might be reversed, and that McKellar might be ordered to pay the Petitioners the costs incurred. This petition was supported by an affidavit verifying the principal allegations, and was served on the Appellant's agent.

(June 18, 1851.)\* Mr. Leith moved to dismiss.

This Court would not have made the Order, admit-[397]-ting the appeal, if it had been possessed of the knowledge of the fact of the proceedings taken in the Master's office by McKellar, under the Decree of the 22nd of February, 1848. That fact was not disclosed in the application made by him, which was *ex parte*. Moreover, the terms of the Order in Council have not been complied with. No recognizance has been entered into, nor has any petition of appeal been lodged, although nearly a twelvemonth has elapsed since the date of the order.

Mr. Wigram, Q.C., *contra*.—It was not thought necessary to appeal from the interlocutory decree, and, accordingly, the parties went in before the Master to take the account. When it was discovered that it was requisite and expedient to appeal, the six months limited by the Charter had expired, and this Court granted leave to appeal as an indulgence.

The Right Hon. T. Pemberton Leigh.—There has been great laches, but not such as, in their Lordships' opinion, ought entirely to shut out the appeal. But further terms must be imposed upon the Appellant. The recognizance must be increased to the sum of £1000, a sum sufficient to cover the costs incurred in the Master's office, by the Appellant forcing on the proceedings and taking the accounts; and, as the delay has been occasioned by the Appellant, the petition of appeal must be lodged in the Council office within six weeks, and if not then lodged, the appeal is to stand dismissed. This course will, we think, do complete justice to all parties. We reserve the costs of this application.

\* Present: Members of the Judicial Committee.—The Right Hon. Dr Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Jervis, Knt.



[398] By the Order in Council made upon this petition, the Appellant was directed to lodge in the Council office the certificate of recognizance to Her Majesty, in a penalty of £1000 sterling, conditioned to stand and abide such determination as might be made, and to pay all such costs as might be awarded in case the appeal be dismissed (such recognizance to be in lieu of the aforesaid recognizance of £500, for costs in the appeal as set forth in the Order of the 25th of June, 1850), and to perfect such recognizance, and lodge his petition of appeal in the Council office within the space of six weeks from the date of the report, and, in the event of failing to perfect such recognizance, and lodge such petition within that period, the Order be discharged, and the costs of the petition paid by the Appellant; but if the recognizance was perfected, and the petition of appeal lodged within that period, then that the costs of the petition was to be reversed.

The appeal now came on for hearing.

Mr. Wigram, Q.C., and Mr. W. A. Collins, for the Appellant.—The simple question the Court below had to decide was, whether the transaction in question entered into in the month of September, 1838, amounted to a settled account up to the 31st of January, 1838, between the parties, and precluded the Respondents from opening the accounts again. Our contention is, that it did constitute a settled account, and that the Court below entirely misconceived the effect of that settlement. Indeed, the Bond and Bill of exchange is a bar to any such claim. The evidence of Greenaway, and the correspondence between the parties respecting [399]ing this settlement, show beyond dispute that it was a clear case of settled account, with the reservation of one item of £3757 15s. 1 $\frac{3}{4}$ d. Although the investigation of that item, if it had been found to be incorrectly made up, might have disarranged the items in the prior accounts up to the 31st of January, 1838, yet that would not affect such settlement, and that was also settled by the acceptance of the Bill of exchange for a less amount. The charges of wilful neglect and fraud contained in the original bill were unsupported by evidence, and wholly failed. As the accounts between the parties had been so long settled, we submit that the Decree ordering the reference to the Master to take the accounts, and that the Order overruling the exceptions, ought not to have been made. *Brownell v. Brownell* (2 Bro. C.C.62).—Mr. Pemberton Leigh.—The proceedings taken by the Appellant in the Master's office under the Order was wrong: he should have appealed at once; at all events, he ought, whichever way our judgment may be, to pay the costs of those proceedings.—The Decree was an erroneous one. In *De Burgh v. Clarke* (4 Clk. and Fin. 562) the House of Lords held that the original Decree, pronounced more than two years before enrolment, was saved by a subsequent Order made in the cause. They referred also to *Parker v. Morrell* (2 Phillips, 453).

Mr. Rolt, Q.C., and Mr. Leith, for the Respondents.—The accounts have never been stated and settled. The Court below was, therefore, perfectly right upon the facts shown, to refer it to the Master, with [400] liberty to surcharge and falsify the accounts. They were not closed by the transactions which had taken place. The claims made by "Gibson, McKellar and Co.," in the account No. 2, for discounts, over-charges in respect of the shipments, and the differences of interest which formed their objection to the account, have never been settled; one of the disputed points being, whether a *del credere* commission was properly charged by the Appellant in his character of agent: a most important inquiry, as it converted the agent into a principal. The Respondents were wholly in the dark as to the particulars of these discounts and overcharges. They never had the vouchers, only the invoices and statements upon which the alleged settlement of the account up to the 31st of January, 1838, was founded. Facts which the Appellant was bound to have communicated to them were kept back at the time of executing the Bond and accepting the Bill of exchange. The statement furnished them was a *suggestio falsi*. What can be stronger proof that it was not a formal settlement than the undisputed fact, that the item for £3757 15s. 1 $\frac{3}{4}$ d. was reserved, and which manifestly, if wrong, would disarrange the whole of the items of the general account? That alone is sufficient to entitle us to have the accounts opened, as the Court below most clearly expressed in the judgment of Mr. Justice Colvile. It was not necessary to establish legal fraud: there was unfair advantage taken, and that is sufficient to justify the

Court in opening the accounts. *Gibson v. Jeyes* (6 Ves. 266). *Wood v. Downes* (18 Ves. 120). *Montesquieu v. Sandys* (18 Ves. 301, 308). *An-[401]-derson v. Maltby* (2 Ves. 244; S.C. 4 Bro. C.C. 422). Length of time is no bar if fraud appears in a stated account. *Vernon v. Fawdry* (2 Atk. 119). *Allfrey v. Allfrey* (1 Mac. and Gor. 87).

The Right Hon. T. Pemberton Leigh.—During the progress of this appeal, we have had an opportunity of looking very carefully through the whole of the papers in the case, and after the extremely clear and able manner in which the case has been argued at the bar, we feel ourselves in a situation to dispose of it at once, and we think it better to do so now, than to put the parties to any further delay.

The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid [402] the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side.

Now, that being the general law of the case, it appears to us very clear that the settlement which took place here was in the nature of a compromise: an acceptance by one party, and a consent to pay by the other a gross sum in satisfaction of a disputed account. Whether the circumstances under which that settlement took place are such as to induce a Court of Equity to set aside the transaction, and direct a general or specific account, must depend on the particular facts of this case, which makes it necessary for us to go into those facts a little more in detail than we should otherwise have done.

Now, the facts appear to be these: Previous to 1831, the Appellant carried on business as a merchant tailor and clothier in Calcutta, under the name or firm of "Robert Gibson and Co." In the month of January, 1831, he agreed to admit into partnership with him two persons of the names of Wallace and Leslie, who had previously been his assistants in the business, a [403] circumstance not wholly immaterial, because it shows that those persons were probably well aware of the nature of the business, and the mode in which the transactions of that business were carried on both by the London and Calcutta houses. The terms of that partnership were not reduced into writing at the time it commenced, and it was not until May, 1832, that articles of partnership were executed. By those articles of partnership, (after reciting the agreement which had been made for a partnership to commence at the beginning of 1831,) it was stated, that a valuation had been made of the shares, of which these new partners were to have one-fourth each, and that a joint and several Bond had been given with the consent of the Appellant, Henry McKellar, for the amount which was due in respect of those two fourth shares, and a period of four years was to be allowed for the payment of the sum, amounting altogether to Rs. 112,500. It further appears from this deed, that the Appellant contemplated retiring from the partnership, and introducing his brother, Thomas McKellar, into the concern, and going himself to England; and there was power reserved by the deed for the Appellant to make that arrangement; and it was further agreed, that



in the event of McKellar disposing of his share and interest in the co-partnership, and proceeding to England, he should be the agent of the firm of "Gibson, McKellar and Co." in Europe, and that all sum or sums of money that should be remitted to any agent or agents in England should be remitted to him. But no stipulations were introduced into the deed either in respect of the remuneration which H. McKellar was to receive, or the duties he was to perform.

It seems that in November, 1832, Thomas McKellar [404] did go out from England, when the Appellant's share in the partnership was transferred to him, and, in the same year, the Appellant returned to England.

Now, it appears from the old account, No. 1, which is in evidence, that previous to leaving Calcutta the Appellant settled with Wallace and Leslie the amount which was due to him, between himself and his partners, and at that time a balance was shown to be due of about Rs. 228,941.

On coming to England, the Appellant acted, as he had agreed to do, as the agent for the new firm at Calcutta, and not only selected the goods that were to be sent to the Calcutta firm, but he himself paid for those goods; and it appears from the accounts, which are not disputed, that the advances he made in that respect were so large, that at the end of the year 1833 they amounted to £11,676, and at the end of 1834 they amounted to £20,685, and at the end of 1835 to about £29,000. Now, during the whole of that time invoices were sent of the goods that were thus furnished to the Respondents: invoices would, of course, be sent by the parties who supplied the goods, and, with a single exception, all those goods were supplied by the firm of "A. McKellar and Co." in London. Now, those invoices would, of course, show to the Respondents the amount of the goods which they were alleged to have received, and the amount of the invoice prices which were represented to have been paid for those goods. On the other hand, they would not show what charges the Appellant was supposed to make for the agency he performed on their behalf in England, or the allowances which he might make in respect of the sums that were charged in the invoice account. But, in the autumn of 1836, an account [405] current was sent of all the dealings and transactions which had taken place in respect of that agency from the beginning: to what date does not distinctly appear; but at all events, it must have been up to the end of the year 1835. Now, that account would necessarily show everything: it would show what charges he made: it would show what allowance he made: it would show at what rate interest was charged, and at what rate commission was charged; and, as far as I can find in the course of these proceedings, no observation was made on the account so rendered, either in the shape of approbation or disapprobation, until a period which I am about to mention. The parties go on in that way; H. McKellar continues to purchase goods, and to send them out, paying for those goods until the month of January, 1838, and probably until a subsequent period: but it is only to the month of January, 1838, that it is necessary for us to apply our attention.

In 1838, according to the account made out by the Appellant, there was due to him on the old account, Rs. 228,941, and on the new account, or the purchase account, the sum of £36,169. These accounts were sent out to Greenaway, his agent at Calcutta, with directions to obtain a settlement, and with power to give a discharge for anything which might be paid in respect of them. With these accounts the Appellant sent a letter addressed to the Respondents, on which much reliance has been placed by the Respondents in their argument. It is to be observed, that in the account current there was this distinction: up to the month of June, 1836, and during part of that month, there is an allowance made by the Appellant for discount in all these accounts. What [406] the distinct rate was, is not, perhaps, in all cases, very clear: we will take it at two-and-a-half per cent, as the Respondents allege that it was. But, from the end of June, 1836, there was no allowance for discount at all. Therefore, there was a difference in the discount allowed: up to June, 1836, a discount allowed, and no discount allowed after June, 1836. In 1838, Greenaway receives the accounts, accompanied by a letter to the Respondents, which contained this passage: "I have now the pleasure to forward copy of your account current, to which I do not anticipate any objection." It is clear, therefore, that there had been some previous correspondence and discussion between these parties with respect to the result of these accounts. With respect to

this dealing, he says, he sends these accounts; and the letter then goes on to say that, "the discounts have been shown where allowed in the account rendered. You will observe from the last shipment, in June, 1836, no discount has been allowed, the whole of the goods having been purchased for cash, and consequently none allowed, as also in the account of Brickwell and Moore, enclosed in mine to you of last month."

Now, it is said that this is an incorrect representation by the Appellant, and is in fact equivalent to saying, You will find in this account the whole amount which I have received for discounts allowed. Why, it is quite obvious that it is no such thing. The character of that statement is this, as has been urged by the Respondent's counsel. In part of the account there is discount allowed, in another part of the account discount is not allowed; where discount is allowed you will see it in the account, and where [407] none is allowed, it is stated that he had received none.

These accounts, together with a letter dated the 26th of April, 1838, are sent by Greenaway to the Respondents; a letter proposing and urging a settlement, and offering to correct any errors or omissions that may be found in them.

Now, what takes place upon this! The Respondents had known in 1836, or in the beginning of 1837, when they received this account current, the principle upon which this gentleman was making out his account; the amount on which he charged interest; the rate at which he charged interest; the rate at which he charged commission, and the rate at which he allowed discount. It is very true they did not know by that account, either in 1836 or in 1838, what the amount of discount was which the Appellant himself had received; but having these accounts rendered to them, they object; and what is their objection? Why, at first it did not very distinctly appear what the particular grounds of their objection were; but Greenaway says, Well, if you are dissatisfied with this account, render me an account as you say it should be made out: an account with the items which you say it ought to contain. They do make out what they say the account ought to be, and they charge the Appellant, and debit the account with discount at seven-and-a-half per cent upon every purchase, introducing into the account the corrections that would result from that deduction. It is perfectly true that the effect of that would be to alter every single item in the account, and that seems to have been the difficulty which was pressed upon the Court below, namely, that they could not consider it in any sense a settle-[408]-ment, when not only the balance might have been altered, but when there was not one single item in the account which would not be altered if the defence of the Respondents prevailed. Then what is the result of that account as made out by themselves? The result is this: that there is due on that account, instead of £36,000, a sum of £32,000 or £33,000, making, therefore, a difference of £3000; and then how is that matter treated by these parties? Why, they say this: Here is a balance which we must admit to be due from us, at all events, to the amount of Rs. 491,695, and if you will give us time for the payment, we will consent, not only to admit that balance, but we will pay down Rs. 29,000 at once, and we will give security, by our Bond, for the payment of Rs. 400,000 by instalments, in four years, by a lac of rupees in each year.

Well, it is said, this is not a compromise but a settlement. It is not very material which: the language, however, of the Bond, would rather seem as if it were in some sort a compromise, for it states, that in consideration that time shall be allowed the Respondents for the payment of that balance, it is agreed to admit that Rs. 491,695 are due by them, but at the same time they say that "whereas they have examined and investigated the several accounts of the said Henry McKellar with the said firm of Gibson, McKellar and Co., rendered by or on behalf of the said Henry McKellar, up to the 31st day of January last, and the said Henry McKellar having agreed to grant such time for payment as in the condition hereunto written, the said William Leslie and John Wallace have admitted the sum of Company's Rs. 491,695 14s. 3p." (showing the extreme minute-[409]-ness with which they had made the examination), "to have been due and owing by the said firm of Gibson, McKellar and Co. to the said Henry McKellar, on the 31st day of January last, but have refused to admit the further sum of £3757 15s. 1 $\frac{3}{4}$ d. sterling of lawful



money of Great Britain, claimed as due to the said McKellar until satisfied on further investigation and examination."

Now, is it possible that there could be a more solemn adjustment of an account, as far as that adjustment went? The account begins with an account in 1836; a subsequent account in March, 1838; a discussion for nearly six months on those accounts; a final admission of Rs. 491,695 being due, and an express reservation of an item of £3757, not as a disallowed item, but as an item which at that moment had not been ascertained, but which might be ascertained and would be ascertained by further investigation and examination. Well, this Bond was given, and the amount, as it appears, paid.

Now, not very long after, namely, in the year 1839, Leslie, one of the partners, comes over to England. It appears that he brought with him a power of attorney for the settlement of the accounts; that it was a partnership matter that he had authority to deal with when he came to England, and which accordingly he did deal with. Now, observe, when he came to England, in what position these parties stood toward each other. There had been the fullest investigation and examination of these accounts, and the fullest time in respect of considering them in every point except one, and that point is one which cannot be cleared up at Calcutta, where Greenaway is the agent; it must be cleared up in England, unless the vouchers relating to [410] those payments are sent over to India. Leslie comes over; he sees the Appellant, and no doubt he had the right then to say, Before I pay you a shilling of this £3757, or give security for it, you, who are my agent, are bound to give me the whole of the information you possess; you are bound to produce the vouchers which show what discounts you have received; I shall then claim that I am entitled to be allowed upon the Indian account all the discounts you have received, which are larger than are credited, and, therefore, to have the account corrected, by reducing each and every item of the account, according to that reduction. That was his right, no doubt; but, on the other hand, if he thought fit, instead of insisting upon that right, he might say, Instead of going through these accounts; instead of comparing them; instead of ascertaining the balance which may increase or diminish that £3757; if you are willing to strike off £1200, and to accept the balance in full of all demands, I, on behalf of myself and my partner, am content to pay that sum, and I will give you my acceptance for the amount so reduced, and there will be an end of the transaction between us. Now, is it possible to conceive a more fair settlement of an account than this, as far as it had gone? A Bill of exchange at eighteen months is accepted, allowing abundant time for the partners in Calcutta, if they objected to the settlement, to object to it, and if they could set it aside, to set it aside. Leslie goes out to India again in the beginning of the year 1840, and what is the evidence? When he is communicating with his partner, Wallace, does Wallace say he had no authority to make that settlement? Does Leslie say, I was coerced; I was under apprehension; I was misled by the representations [411]-tions of the Appellant, and, therefore, the settlement is not to stand? Wallace is proved distinctly to have said, on more than one occasion:—This is a settlement which has been made, a Bill of exchange has been given in respect of that settlement. If I had been dealing with you, Mr. Greenaway, I think I could have made a better settlement; that is, if I had been dealing with you, who have not the vouchers, I could have made a better settlement than with the Appellant, who has the vouchers; but a settlement has been made, and I suppose the Bill must be paid.

But it does not rest here. The Bill being given on the 31st of August, 1839, does not become due until the 3rd of March, 1841. In the interval, these parties, who had previously been on the best terms, appear to have quarrelled. Of course, we know nothing of this case except from what appears upon the facts and correspondence. They appear to have been under great obligation to the Appellant. Whatever their feelings previously had been, it is plain that a rupture had taken place, and feelings of the greatest hostility, to judge by the language of their letters, were entertained by the Respondents or by Wallace, the surviving partner, towards the Appellant. Independent of the account to which I have referred, the Calcutta firm had acted as the agents of the Appellant in collecting and getting in the debts due to him as representing the preceding partnership, and he makes repeated

applications for an account of their receipts, in respect of that collection. In October, 1840, more than twelve months after that Bill had been given, they write him a letter, in which they say, "We will not render you any account at all; we will not give you one shilling we have received from [412] you, until you settle our outstanding claim against you." Greenaway writes, "What have you, as agents, collected? Do give me a notion." That is, what is due to the Appellant. They send him a letter, enclosing a rough note of their claims, and neither in that letter, nor in the rough note from beginning to end, is there the slightest allusion to the settlement which had taken place in England.

The Bill becomes due in March, 1841; it is dishonoured, and an action is brought on the 14th of March, 1841. Now, what is the course the Respondents take? They defend the action at law; they obtain a commission for the examination of witnesses in England, and by that means they suspend that action from the month of March, 1841, to the month of February, 1842. That commission was never returned, an application was made with success to set down the cause for trial, and a verdict was then obtained in 1843, which the Plaintiff was manifestly entitled to in 1841; and then a few days afterwards they resort to what used to be, and I presume still is, the resource of desperate debtors; namely, having failed at law, they file a bill in equity, imputing all manner of fraud in the accounts or in the settlement of the accounts, and in obtaining the Bill of exchange by the Appellant, and they pray for a general account, for an injunction, and for the delivery up of the Bill of exchange to be cancelled. To that bill the Appellant put in his answer; and what is the result of that answer? It has been read very fairly on both sides; there is no question upon the facts, but there was no evidence in favour of the Respondents, except upon that answer; and the result of it is this: the mode in which I have stated this account [413] is, that from 1833 to 1834, I received no discount; from 1834 to 1836, I received discounts at rates varying from five per cent to two-and-a-half per cent; from 1836, I received no discount at all, in the name of discount; but I received a *del credere* commission at the rate of two-and-a-half per cent. Now, he says, I insist upon this, that not only according to mercantile usage, these were fair and reasonable charges, such as I was entitled to make, but if the accounts had been made out according to ordinary mercantile usage in such cases; if I had drawn upon you for the purchases instead of supplying you for four years, at least, with the whole amount of capital by which your business was carried on; instead of being in your favour, I believe the account would have been £8000 or £10,000 more against you than it is.

Then it is said, that this is a case in which the transaction whereby the account was settled by the delivery of the Bill of exchange for Rs. 30,744 is to be set aside. On what possible ground is it, that this transaction is to be impeached? As I understand the judgment in the Court below, the Chief Justice, at the original hearing, or rather the re-hearing, seems to have entertained this opinion. He says, this cannot be a settled account, because one item was reserved for subsequent verification. And, if he took it on the Bond, so it was, but if he took it on the Bond and the Bill of exchange together, then it is not a settlement. I ascertain the amount to the extent of Rs. 491,695: there is another item which I cannot ascertain—I am content, both parties are content—not to have that, but that one party shall make an allowance, and the other party shall accept an allowance, and, accordingly, it is settled on that footing.

[414] I confess, therefore, I cannot understand exactly upon what ground it was that the Court held that these accounts between the parties were not closed. The Chief Justice, in the note which he has sent of the grounds of his judgment on the re-hearing, states only the objection which arises from the nature of the Bond, as well as from the nature of the settlement, which is succeeded by the Bond, but he does not advert to the Bill of exchange at all. When Mr. Justice Colville comes to give what I agree with the Respondents in saying is such a judgment, which, as far as clearness in expressing the grounds upon which it rests is concerned, one would expect from him, he overrules the exceptions; but, when he comes to deal with it, he seems to feel a little embarrassed by the form of the decree.

It is not necessary for us to consider that further, because we are clearly of opinion, that the transactions here are closed, the settlement being such as, in our



opinion, was conclusive against all parties concerned, and the result being such, this bill cannot stand, and the Court, instead of making either of the decrees it made, ought to have regarded those accounts as settled, and ought to have dismissed the bill with costs, so far as it sought any account of the transactions included in those accounts, and so far as it sought to have the Bill of exchange delivered up to be cancelled.

The only point on which we have entertained some doubt, if any arises, is this: it is quite clear, that if the Appellant was right at the re-hearing, the second decree could not have been justified in our view of the case, any more than the decree which was made at the original hearing; and, therefore, up to that time [415] he must have the costs, so far as they relate to that proceeding. But then comes the question as to the costs of the proceedings in the Master's office? Now, we are by no means bound to hold, that in all cases where the Defendant succeeds, he is to have the costs of the hearing; provided that the judgment is only to dismiss the bill. The Court directs an inquiry, by means of which inquiry the Plaintiff thinks by further evidence he can succeed in substantiating his case, and accordingly he goes into the Master's office and produces that further evidence. Of course a vast deal of expense will necessarily attend the operation, and the consequence is, that usually we are by no means disposed to hold that the Defendant is to be compelled to pay costs because he should in a doubtful case have appealed to this Court and have succeeded in an appeal against the original decree.

But this case is very peculiar in its circumstances. The objection which the Court seems to have taken, was not to the nature of the evidence, but it was an objection which, if it prevailed at all, could not be removed in the Master's office. If it be decided that there was not a settlement of the accounts after the execution of the Bond, I think the Chief Justice was right in thinking that the accounts could only be settled by the verification and ascertainment of each particular item; therefore, nothing that was done in the Master's office could ever remove that objection, and, consequently, it was not a case in which the Appellant could say, I have got, I think, a very good case, but I can make it better by going into the Master's office. If he had got a case that was good at all, it was as good at the hearing as it ever could be made. But there is this: and we very much agree with Mr. Justice Colvile in his luminous judgment on [416] that point, that even if the accounts had been gone through in the Master's office, they would probably have been the same, or (if we can form a conjecture) rather more in favour of the Appellant than at present; because it is clear, those accounts must be taken as proof of the goods delivered and the invoices had for them, and as proof of everything except the item which, it is said, remained outstanding, and the amount of which would possibly increase the claim on the other side, beyond the Rs. 491,695. Now, it appeared to the Appellant to be more to his advantage to adopt the course of getting the account settled under the decree, whether right or wrong, and he, therefore, goes in before the Master. He first gets a separate report, which probably it would have been difficult for the Master to have made in favour of the Appellant, having regard to what had been done by the decree; but the Court having overruled the exceptions to that report, and told him that probably the result in the Master's office would be the same, he proceeds again under that decree; but, instead of working it out to the end, and trying what the result would be in that view of the case, in the middle of those proceedings he turns round and says, No, I do not think this is taking a favourable course; at all events there will be great delay and great expense; and now I will appeal against the Order made on the exceptions, and against the original decree; and he makes a substantive application to this Court for that purpose. Now, it appears to us, under these circumstances, he had one of two courses to pursue—either to proceed under the decree and work it out in the Master's office, or to appeal against the decree, which, if wrong at all, was wrong altogether.

Upon the whole, therefore, it is not necessary to [417] refer to the cases which have been alluded to, where, without granting the specific relief, a Court of Equity granted a relief, which, it was admitted, if applied to another state of circumstances, would be wholly improper. The Order we shall humbly advise Her Majesty to make, will be, to vary the original decree, by declaring that the accounts

referred to, and included in the Appendix to this case, were settled by means of a Bond and the Bill of exchange, and ought not to be disturbed; and, that the bill, so far as it seeks an account in respect of such transactions, and that the Bill of exchange should be given up, should be dismissed with costs, such costs to include the costs of the re-hearing; but that the Appellant ought to pay the cost of the proceedings in the Master's office with respect to the portions of the bill so ordered to be dismissed. No costs of the appeal.

The report of their Lordships, which was confirmed by Her Majesty in Council, was as follows:—

"The decree of the Supreme Court of Judicature at Calcutta, dated the 22nd of February, 1848, ought to be varied by omitting therefrom that part thereof whereby it was referred to William Peter Grant, Esquire, the Master of the Court, to take an account of the dealings and transactions between the parties in the original and cross suits, and whereby it was directed, if, on taking such account, he should find any settled account or accounts, to take the account on the footing of such settlement, with liberty to either party to surcharge and falsify such settled accounts, and where it was directed, that if it should appear that any balance of the accounts prayed by the original bill was carried forward into any account subse-[418]quently settled, then that he might take the account prayed for by the original bill, on the footing of such settlement, with the like liberty to either party to surcharge and falsify, and that in lieu thereof it ought to be declared and decreed as follows (that is to say), that the accounts, included in the documents, No. 1, 2 and 3, delivered by Greenaway to Gibson and Co., were settled by the Bond and Bill of exchange in the pleadings mentioned, and that the accounts ought not to be disturbed, and that it ought to be referred to the Master to take an account of the dealings and transactions between the parties in the original and cross suits, having regard to their Lordships' declaration. And, that it ought to be further ordered, that the bill filed by Wallace and Spence, as far as it seeks relief in respect of the transactions comprised in the accounts, No. 1, 2 and 3, and so far as it sought that the Bill of exchange ought to be cancelled, and so far as it sought an injunction in respect of the same, be dismissed with costs, including therein the costs of the re-hearing, and it appearing that the Appellant has proceeded in the Master's office, under the decree in respect of the matters included in the accounts, their Lordships recommend that the Appellant, under the special circumstances of this case, be ordered to pay the costs of such proceedings; and the costs payable to the Appellant, and the costs payable by him, are to be set off, the one against the other, and the balance to be paid to the party entitled to the same; and their Lordships do further recommend that the case be remitted to the Supreme Court of Judicature at Calcutta, to give effect to the foregoing declaration, and that both parties bear their own costs of the appeal to your Majesty in Council."

[Mews' Dig. tit. ACCOUNTS AND INQUIRIES, A. ACCOUNTS; 4. *Settled Account*; c. *Reopening, Surcharge and Falsifying*; c. PROCEEDINGS UNDER JUDGMENTS OR ORDERS, 11. *Costs of taking*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, m. *Security for Damages and Costs*, n. *Costs*; tit. PARTNERSHIP, II. RIGHTS AND OBLIGATIONS, 12. *Account*, e. *Settled and Reopening*. S.C. 5 Moo. Ind. App. 372, 1 Eq. R. 309.]

#### [419] ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

THOMAS HAROLD TRONSON,—*Appellant*: LAUNCELOT DENT and Others,—*Respondents*\* [June 20 and 22, 1853].

A consignee of goods has such a right of property in the goods consigned to

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson, Knt.



him as to maintain an action of assumpsit against the ship-owner for non-delivery of the goods.

A cargo of opium, shipped at Calcutta, was, by the bill of lading, to be delivered at Hong Kong to the Respondents. The ship came in collision at sea, with another vessel, and received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by the salt water. The master, who acted *bona fide* and to the best of his judgment, selected the damaged chests of opium and sold them by auction, and forwarded the remainder to Hong Kong. It appeared that the Master might have had the damaged opium re-dried and re-packed while the vessel was re-fitting, and have forwarded it, though deteriorated in value, with the other opium: Held, under such circumstances, in an action brought by the consignees against the ship-owner for the value of the opium damaged and sold, that it was the duty of the Master to carry the cargo to its place of destination, as the goods could have been delivered in a merchantable, although damaged state.

By the Ordinances constituting the Supreme Court at Hong Kong, it is enacted, that all matters relating to the practice and proceedings of that Court are to be the same as the Courts in England. The Supreme Court is composed of a single Judge, and there is no Court of Error or appeal in the Colony. An appeal to England lies against any final decree, judgment, or sentence, or against any rule or order made in a civil suit or action, having the effect of a final and definitive sentence. In an action on promises, the jury found a verdict for the Respondents. Before judgment was signed, the Appellant applied to the Court for leave to appeal from such verdict to England, which the Judge, in the circumstances of the constitution of the Court, granted. Held, that as the English practice prevailed at Hong Kong, the allowance of such appeal was irregular, being in effect, an appeal against the verdict of a jury, and that the proper course would have been to have moved the Court below for a new trial, and to have appealed against the judgment refusing such motion [8 Moo. P.C. 440].

An appeal lies to this Court, as a Court of Error, if there be error on the face of the record such as might be moved in arrest of judgment in the Court below.

Where there is a fatal objection to the right of appeal, the Respondent ought to apply to quash the appeal, and not to wait till the hearing to urge such objection to its competency.

This appeal was brought from a judgment of the Supreme Court of Hong Kong, upon a verdict of a jury in an action of assumpsit brought by the Respondents against the Appellant to recover the value of twenty-two chests of Behar opium, shipped on board the steam vessel the *Erin*, of which the Appellant was master, on a voyage from Calcutta to Hong Kong, and alleged to have been lost through the improper conduct of the Appellant as such master.

The declaration stated, that the Appellant at the time of making his promises thereafter mentioned, was the master of the *Erin*, then in the river Hooghly, and bound from thence to Hong Kong, and thereupon Messrs. Gillanders, Arbuthnot and Co., merchants trading in Calcutta, on the 11th of July, 1851, shipped on board the *Erin* seventy chests of Behar opium in good order, of the value of 42,000 dols., to be taken care of and safely carried by the Appellant on board such vessel from the Hooghly to Hong Kong, and there safely delivered in like good order to the Respondents, the dangers of the seas only excepted; and further that, although a reasonable time elapsed, and the Appellant had delivered a part of the said goods, to wit, forty-eight chests of Behar opium, parcel thereof, to the Respondents, yet he did not safely carry the residue from Hooghly to Hong Kong, and there safely deliver the same to the Respondents, although no danger of the seas prevented him; but, [421] that the Appellant so carelessly and negligently behaved and conducted himself with respect to such residue, that by the carelessness, negligence, and improper conduct of the Appellant and his mariners and servants, the residue, being of the value of 12,000 dols., was wholly lost to the Respondents.

The Appellant filed a special plea to the declaration, whereby he alleged, that the goods, the value whereof was sought to be recovered by the Respondents, were shipped in the river Hooghly, on board the *Erin*, of which the Appellant was the master, on the terms of a certain bill of lading, wherein it was expressed, amongst other things, that the goods were to be delivered at the port of Hong Kong, unto the Respondents, in good order and condition, subject to certain exceptions, and, amongst others, except accidents from seas, rivers, and steam navigation, of whatever nature or kind soever: and that, in the course of the navigation, a collision took place at sea between the *Erin* and a vessel called the *Pacha*, whereby the goods were completely saturated by sea water: that the *Erin*, shortly after such collision, arrived at Singapore: and that, on survey being had, parcel of the goods so shipped being opium, was found completely saturated with and very much injured by sea water: that, as master of the *Erin*, in discharge of his duty, and having only regard to the interest of the consignees, and being advised by numerous persons duly qualified, who had carefully surveyed the same, that the interest of the consignees and others interested in the said goods would be best protected by a sale thereof being made at Singapore, the Appellant caused the same to be sold by public auction for the best price that could be got: and that [422] thereby, and without any carelessness, negligence or improper conduct of the Appellant, his mariners or servants, he had been hindered from making delivery to the Respondents, except of the monies realised by such sale.

To this plea the Respondents replied that, although they admitted that the collision in the plea mentioned took place, and that, in consequence thereof, the contents of the twenty-two chests of opium were in some degree injured, yet that the opium, or no part thereof, was so injured or damaged as to authorise the sale, and negligent and unlawful default made by the Appellant in the delivery thereof to the Respondents, by which sale and default in delivery they had sustained a loss, as in the declaration mentioned.

The Appellant filed a further plea, bringing into Court 8188 dols. 95 c., the net proceeds of the sale of the twenty-two chests of opium, and averring that the Respondents had not sustained damages to a greater amount.

The Respondents replied to the further plea, that they had sustained damages to a greater amount than the sum mentioned in the further plea, and issue was joined on the replication.

The action came on for trial on the 27th of March, 1852, before the Hon. Paul Ivy Sterling, the acting Chief Justice of the Court, and a special jury, when the Counsel for the Appellant objected to the trial proceeding, on the grounds:—First, that the acting Chief Justice had been Counsel in the case for the Respondents, and had a bias. Second, that the special jury list was formed and nominated by the Legislative Council, whilst the acting Chief Justice and Mr. Jardine were members of it, the former being at the [423] same time Counsel for the Respondents, and the latter deeply interested in the event of the action; and third, that the Counsel for the Appellant was too ill to conduct the Appellant's defence.

In support of the first objection, an affidavit of the Appellant was read to the effect, that the acting Chief Justice had been retained by and acted as Counsel for the Respondents up to the 28th of February preceding the trial, when he was appointed to the office of acting Chief Justice, and that as such Counsel he had advised the Respondents in every step in the cause, and had the management of the case on their behalf.

The acting Chief Justice overruled the objection, stating that his connection with the case did not extend beyond the settling of the pleadings then before him as Judge on the record; that he had no feeling of bias; and that, as sole Judge in the Colony, he must try the case, or there would be a denial of justice to the Respondents.

In support of the second objection, another affidavit of the Appellant was read, to the effect that, by an Ordinance of the Legislative Council of Hong Kong passed on the 27th of August then last past, it was enacted that, as often as the list of jurors should be transmitted by the Registrar to the Government and Legislative Council, he and they should mark off and designate by the term "special juror," twenty-four of the names contained in the list, and that the persons whose names were so marked off or designated should be liable to serve both as special and



common jurors, and the names of such special jurors should be formed into a separate list: that, at the period of passing and enacting that Ordinance, the Legislative Council was composed of the following persons:—Sir George [424] Braham, Governor of the Colony; the Hon. John Walter Hulme, the Chief Justice; the acting Chief Justice Sterling, then Attorney-General for the Colony; the Hon. David Jardine; and the Hon. Joseph Frost Edger. That the special jury list then in force was formed and nominated by the above-named Legislative Council and Governor, the acting Chief Justice Sterling being at that time, and up to the 28th of February then last, the Counsel of the Respondents, and Mr. Jardine being a party interested as to the event of the action. This objection was also overruled by the acting Chief Justice, on the ground that, although Mr. Jardine and himself were necessarily present as members of Council on the occasion of revising the jury lists for the year 1852, yet that Ordinance could have no possible connection with the trial of the present case.

In support of the third objection, an affidavit of the Appellant's attorney was read, to the effect that, on the 19th of March, 1852, he had filed in Court a medical certificate of the inability of the Appellant's Counsel to conduct the trial. This objection was also overruled, in consequence of the Appellant's Counsel being in fact present, and on the ground of the delay on the part of the Appellant.

The trial of the cause then proceeded.

It appeared from the evidence given on behalf of the Appellant, that in July, 1850, when the *Erm* arrived at Singapore, after the collision with the *Pacha*, as mentioned in the Appellant's plea, the forehold was full of water, covering the opium stowed in it, which was about six hundred chests, and that the sea water had penetrated the third compartment of the vessel, so that the lower tier [425] or two of opium stowed in it were wetted. That the water gaining on the pumps, the vessel was run on shore, and as the tides each day increased in height, she was got further on the beach, and on the third day it was found that the vessel had two holes within two feet and a half of the keel; that the opium was during the same time removed as quickly as practicable, and deposited in the warehouse of the agent for the owners of the vessel; the marks and numbers of about two hundred and sixty-four chests were entirely defaced, and they were saturated with water, which was streaming from them when they were deposited in the warehouses; and as many more chests were wetted and damaged by the salt water. The Appellant, after consulting with the agent of the owners, applied through him to the Chairman of the Chamber of Commerce at Singapore for advice as to the steps he should take, when the Chamber of Commerce advised that the opinion of the agents of the different Insurance companies should be obtained. The agents accordingly met, and having examined the opium, advised the Appellant that the damaged opium should be sold, as was usual in such cases, and that the sound should be re-packed and sent on to China. With regard to the usage, it appeared from the evidence, that the agents of Lloyd's had general instructions in case of damaged cargoes being brought to Singapore, to sell what might be found damaged, and to forward whatever was sound; and that on all former occasions when opium had been brought into Singapore under similar circumstances, it had been sold, excepting in one instance, when the opium on board a vessel called the *Sylph*, in a damaged state, had been taken out and only [426] a small portion sold, and the rest dried, re-packed, and sent on to China; but, in that case the damaged opium was sold in Singapore for about 500 dollars a-chest, whilst that which was forwarded to China did not realise there more than 250 dollars a chest. That the chests of opium were then surveyed by several of the principal merchants competent to form an opinion on the subject, who selected such of the chests, amounting to about five hundred chests, which were damaged, as they thought ought to be sold, and which were accordingly disposed of by public auction for the average sum of 361 dollars 23c. per chest. The price obtained was considered a very good price for the opium at the time it was sold; but the marks of many chests were effaced, and there was no evidence of the condition of the particular chests in question in the cause, or of the amount for which they were sold. Evidence was also given by the Respondents to the effect, that there would not have been any difficulty in drying and re-packing the six hundred chests of opium in question, and sending them on to China within the month of August; that about nine hundred

and twenty chests of damaged opium, saved from the wreck of a vessel called the *Sylph*, had been previously landed at Singapore, dried, re-packed, and re-shipped to China within a fortnight, and that the same operation might have been effected by the Appellant with the opium in question. It also appeared, that it would have been more for the interests of the parties concerned, if the opium taken out of the *Erin* had been re-packed and sent on to its destined port, instead of selling it at Singapore, where the market for opium is very limited, not averaging more than three thousand or three thousand five hundred [427]-dred chests during the whole year, including very little Patna, as the latter was seldom or ever taken when Benares opium was procurable; and it further appeared, that some of the opium shipped in the *Erin*, belonging to other parties, which had sustained similar damage, had been actually dried and re-packed at Singapore, and dispatched to China on board that vessel, when she continued her voyage, and had there been sold as opium, at prices little under those realised for the best sound opium.

The acting Chief Justice charged the jury to the effect that, if the Appellant could, with reasonable exertion, have brought on the Respondents' damaged opium to China, in the marketable state of opium, either in the *Erin* or some other vessel from the frequented port of Singapore, he should have done so: that, from the evidence, it would appear that some of the damaged opium was brought in the *Erin* herself, and some in other vessels; that no local usage of the intervening port of Singapore would excuse the Appellant from the legal obligation created by the bills of lading: that if, from the evidence, the jury were satisfied the Appellant could have, with reasonable exertion, brought on the opium in its specific state, they would, according to the evidence adduced, assess the damage sustained by the Respondents by the non-delivery of their consignment. On the other hand, if the Appellant could not have so brought on the twenty-two chests of opium, they would find for him by naming the Respondents' damage at the sum paid into Court.

The jury found a verdict for the Respondents:—[428] damages 10,241 dollars: one month's interest 72 dollars 80c. and costs; and final judgment was entered up on the 24th of April, 1852.

Before final judgment was filed, and on the 5th of April, 1852, the Appellant presented a petition to the Supreme Court, praying that he might be at liberty to appeal against the above judgment to Her Majesty in Council. The acting Chief Justice signed the following *fiat* at the foot of the petition:—"Inasmuch as, in accordance with the constitution of the Supreme Court, there is but one Judge thereof, and no Court of error or appeal in the Colony; and it, therefore, appearing that the verdict in this case comes within the operation of Her Majesty's instructions given on the 21st day of January, 1846, respecting appeals from the Colony: Be it as above prayed." A summons was taken out by the Respondents, calling upon the Appellant to show cause why the *fiat* should not be rescinded or altered, and why the Respondents should not have speedy execution. This summons came on for hearing on the 30th of April, in the same year, when the acting Chief Justice refused the same, except as to that part of the application for granting speedy execution, for which an order was made.

The Appellant appealed to Her Majesty in Council, and submitted that the judgment of the Supreme Court of Hong Kong ought to be reversed, and judgment given for him, or a new trial had, for the following reasons:—

First. Because the preliminary objections and points raised by the Appellant's counsel, or some or one of them, ought to have been allowed.

[429] Second. Because the case was not rightly submitted to the jury by the acting Chief Justice.

Third. Because the verdict was contrary to the evidence.

Fourth. Because there was no evidence that any opium belonging to the Respondents had been improperly sold.

Fifth. Because the facts proved in evidence did not establish that the Appellant was liable to the Respondents for any loss which they sustained by the sale of the opium in question.

The Respondents, on the other hand, contended, that the judgment appealed from was correct, and ought to be affirmed, for these reasons:—



First. Because there was no ground, either in law or fact, for setting aside the judgment of the Court below, or disturbing the verdict of the jury.

Second. Because the preliminary objections were, and each of them was, frivolous.

Third. Because it was the duty of the Appellant, if he could, to carry, or cause to be carried, the opium to the port of delivery, according to the bill of lading.

Fourth. Because the first plea (if valid) set up a practical impossibility of carrying on and delivering the opium at Hong Kong according to the bill of lading, and the jury by their verdict, found that no such impossibility existed.

Fifth. Because the first plea (if capable of any other construction) was bad in substance, and, therefore, that it would be idle to grant a new trial.

Sixth. Because the second plea was contrary to the evidence, and had been disposed of by the verdict.

[430] The case was argued by Sir Frederick Thesiger, Q.C., and Mr. Bovill, for the Appellant; and Sir Fitz-Roy Kelly, Q.C., Mr. Leith, and Mr. Willes, for the Respondents.

Before entering upon the questions raised by the Appellant's reasons, a preliminary objection was taken by the Respondents' counsel to the hearing of the appeal, upon the ground, that the appeal was irregular and incompetent, being in effect an application to the Court of last resort to set aside the verdict of a jury, which was contrary to the practice of the English Courts, by which the proceedings of the Supreme Court at Hong Kong were regulated according to the Ordinances, No. 6 of 1845, sec. 3, and No. 2 of 1846, sec. 3; and they insisted, that the proper course would have been to have applied to the Court below for a new trial, and to have appealed from the judgment of the Court if the application was refused. The Appellant's counsel, in answer to this objection, contended that the Respondents having appeared to the appeal and lodged their printed case, had submitted to the jurisdiction of the Court, and that it was too late to urge such objection to the hearing of the appeal; that the proper course would have been to have moved to quash the appeal, without putting the Appellant to the expense of proceeding to a hearing, and then taking the objection *in limine* to the jurisdiction. *Shire v. Shire* (5 Moore's P.C. Cases, 81), *D'Orliac v. D'Orliac* (4 Moore's P.C. Cases, 374; and see *Rockford v. Battersby*, 2 H.L. Cases, 388). They [431] also submitted that an appeal lay in this case, though it was from a verdict of a jury, *The Bank of Australasia v. Breillat* (6 Moore's P.C. Cases, 152), and that the certificate of the acting Judge was evidence of the practice in Hong Kong, that parties should not be obliged to apply to the Court for a new trial; and that, even if such an appeal did not strictly lie, yet the Court, to prevent a failure of justice, could admit the appeal under the Statute, 7th and 8th Vict. c. 69.

Their Lordships, without deciding upon this preliminary objection, permitted the hearing of the appeal upon the merits.

Upon the question whether there was such a right of property in the Respondents, the consignees, by the bill of lading, at the time of the breach as to entitle them to sue the shipowner for the non-delivery of their consignment, *Coleman v. Lambert* (5 Mee. and Wels. 502), *Moore v. Wilson* (1 Term Rep. 659), *Fragano v. Long* (4 Bar. and Cr. 219), *Evans v. Marlett* (1 Ld. Raymond, 271), *Thompson v. Dominy* (14 Mee. and Wels. 403), *Dutton v. Solomonson* (3 Bos. and Pul. 582), *Howard v. Sheppard* (9 C.B. Rep. 197), *Abbott on Shipping*, p. 283, (7th edit.,) were referred to.

As to the authority of the master of the ship, in the circumstances, to dispose of the cargo, the *Gratitude* (3 C. Rob. Adm. Rep. 240, 255-9), *Roux v. Salvador* (3 Bing. N.C. 266), *Vlierboom v. Chapman* (13 Mee. and Wels. 230), *Read v. Bonham* (3 Brod. and Bing. 147), *Idle v. The Royal Exchange Assurance Co.* (8 Taunt. 755; and see note (d). 3 Brod. and Bing. 151), *Hayman v. Molton* (5 Esp. N.P. 65), *Knight* [432] *v. Faith* (15 Q.B. Rep. 649), *Abbott on Shipping*, pp. 6, 143, (7th edit.,) *Story "On Agency,"* Ch. VI., sec. 118.

Upon the objection to the pleadings, first, that the declaration was bad in substance, in not averring that the right of property was vested in the Respondents, *Howard v. Sheppard* (9 C.B. Rep. 297), *Galloway v. Jackson* (3 Scott N.R. 753), *Stephen "On Pleading,"* pp. 354-9, were referred to; and secondly, that it could be moved in arrest of judgment after a plea of payment of money into Court, applying

to different breaches in the declaration, *Wright v. Goddard* (8 Ad. and Ell. 144) was cited.

The judgment of their Lordships was delivered by

Sir John Patteson.—In this case, the last point we have heard argued is one which would properly be made on a motion in arrest of judgment, treating it as a matter of error on the face of the record, namely, that the declaration is bad, and I am very glad that it has been fully discussed, because, although it is not mentioned in the Appellant's reasons for the appeal, yet, as Mr. Bovill very truly says, there are objections taken on the other side which are not mentioned in the Respondents' reasons: it is, therefore, very fair that it should be taken, and considered now. It is a point which steers clear of the objection taken on the other side, with respect to the nature of this appeal, whether the appeal could be made in point of form, because, I take it, it is undoubted, that an appeal might be made here, treating this Court as a Court of Error, if there be error on the face of the record, such as [433] might have been moved in arrest of judgment in the Court below.

The first question, therefore, to be considered is, whether this declaration be bad upon error after verdict and in arrest of judgment.

Upon this point we have been referred to the case of *Wright v. Goddard* (8 Ad. and Ell. 144), and the question is, whether that case goes the whole length of holding, that wherever there has been a plea of payment of money into Court, applying to different breaches in the declaration, there cannot be a motion in arrest of judgment.

The Court seems to have considered in that case, that there could not; but every case must be taken according to its particular circumstances, and, although that case is a very strong authority to show that you cannot move in arrest of judgment after a plea of payment of money into Court, perhaps we may say it is not quite conclusive of the position, that in no case whatever can such a motion be made after such a plea.

We must then consider, whether this declaration be bad in arrest of judgment, assuming that the authority of *Wright v. Goddard* does not show that in such a case an arrest of judgment cannot be moved for.—[His Lordship here read the declaration and proceeded:]—Now by this declaration, it is not pretended there was any negligence shown, which, indeed, is not at all material, because it would be sufficient to say, that the Defendant did not deliver the residue, although no dangers of the sea prevented his doing so, inasmuch as he was bound to deliver unless he was prevented by dangers of the sea. The declaration states a promise; of course all state-[434]ments of promises in a declaration are to be taken to be express promises, unless manifestly on the face of the statement they are implied promises in point of law; and the pleas do not deny the existence of such a promise. There is no plea of *non assumpsit*; but there is a special plea, setting out a great many facts and circumstances which are said to have occurred. Then there is another plea, which sets forth that "the Defendant brings into Court a sum of money, being the net proceeds of the aforesaid sale of twenty-two chests of Behar opium, ready to be paid to the Plaintiffs; and the Defendant further says, that the Plaintiffs have not sustained damages to a greater amount than the said sum, in respect of the causes of action in the declaration mentioned; and this he is ready to verify." Certainly that plea, in terms, admits that the Plaintiffs have sustained damages to the amount of the money paid into Court. The pleas do not deny the promise, or allege that, even if there were such a promise, the Plaintiffs could have sustained no damage whatever by reason of any act of the Defendant. Therefore, there is an admission, beyond all doubt, of the fact of the promise having been made.

We must go back then to the declaration to see whether or not, although there be an admission by the Defendant in his plea of payment of money into Court, of a promise, in fact, whether the declaration states such a promise as would be binding in law, because it is contended that, although there may be in point of fact a promise, yet, if the declaration does not show such a promise as could be sued upon, it is bad in arrest of judgment, notwithstanding such an admission by the plea of payment of money into Court.

[435] Certainly this declaration is not framed altogether in so technical a form as it seems to me it might have been; but it does state that certain persons shipped



opium to be delivered to the Plaintiffs, the dangers of the seas only excepted, and that in consideration thereof, and of certain freight and reward to the Defendant, "the Defendant promised the Plaintiffs to take due and proper care of, and safely and securely carry, and convey, and deliver." It is said, that it was not averred that the freight and reward were to be paid by the Plaintiffs to the Defendant: it only says, "certain freight and reward to the Defendant in that behalf;" it does not say, "to be paid by the Plaintiffs to the Defendant in that behalf." I think that was matter of special demurrer, and that after verdict such an objection cannot be taken in arrest of judgment, because it being stated that the goods were shipped to be delivered to the Plaintiffs—not, observe, to be delivered to the shippers, or by the shippers' order to be delivered to the Plaintiffs, but it is that he "promised the Plaintiffs to take due and proper care of, and safely and securely carry, convey, and deliver;" the fair meaning of that is, although certainly not technically expressed, that the freight and reward to the Defendant was to be paid by the Plaintiffs: and, after verdict, I think it is quite clear that it must be so read. Then, that being so, it is stated, that there is no request averred on the part of the Plaintiffs. But I do not see where a request is necessary, unless it be meant that it was necessary to have averred that the shippers, at the request of the Plaintiffs, shipped the goods; but, I think, that cannot be at all necessary, because it is stated that the shippers delivered the goods to the Defendant to be [436] carried by him, and to be delivered to the Plaintiffs, and, therefore, that he made the contract with the Plaintiffs.

Now, can such a contract be made with the consignee of the goods? It is not denied now, at least, that such a contract may be made with the consignee of the goods. At first, I thought it was intended to be argued that in no case whatever could the consignee of goods sue the shipowner for the non-delivery of those goods, but that the action must always be brought by the shipper; but, I think, it is quite clear such a proposition cannot be maintained. It is true that in *Moore v. Wilson* (1 Term Rep. 659), Mr. Justice Buller nonsuited the Plaintiff, who was the consignor, because it appeared by an arrangement between him and the carrier that the consignee was to pay the freight; but on a rule for a new trial he held, that he was wrong in so doing, and the Court quite agreed with him, because, though the freight was to be paid by the consignee, the consignor of the goods was equally answerable for the freight, and might maintain the action. It was put in argument, that the consignor could maintain the action, as agent for the consignee, which may be correct if he does it as agent for the consignee, though it is not so put on the face of the declaration; but still the consignee, if he had thought fit, could have sued. However, that only goes the length of showing that the consignor may sue, not that the consignee may not.

The case of *Fragano v. Long* (4 Barn. and Cr. 219) is a strong authority to show, that the person on whose account goods are shipped, may bring an action against the owner of the vessel. The argument there was, that he could not do so, because there was [437] no bill of lading making him consignee of the goods, so as to vest the property in him (it turned on the question of property very much), but the Court held, that the property vested in him as soon as the goods were sent from Birmingham to be shipped at Liverpool for Naples, and, although there was no bill of lading, yet that he was the owner of the goods, and, therefore, there was a contract between him and the shipowner, so that the action would lie. And that was an action of *assumpsit*.

In Abbott, on Shipping, (7th edit.) this point is a good deal discussed, and it is said (p. 283), "There is often some difficulty in deciding, to whom the master and owners are responsible on their contract evidenced by the bill of lading, and whether actions for loss or injury occasioned by their negligence or misconduct should be brought by the consignor or consignee. No rule of general application can be laid down for the solution of this difficulty, but it will always be important to consider, in whom the right of property, and sometimes in whom the right of possession, was vested, at the time of the breach of contract or neglect of duty which is complained of." Then he speaks of goods being "sent by a vendor to a vendee," in which case, he says, "the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for the loss of them." There

are several cases referred to; amongst the rest, *Fargano v. Long*, to which I have just alluded; and at last it is summed up in these words (p. 292): "The result of these cases, which are not in all respects easily reconcileable, would appear to be, that actions against shipowners, as carriers, on their implied contract, and actions for the loss or in-[438]-jury of the goods entrusted to them, must be brought by a person who has some property in the goods. The consignee will be deemed to have such a property, unless the contrary appear." In support of which position is cited the case of *Coleman v. Lambert* (5 Mee. and Wels. 502).

Now, I think it is quite clear, on the face of the declaration in this case, as we must read it, that the Plaintiffs must be taken to have been the original consignees of these goods. The shippers were Gillanders, Arbuthnot and Co. The consignees must be taken *prima facie* to be the persons who have the property, if property is necessary in order to sustain this action, on a promise alleged as this promise is. Gillanders, Arbuthnot and Co., who were the shippers, might have been the shippers as agents merely for the Plaintiffs; or they might have been themselves the owners (consistently I mean with anything that is stated on the face of this declaration), and the Plaintiffs might have been merely their agents at Hong Kong to dispose of the goods. A great variety of circumstances are consistent with this declaration, and, if there be one state of things which is consistent with the declaration, and which may make the declaration good, before you come to enter into any evidence upon the subject (for I take it, you must see, that such a state of facts may apply to the declaration), the declaration on the face of it would be good. Now, it is quite consistent with this declaration, that the Plaintiffs, who appear to be consignees on the face of it, may have been the very owners of the goods, and that Gillanders, Arbuthnot and Co. may have been merely their agents to ship the goods. It is said, that the contrary appears by the [439] special plea; but if we were to take the special plea into consideration, the contrary does not appear as regards the Plaintiffs and Gillanders, Arbuthnot and Co., because, though the special plea states that they were to be shipped to the Plaintiffs for trans-shipment to other persons, yet it does not show that Gillanders, Arbuthnot and Co., the shippers, had retained any interest or property in the goods whatever, and, therefore, some property would pass from them by the bill of lading, making the Plaintiffs consignees, and by the shipment of the goods. The moment they had signed the bill of lading, some property would pass to the Plaintiffs; whether a special property, in order that they might trans-ship the goods to other persons, or whether an absolute property. I do not think signifies, because it is laid down, as I have already read in Abbott, on Shipping, that there must be some property in the consignee. Now here, taking the statements in the plea to be correct, there is certainly some property in the consignees. Then, that being the case, the declaration, as it appears to us, after verdict, is a good declaration, because it is quite consistent with all that is stated there: that the goods had been originally shipped to be delivered to the Plaintiffs; that they were the consignees, and, therefore, they were liable for the freight to the Defendant; and that the Defendant undertook and promised to convey and safely deliver to them at Hong Kong; and, therefore, after a plea of payment of money into Court, and the case I have already alluded to, we think the declaration is not bad in arrest of judgment, and, if it would not be bad in arrest of judgment, supposing such a motion could [440] be made, of course it is not bad on error; therefore, we must go into the other parts of the case.

Now, the next question we come to is, whether or no an appeal will lie in such a case as this? The objection to the jurisdiction of this Court is raised on the part of the Respondents, without any express notice in the reasons which are given in their printed case, and the point, as it seems to us, is one of very considerable importance, because, if appeals are to be brought here from the verdict of a jury, without any attempt having been made in the Court below to obtain a new trial, either upon the ground that such verdict was against evidence, or that it was grounded on the misdirection of the Judge, it is in truth and effect neither more nor less than moving in this, the appellate Court, for a new trial; which, if permitted, would be a most inconvenient practice, contrary as well to the usual course of this Court, as of the Courts in England, where, even after a motion for a new trial made and refused, or the rule discharged, if the objection does not appear on the



face of the record, the Courts, being Courts of Error, will not entertain such an application. It was, however, conceded by the counsel for the Respondents, that if a motion had been made in the Court at Hong Kong for a rule to show cause why there should not be a new trial on the ground of misdirection, or, on the ground of the verdict having been against the evidence, and the rule had been refused, or after a rule *nisi* had been granted it had been discharged, it would have been competent to the party whose rule had been so refused or discharged to have appealed to this Court, because it would have been an appeal against, in effect, a final [441] order of the Court below, which the language of the Ordinances appeared to authorise; but, certainly, it would be very inconvenient, to say the least of it, that such a course should be permitted without any motion having been made in the Court below. It appears, however, that in Hong Kong there is only one Judge, who at this time was the acting Chief Justice; such a motion, therefore, would have been made before him, the same person before whom the cause was tried; and, therefore, as regards any misdirection, the motion would be *ab idem ad eundem*; but, as regards the verdict being against the evidence, it would be far more convenient that the Judge who heard the evidence, and before whom the trial took place, should be the person to be applied to in the first instance, that he might determine whether it was a proper case or not to grant such rule. We feel, therefore, it would be very wrong to sanction any such omission in applying to the Court below for a new trial, and to hold, that a party might come at once to this Court by appeal and raise such a question.

Now, let us examine the question that is thus raised, and see whether, according to the Ordinances, it is possible that it can be raised in this way. There are several Ordinances relating to the practice of the Court at Hong Kong and the mode of appealing: and it is argued that the practice of the Supreme Court may possibly be, that appeals, such as this, may lie without any such motion, and it is contended that the certificate of the acting Chief Justice allowing this appeal, shows that such is the practice. However, we think it is hardly fair to put that interpretation upon the certificate, for all the acting Chief Justice says is, that there is but one Judge of the [442] Supreme Court, and that there is no Court of error or appeal in the Colony; and it, "therefore, appearing that the verdict in this case comes within the operation of Her Majesty's Instructions, given on the 21st day of January, 1816, respecting appeals from this Colony: Be it as above prayed." And, when he is asked to rescind the leave thus given, he dismisses the application, for reasons which, it is contended, are in the nature of a certificate by him, that the practice of the Court is, that the parties should not be obliged to apply to the Court for a rule *nisi* or a new trial. We think that is pushing the effect of the certificate rather too far, and beyond its legitimate import.

Let us see, then, whether it be possible that there can be such an appeal consistently with the Ordinances. What is it that is appealed against? It is the judgment of the Court. Now, the judgment of the Court is manifestly a right judgment, so long as the verdict remains. If the verdict stands, no other judgment can be given, and, therefore, the judgment which is given by the Judge appears to be the only act of the Court, and it is only against an act of the Court that an appeal lies. There is no other act of the Court; the verdict is not the act of the Court: the verdict is the act of the jury, and I do not find anywhere in the Ordinances that anything is said about an appeal against the verdict of the jury. If that intervening step had taken place which I before alluded to, namely, that a motion had been made for setting aside the verdict and granting a new trial, then the refusal so to do on the part of the Court, would have been an act of the Court, and there would have been an appeal against that act; but I cannot see anywhere upon the face of these proceedings, or on [443] the facts which are brought before us, how there is any appeal against any act of the Court, otherwise than against a judgment of the Court: then, if that be so, what is this appeal? Why, it is nothing more nor less than an application for a new trial: not an appeal against an act of the Court, but an application to have the verdict of the jury set aside, and a new trial granted.

Now, reference was made to some of these Ordinances, and with respect to the practice of the Court at Hong Kong. There is an Ordinance, No. 15, of 1844, which is one of the oldest. I think, we need trouble ourselves with, and it is said in

section 3 of that Ordinance, that the law of England shall be in full force in the Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the Colony, or its inhabitants; and then it enacts, "That in all matters relating to the practice and proceedings of the said Supreme Court, and not hereinafter provided for by this Ordinance, the practice of the English Courts shall be in force, until otherwise ordered by any rule of the said Court;" but there is nothing that I can find in this Ordinance which directs the proper practice with reference to setting aside a verdict at all. If, therefore, the practice rests on that Ordinance, it would certainly be necessary that there should be a motion to set aside the verdict in the Court of Hong Kong. There are, however, other Ordinances regarding this matter which it may be well to examine. The first, No. 6, of 1845, recites, that "It is expedient that the matters embraced in Ordinance, No. 15, of 1844 (the one I have just referred to), relating to the establishment of the Supreme Court of Hong Kong, trial by jury, criminal [444] proceedings, and the summary jurisdiction of the Court, should be provided for by separate and distinct Ordinances;" it then enacts that Ordinance, No. 15, be repealed, and the Court at Hong Kong, which had hitherto been holden by the Chief Superintendent, abolished: and it further enacts that there shall be a Court of Record to be called the Supreme Court of Hong Kong; and, by section 4, it is enacted, that "the law of England shall be in full force in the said Colony of Hong Kong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants; and that in all matters relating to the practice and proceedings of the said Supreme Court, the practice of the English Courts shall be in force, unless and until otherwise ordered by rule of the said Court." Then it re-enacts, in effect, what it had just before repealed. There is another Ordinance, No. 2, of 1846, and which appears to have been made, after there was a Legislature established for the Colony, because it recites, that it is expedient to amend the Ordinance, No. 6, of 1845, by making provisions for the saving of all proceedings, and all suits formerly depending in the Court of Hong Kong, the abolition of which Court is effected by the 2nd section of that Ordinance; as also with reference to the 4th section of the same Ordinance, limiting the operation in the Colony of such of the laws of England, and the practice of the English Courts, to such laws and practice as existed when a local legislature was first conferred on the Colony. It then goes on to enact as follows:—"And whereas, also, it is deemed advisable to reserve to the Legislative Council of the said island the power of revising and approving of the Rules and [445] Orders to be made under the 2nd section of the said Ordinance, constituting a local Court of Error and appeal." It enacts, "That from and after the passing of this Ordinance, the said 29th section of the Ordinance, No. 6, of 1845, shall be and is hereby repealed."

That was the section which constituted the Governor and Council a Court of Error and appeal; and by it the Court of Error was legally and properly put an end to.

Then the 2nd section enacts, "And be it further enacted and ordained that all proceedings formerly commenced in or adopted under the said former Court of Hong Kong, and that all suits and matters (if any) which may have been pending at the date of its abolition, may be continued or revived in the said Supreme Court." And section 3rd enacts, "That from henceforth such of the laws of England only, and such portion of the practice of the English Courts (subject to the exception of their applicability as contained in the 4th section of Ordinance, No. 6, of 1845) as existed when the said colony obtained a Local Legislature, that is to say, on the 5th day of April, 1843, shall be of force." So that that continues the same practice, because the 4th section of Ordinance, No. 6, of 1845, which is alluded to there, does not touch that point; then, that being so, how can we possibly say, that in the Court of Hong Kong there is a practice that verdicts shall be set aside by a Court of appeal in England? I do not see that there is the slightest ground for so saying. There are also the Instructions of Her Majesty of the 21st of January, 1846, which recite, that "it is necessary to make provision for permitting and [446] regulating appeals to us in our Privy Council from the Supreme Court of Justice of our Colony of Hong Kong and its dependencies. Now, we do hereby direct and appoint that it shall be lawful for any person or persons being a party or parties to any civil suit or action depending in the Supreme Court of Justice of our Colony of Hong Kong and its



dependencies, to appeal to us, our heirs and successors, in our or their Privy Council, against any final decree, judgment or sentence, or against any rule or order, made in any such civil suit or action, and having the effect of a final or definitive sentence, which appeal shall be subject to the rules and limitations following:—"It then sets out these rules and limitations, but they do not touch this matter, because the words of the Instructions are clear, "any decree or sentence, or against any rule or order." Now, refusing a rule *nisi* for a new trial would be fairly considered as an order, and the discharge of that rule would be a rule or order. So that, if any application had been made to the Court at Hong Kong to set aside this verdict and grant a new trial, the decision of the Court upon that motion would have been properly the subject of an appeal under these words; but not a word is said about appealing against any verdict. The judgment, as I have already said, cannot be appealed against, while the verdict stands, and this is in effect and in truth neither more nor less than an appeal professing to be an appeal against a judgment, but, in truth, an appeal by way of motion to set aside the verdict, and to have a new trial. We think, therefore, that we cannot encourage such a proceeding, and that it would be very desirable to have it fully understood that no such application can be made [447] by way of appeal to Her Majesty in Council, to set aside a verdict, and to have a new trial, unless there has been a previous application made to the Court in which the trial took place, to have the verdict set aside and a new trial granted, on whatever grounds that motion might proceed.

Still, as this is a case probably of the first impression, and as it may not have been fully understood that this is or ought to be the rule on which appeals are to be allowed here; and we think the Respondents ought to have applied to quash this appeal on that ground, and as they seem to have conceded the question from the course they have taken, that this Court had jurisdiction, we should have been very unwilling to have acted on what, we hope it will be understood, we mean to lay down as the rule on future occasions; for if we saw that the justice of the case was strongly in favour of the Appellant, we should have been somewhat astute in endeavouring to find some mode by which we might recommend Her Majesty that the case should be sent back to Hong Kong; or, that in some other way or other, the Appellant should have an opportunity of applying in the proper quarter to have the verdict set aside and a new trial granted.

We have, therefore, thought it right to consider the question, whether or no the verdict was right or wrong; not at all meaning to say, that in any future case which may come here, we should think it right to enter into any such consideration at all, under circumstances similar to the present, namely, where a verdict had been given and judgment entered, and no application made to set aside that verdict in the Court below.

[448] Let us then see what this verdict is. Here an action is brought against the Master, and in substance the case is simply this:—The ship *Erin* had sustained very considerable damage on her voyage towards Hong Kong. She was obliged to put into Singapore, and the cargo was instantly taken out, because the ship had sustained such damage that they were obliged to take the cargo out in order to repair the ship. A quantity of opium was found to be injured to a considerable extent by the salt water; and the Master acting *bona fide*, as it is said, and there is no reason at all to suppose otherwise, taking the advice of a number of persons there, felt that his duty was not to carry on the opium in the state in which it was, without doing anything at all to it; for they all said that he should endeavour, whilst the repairs of the ship were going on, to dry the opium or to stop the damage that it was suffering from the sea-water, and to carry it on in his own ship, and not to transship it; but feeling he was justified, under the circumstances, in selling such damaged opium, he did sell it, acting for the best, as he says, for the consignees, and for all the parties interested. And no doubt it does appear that he did act according to the best of his judgment in that matter; that he took the advice of a number of persons on the spot, and that he is not to be accused of having committed any fraud, or having done anything which he did not believe to be right and proper on his part. It does appear, in the course of the evidence, that it had been rather too customary at Singapore, to sell the cargo whenever any accident happened to a vessel, or the cargo was at all damaged; but, however, that does [449] not impeach

the conduct of the Master on the present occasion; he appears to have acted as he thought was best for all the parties concerned

Now, the first question is, was he justified in doing what he did? There is a very considerable difference between the sale of the ship and the sale of the cargo. The Master is the agent of the shipowners; he has the charge of the ship for them; he has, therefore, a much more powerful control over the ship in cases of injury, than he can have over the cargo, because he is altogether entrusted by the shipowners with the charge of the ship, but with regard to the goods which are shipped on board, it is not so; he is bound to convey them according to the tenor of his bill of lading, or whatever contract he has entered into, to their place of destination; and all the books of authority, English and Foreign, say, it is only if an accident arises, if he is actually cast away, that he is to deal with the cargo, it being a necessity cast upon him, not by any act of others with whom he is connected, but by the events that have occurred, and because the cargo is not to be left to perish, or to be left unregarded and uncared for, and there is no one else on whom the duty of guarding the goods, or taking care, or doing the best with them, can be cast except upon the Master: but we find in *Abbott, on Shipping*, it is laid down that the Master is to be very careful in this matter, and that his duty is to carry the goods to their destination. "The disposal, however, of the cargo by the Master, is a matter that requires the utmost caution on his part. He should always bear it in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty, is an act for which both he and his owners may be made responsible; and the law of England does not recognise the authority of any tribunal, or officer acting upon his suggestion, or at his instance."

It has been held, that even a decree of a Court of Vice-Admiralty will not protect him. Therefore, his duty is to carry the cargo, and convey it to the place of its destination, if the goods can be carried to the place of their destination in a merchantable state, although very much damaged; it is a grave question whether the Master can, in any case, be justified in selling the cargo, because the goods would be more damaged in the course of conveying them from the place where he repairs his ship to the place of ultimate destination, than they have been already at the time he comes there. They may be damaged ten per cent. at the place where he is obliged to put in, in order to repair his vessel, and it may be that they will be damaged 20 per cent. by the time they arrive at the place of their destination; but it does not follow that he is at liberty to sell them on that account. If they are in such a state that he cannot convey them in the shape of merchantable goods to the place of their destination, and they would utterly perish when they arrived at their place of destination, that is quite another consideration.

In the case of *Roux v. Salvador* (4 Scott, 1; S.C. 3 Bing. N.C. 266), where a ship put into Rio de Janeiro with a cargo of hides, which were in such a state of fermentation that they were beginning to putrefy, and it was clear upon the evidence of all the persons [451] who had seen them, that it was impossible to take them across the Atlantic to Bourdeaux, which was the place of their destination, because, long before they arrived at Bourdeaux, they would have been a mass of putrefaction, and not hides at all, they were taken out of the vessel, and sold, and tanned and used at Rio de Janeiro, and it was said, and I recollect argued very strongly both in the Court below and in the Court of Error (I sat in the Exchequer Chamber on that occasion), that, because the hides were in the condition of merchantable goods at Rio de Janeiro, which was proved by their being tanned and used, the Master was not at liberty to sell them, though he believed he could not carry them across the Atlantic if he had attempted to do so; inasmuch as they would perish altogether, although they might be in the state of hides at that time.

Again, in the case of *Vlierboom v. Chapman* (13 Mee. and Wels. 230), a cargo of rice arrived in such a state that it would have perished altogether if it had been attempted to be carried on. There it was held to be quite clear that the Master was at liberty to sell the rice.

Now, perhaps, it would be going too far to say, that it must be perfectly clear, in all cases, that the cargo would have been destroyed altogether if it had been carried



on, for every case must depend on its particular circumstances; but the fact that the witnesses here say that the opium would have suffered further damage from being carried on, falls very far short indeed of saying it could not have been carried on so as to be merchantable opium when it arrived at Hong Kong, though still more deteriorated. The Master acted *bona fide*; and something was said in the [452] course of the argument in this case upon that fact; but that has been put to rest altogether by the case of *Idle v. The Royal Exchange Assurance Company* (8 Taunt. 755). There the jury found that the Master in selling the ship had acted fairly and *bona fide*, and for the benefit of all concerned, and that the sale was honestly, fairly, and properly conducted: but the Court of King's Bench on a Writ of Error (see Note (d), 3 Brod. and Bing. 151) held that the necessity and legality of the sale was not to be inferred from the *bona fides* of the Master. No doubt, if there was not *bona fides*, it would take another aspect; but the existence of *bona fides*, and the fact that the Master acted to the best of his judgment, would not of itself be sufficient; it must be shown that there was an actual necessity.

That a sale of the cargo by the Master is only justified by necessity was also held in the case of *Robertson v. Clarke* (1 Bing. 445) in the Common Pleas. Lord Gifford, C.J., there said, "This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bona fide*, for the benefit of all concerned, and must be strictly watched. Nothing can now impeach the correctness of this principle, and the only question here is, did the evidence establish that urgent necessity? The jury have come to the conclusion that it did; and, after hearing the notes of the learned Judge who presided, I am of the same opinion. It is not disputed that the sale was *bona fide*; and it is clear that it was for the benefit of all concerned. I agree that it is not sufficient to show that the sale was *bona fide*, and for the benefit of all concerned, unless it be also shown that there was urgent necessity for its being [453] resorted to; but that having been satisfactorily proved in the present case, the verdict cannot be disturbed on that ground."

Now these cases, and the case of *Read v. Bonham* (3 Brod. and Bing. 147), and a number of others that were referred to in the course of the argument, are cited and commented upon in the very elaborate judgment which was recently delivered in the Court of Queen's Bench by Lord Campbell in the case of *Knight v. Faith* (15 Q.B. Rep. 649). I do not mean that that case turned upon the same question we have before us here, because it turned on a different and a very curious point, namely, whether upon a time policy a vessel which had received its death wound before the expiration of the time, but did not expire till afterwards, was to be considered as protected by the policy and other matters; but Lord Campbell, in the course of that judgment, was obliged to go into the doctrine as to the Master's power with respect to the ship, because he had sold the ship in that case, and he cites all those cases, and comments upon them very fully.

What is the evidence, then, in the case before us? There is conflicting evidence. There is a great deal of evidence that it was the best thing that could be done for the consignees that the opium should be sold at Singapore; there is also evidence, on the other side, to show that it was not necessary to sell, and that the opium could have been dried; or, if that were doubtful, it might at all events have been dried partially during the twelve days that the ship was there repairing its damage. No doubt the evidence is conflicting; but taking the evidence on [454] the part of the Appellant at the strongest, we have not been able to find that any witness says that the opium would have been destroyed if it had been carried on. The utmost the witnesses state, is, that it would have been much more deteriorated, and I can find no more than this—they all seem to admit that it might have been carried on in the same vessel after the vessel had been repaired, so as to be delivered at its port of destination, namely, Hong Kong, as opium—no doubt not worth so much as it was at Singapore; that might or might not be the case; but at all events it might have been delivered at its port of destination in its merchantable state, as opium. If so, none of the cases go the length of holding that the Master under such circumstances was justified in selling. It is said, however, that the Judge who tried the cause, in his summing up, stated that other duties were supposed to be incumbent on the Master, and that he stated what were not really duties incumbent on the Master, and that,

therefore, the jury may have been misled by him. If so, that is a ground of misdirection upon which a motion ought to have been made in the Court below for a new trial.

The language of the Judge in his statement sent here of what he told the jury is evidently only a summary. He says, "I charged the jury to the effect, that if the Defendant could, with reasonable exertion, have brought on the Plaintiffs' damaged opium to China, in the marketable state of opium, either in the *Erin* or in some other vessel from the frequented port of Singapore, he should have done so. That, from the evidence, it would appear that some of the damaged opium was brought on in the *Erin* [455] herself, and some in other vessels. That no local usage of the intervening port of Singapore would excuse him, the Defendant, from the legal obligation created by the bills of lading."

Now, an objection that is made to his summing up is, with respect to these words, "with reasonable exertion;" and it is assumed that by the words "reasonable exertion" he told the jury that it was the Master's duty to have trans-shipped the goods, or, at least, that it was his duty to have dried the opium, and if it took two months to have dried the opium, it was his duty so to have done after he himself had left the place, because he clearly was not bound to keep the ship there for the purpose of doing so. If the ship could have been repaired in twelve days, of course he could have gone on at the end of those twelve days, but he was bound to get somebody to attend to the drying of the opium, and then to forward it to Hong Kong. I think it is a great stretch of ingenuity to say the words "reasonable exertion" mean all that. I do not know what the words "reasonable exertion" actually and necessarily import, but certainly there was some exertion which it was the Master's duty to have made on that occasion. It is stated, I think by foreign authorities, that it is the Master's duty to trans-ship, but doubt is raised as to that; and in our Courts it should seem to be considered that he is quite at liberty to do so, and that if he does trans-ship, he would be protected in doing so, if it turns out in the opinion of the jury that it was the proper course of dealing with the goods, but that he is not positively bound to do so; if his own ship cannot carry them on at all, he may either leave [456] goods which are not perishable, or sell goods which are in their nature perishable, which cannot be carried on; which must, of course, be sold; but that is not the case here. But, although he may not be bound to trans-ship, he is at liberty so to do. In other cases it has been held that he ought to take all proper care of the cargo: but there is no authority that I know of which distinctly shows that he is bound to lay out a great deal of money in order to endeavour to repair the damage done to the cargo either by drying or in any other way. While the cargo is there, he may not have the means of doing so. He is bound to ventilate it, and so on; but that, I apprehend, is while it is on board the ship, and I think, if I am not mistaken, there is some case of a ship in Ireland where there was a cargo of corn, and the question was, whether it could be kiln dried, and whether the Master was bound to kiln-dry it there. The case did not turn on whether he was bound to do so; but, I remember the case, he had done it; and the question was, whether he was at liberty to do so? It is clear he was at liberty to do so, and here he would have been at liberty to have taken steps to dry this opium during the twelve days he was at Singapore. Whether he was bound to do it or not, need not be determined in this case: nor do I find that it was laid down by the Judge, at least I cannot collect from his language here that he laid down to the jury that the Master was bound to do any such thing, but merely that he was bound to use "reasonable exertion" to have brought the opium on. It is, in order to be carried on, taken out of the vessel; therefore, if by reasonable exertion [457] he could have dried the outside of the chests, and put them back into the vessel, afterwards to be taken to Hong Kong, he was bound surely to use that "reasonable exertion" at all events.

The Judge does not go on to state any other expressions he used from which we can tell what he really meant by "reasonable exertion."

On the whole question, I think we should be justified in saying, from what he has here stated, that he really did tell the jury that he was not bound to trans-ship, or to lay out a great deal of money in the drying of the opium, but that he was bound to carry it on, if it could be carried on in a merchantable state. Now, it



could be carried on in a merchantable state as it appears to us, because, although the witnesses, more than seven in number, say, that it would have sustained greater damage, none of them say it would have been utterly destroyed. The learned Judge below goes on to say, "That if from the evidence the jury were satisfied Tronson could have, with reasonable exertion, brought on the opium in this specific state, they would, according to the evidence adduced for that purpose, assess the damage sustained by the Plaintiffs by the non-delivery of their consignment. On the other hand, if the Defendant could not have so brought on the twenty-two chests of opium, they would find for him, by naming the Plaintiffs' damage of the sum paid into Court."

Now, that being the only statement we have of the mode in which the Judge charged the jury, we do not feel ourselves justified in saying, that there was any misdirection at all in the case, but that he must be taken to have told the jury, as we think the law is, namely, that if the opium could have been carried on [458] in the state of marketable opium to Hong Kong, although it might have sustained great damage in the course of its being carried on, the Master was bound so to carry it on, unless there was somebody on the part of the consignees of the opium to give him different orders, and then it would have been matter of contract and arrangement with the consignees; but although there was a person at Singapore who usually acted for the Plaintiffs, it does not appear that he took upon himself, or was authorised in any way, to deal with the opium on that occasion.

Therefore, that being the case, upon the evidence before us, we do not think that there was either any misdirection on the part of the Judge or that the verdict was contrary to the evidence in the case. Where there is conflicting testimony, we should not wish to deal with the case and send it back again (supposing we had the power), unless we clearly saw that the verdict was contrary to the evidence; and this makes it more incumbent on the Appellant, as it seems to us, to have applied to the Court below while the facts were recent and well known, and where he could have brought before the Court all the arguments that have been argued here, and where the Judge who would hear the motion had heard the evidence, and was so much better able than we are to form a judgment upon it.

Upon the whole, therefore, as this is not a case in which we are of opinion that there has been any injustice done to the Appellant, we probably should not have sent it back for a new trial, even supposing we had the authority to do so, much less can we feel ourselves justified in advising Her Majesty to take such a step, as sending this case back again to Hong [459] Kong by reversing the judgment; we think, according to the true interpretation of the Ordinances, the practice in our Courts here is the practice which ought to prevail, and which, according to the Ordinances, does prevail in the Court of Hong Kong. We think the appeal does not lie under the circumstances: as it is, in effect, an appeal against the verdict, and not an appeal against any act of the Court. Under all the circumstances, we are of opinion, that the appeal must be dismissed, with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. *When an appeal lies generally*, 6. *Practice*, h. *What points may be raised*; tit. SALE OF GOODS, F. DISCHARGE AND BREACH OF CONTRACT, 6. *Breach*, a. *Action for*, i. *Generally*; tit. SHIPPING, A. XV. CARGO, 8. *Duty of Master*, c. *To sell*—*Power of Master*, 12. *Action for loss, etc.*, a. *Parties*. As to rights of consignee of goods, discussed in *Notara v. Henderson*, 1872, L.R. 7 Q.B. 230; and cf. *The Freedom*, 1871, L.R. 3 P.C. 602, 8 Moo. P.C. (N.S.) 40; *Cargo ex Argos*, 1873, L.R. 5 P.C. 165; *Atlantic Mutual Insurance Co. v. Huth*, 1880, 16 Ch.D. 481.]

## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

FEWSTER WILKINSON and Others,—*Appellants*; THOMAS WILSON and Others,—*Respondents* [Nov. 26 and 27, 1851,\* and June 29, 1853 †].

## THE “BONAPARTE.”

Bottomry bond upon the ship, freight, and cargo; taken up by the master of a small Swedish vessel at a port in Sweden. Part of the cargo was consigned to England. Held, that considering the distance between Sweden and England, and the means of communication, it was essential to the validity of the Bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have obtained an answer within a period not inconvenient with the exigency of the circumstances of the case [8 Moo. P.C. 473].

A Swedish vessel bound from a port in Sweden to Hull, was driven, by stress of weather, to put back into another port in Sweden. This took place on the 21st of November, 1848. Ten days afterwards the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed, and the cargo re-loaded. The master at once communicated with the owners of the ship, resident in Sweden, who, being without funds, consented to the master taking up a Bottomry bond for payment of the necessary repairs, and the British Consul at the port where the vessel lay, wrote on behalf of the master, and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter, and the master, in the month of March, 1849, hypothecated the ship, freight, and cargo for the money borrowed for the repairs. Held (affirming the judgment of the Admiralty Court), that such letter to the consignees was a sufficient notice to authorise the master raising money by Bottomry on the cargo [8 Moo. P.C. 483].

Where a party intends to rely upon a particular circumstance as a defence, such ground should be pleaded, and not raised at the hearing, *ore tenus*.

In a question of fact, the Judicial Committee not being satisfied with the sufficiency of the evidence, relaxed the inhibition, and remitted the cause to the Court below, to take proof by further affidavits upon that one point exclusively, without requiring a fresh Act on petition to be brought in [8 Moo. P.C. 475-6].

The question raised in this case was the validity of a Bottomry bond, upon the ship, freight, and cargo, so [460] far as part of the cargo was concerned. The Bond was taken up by the master of the ship the *Bonaparte*, a Swedish vessel, at a port in Sweden, with the concurrence of the owners of the ship, who resided in Sweden. Its validity was opposed by the Appellants, the owners of part of the cargo, who resided at Hull. The Bond was not disputed by the other owners of the cargo, or by the owners of the vessel.

The circumstances of the case were as follows:—The *Bonaparte*, belonging to the port of Uddevallah, in Sweden, being then on a voyage from Gottenburg to Hull, with a cargo of iron and deals, put into South Koster Bay, in Sweden, on the 22nd of November, 1848, in consequence of injuries sustained through bad weather. On the 25th of the same month the master communicated that fact to the owners of the [461] vessel, who resided at Berg, near Uddevallah, and requested them to supply him with the funds necessary for repairing the schooner. The owners, however, informed the master that they had no cash, and that he must get the repairs

\* Present: The Lord Justice Cranworth, the Right Hon. Sir Herbert Jenner Fust, Knt., the Lord Justice Knight Bruce, and the Right Hon. Sir Edward Ryan, Knt.

† Present: The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., Lord Justice Turner, and the Right Hon. Sir John Dodson, Knt.



done at Stromstad, a port twelve miles distant, and there borrow money for the purpose. The master, upon that information, on the 3rd of December following, proceeded to Stromstad, and there applied to one Toren, a ship agent, and the British Consul at that port, who advanced the sum of £392 15s. 11d. sterling, for the repairs of the schooner, on bottomry of the ship, cargo, and freight, at the maritime premium of £55 17s. 5d. sterling.

The Bond thus given having been endorsed over by Toren to one Quensel, was by him endorsed over to the Respondents, the legal holders of the Bond.

The Act on petition of the Respondents alleged, in substance, that the vessel, of the burthen of 52<sup>13</sup>/<sub>100</sub> tons, sailed from the port of Gottenburg on the 13th of November, then last past, laden with a cargo of iron and deals, and bound on a voyage to the port of Hull, and in the prosecution of such voyage encountered much bad weather and severe gales, whereby the cargo on board her was shifted, and the vessel became leaky. That with much difficulty she was got into Romsöe Bay in Sweden, and, on the 1st of December, she proceeded to Stromstad, when it was discovered that she had sustained so much damage in her hull and rigging, that it was necessary she should be repaired and refitted, in order to enable her to complete her voyage to England, and for this purpose the cargo was discharged, and the vessel was accordingly put into dock. That immediately upon the arrival of the schooner at Stromstad, the master went over to [462] Uddevallah, a distance of sixty miles, or thereabouts, where the owners of the schooner (chiefly farmers) resided, to inform them of the injuries the vessel had sustained at sea, and to obtain instructions from them for his guidance, and also the necessary funds to pay for the repairs indispensable to the schooner and the maintenance of the crew, but that the owners then informed him (the master) that they had no ready cash, and that they could not furnish him with the necessary funds, and that he must get the repairs effected at Stromstad, and there borrow the requisite sum on bottomry of the schooner, her cargo and freight. That the master being thus unable to obtain money from his owners, and being totally unprovided with the necessary funds for such repairs and refittings, and being unable to raise and supply the funds on his own personal credit, or that of the owners, applied to Mr. Toren, of Stromstad, to assist him in completing the repairs, and, amongst other things, to advance such sum as might be requisite for the payment of such repairs on bottomry, on the security, as well of the vessel, the tackle, etc., as of the cargo laden on board. That Toren agreed to lend and did lend to the master, on the aforesaid terms, the sum of £392 15s. 11d. sterling, for the use of the vessel as aforesaid, and that the master mortgaged and hypothecated to Toren the schooner, and also the cargo laden on board, and the freight to be thereafter earned for the transportation thereof, for the payment of the principal sum of £392 15s. 11d., at the rate or premium of £15 per cent., amounting in the aggregate to the sum of £451 13s. 4d. sterling. That the vessel was detained at Stromstad by reason of the severity of the weather, and as soon as the weather [463] permitted she proceeded on her voyage to England, and safely arrived at the port of Hull, on the 7th of April, 1849. That Gottenburg, and Uddevallah, and Stromstad, are all ports situated in the same province on the coast of Sweden, and that a Bottomry bond, taken up in the same province of the same country as that in which the owners reside, with their consent and at their request, the master being unable or unwilling to advance the required funds, was valid and legal by the laws of Sweden.

The answer on the part of the Appellants, the owners of the iron, part of the cargo, opposing the Bond, denied that the Bond was valid by the laws of Sweden, at least so far as respected the cargo on board the ship at the time the Bond was executed, and insisted, that the Bond was given in reality to secure a former debt of the owners of the vessel, and that the master, by whom the Bond was given, had so admitted. That the whole of the cargo laden on board the vessel at the time the Bond was executed, was the property of British subjects, and for these and other reasons could not be enforced by the Court of Admiralty.

The reply expressly denied that the Bond was given to secure a former debt of the owners of the ship, or that the master had ever so admitted, and maintained that even if the whole cargo on board the ship had been the property of British

subjects, as stated, that circumstance would not affect its validity, or the power of the Court of Admiralty to enforce the payment thereof.

The proofs in support of the Act on petition, consisted of affidavits made by the master and others, of the state of the vessel, and the application for money, together with a certified copy of declaration made [464] before the district Judge of Stromstad, and entered on the 10th of September, 1849, in the Register of Sentences of that Court, wherein it was stated, that the master, as well as the owners, declared in distinct terms before the Consul there, that they each severally, as well as the other owners, were at that time unable to procure the necessary ready monies required to liquidate and defray the average expenses which the master had to pay for putting his vessel into a seaworthy condition again; and, at the same time, they both declared that, under these circumstances, the average expenses should be paid without delay, so that the vessel might prosecute her voyage, and that there was no other means for them on that occasion to satisfy the advances of the funds for the average expenses, than to allow the master to sign a Bottomry bond upon the schooner *Bonaparte*, the cargo she had on board, and her freight, and that in this extremity they empowered the master to get the advance of the funds for the average charges, and Toren, ship broker, to arrange and conclude the average and bottomry business.

The affidavit of Anderssen, the master, after stating the circumstances respecting the vessel, her destination, voyage, and of her encountering bad weather, whereby her cargo was shifted, and she became leaky, proceeded thus:—That by reason of the aforesaid disasters, it became necessary that the schooner should bear away to a place of safety, and after much difficulty she was got into Romsø Bay, in Sweden, on the 21st of November last, and afterwards on the same day she came to anchor in South Koster Bay, in Sweden; that on the day after the arrival of the vessel in Koster Bay, the deponent proceeded from [465] Koster Bay to Johannes Jansson, who resides at Berg, which is near to Uddevallah, and sixty English miles distant from Stromstad, and which Jansson was the managing owner of the vessel, and the person from whom the deponent had previously been always accustomed to receive his orders respecting the vessel, and the deponent arrived at Berg on the 25th of November last, and then and there related to Jansson the circumstances hereinbefore mentioned; and afterwards, on the same day, the deponent, accompanied by Jansson, went to Olaf Sundberg, another of the owners of the vessel, who resides at Raneberg, near to Uddevallah, and the deponent then and there informed them of the injuries the vessel had sustained at sea, with a view to obtain instructions from them, and also the necessary funds to pay for the repairs indispensable to the vessel; but they then informed him that they and the other owners of the vessel had no ready cash, and that they, therefore, could not furnish him with the necessary funds, and that he must get the repairs effected at Stromstad, a port in Sweden, and twelve English miles distant from Koster Bay, and there borrow the requisite sum of money to repair the ship, and do the best possible for the owners; that accordingly the deponent returned to the vessel in Koster Bay, where he arrived on the 30th of November last, and was detained by bad weather until the 3rd of December last, when he proceeded with the vessel from Koster Roads to Stromstad, where the vessel arrived in the evening of the same day, when it was discovered that she had sustained so much damage in her hull and rigging, that it was found and became necessary that she should be repaired and refitted, in order to enable her to complete her voyage, and that her cargo should be discharged, landed, and [466] taken care of. That the deponent being thus unable to obtain money from his owners, and being totally unprovided with the necessary funds for such repairs and refittings, and being unable to raise and supply the funds required on his own personal credit, or that of the owners of the vessel, or otherwise, applied to Toren to assist him in effecting and completing such repairs and refittings, and among other things to lend and advance such sum as might be requisite for the payment of the expenses of such repairs in the port of Stromstad. That the repairs and refitting, and discharging of the cargo, were subsequently proceeded with at Stromstad, and Toren advanced to him the necessary sums for that purpose, from time to time, on the express understanding that the same were to be so lent on bottomry of the ship, cargo, and freight; that accordingly Toren advanced £392 15s. 11d.



sterling, which sum was necessary for the purposes aforesaid; and the deponent, for and in consideration of the same, did, by a Bond of bottomry, bearing date the 26th of March, 1849, by him duly executed, with the full consent and authority of Jansson and Olaf Sundberg, acting for themselves, and as deponent was informed by them, and believes, for the other owners of the schooner, acknowledge that he had taken up and received of and from Toren, the full sum of £392 15s. 11d. sterling, for the use of the vessel as aforesaid, and, for the security of Toren, did bind himself, his goods, chattels, and effects, and more especially did mortgage, hypothecate, pledge, and assign over to him, Toren, his executors, administrators, and assigns, or to his order, the vessel, the *Bonaparte*, together with all her boats, tackle, apparel, and furniture, and all equipments and appurtenances, also the cargo laden on board the same, and the [467] freight to be thereafter earned for the transportation thereof in the aforesaid voyage, for the payment of the said principal sum and premium of £15 per cent. thereon, amounting to the further sum of £55 17s. 5d. sterling, such aggregate sums of principal and stipulated interest amounting together to the sum of £451 13s. 4d. sterling, to Toren, or to his order, at or before the expiration of fourteen days next after the safe arrival of the vessel at the port of Hull aforesaid. And the deponent further said, that the schooner or vessel was, in consequence of the money so borrowed, repaired and refitted; and as soon as the weather permitted, to wit, on or about the 29th day of March last, he proceeded on his voyage to England, and safely arrived with the vessel at the port of Hull on the 7th of April last. And the deponent further said, that Gottenburg, Uddevallah, and Stromstad, were all ports situate in the same province, on the coast of Sweden, and that a Bottomry bond on ship, cargo, and freight, taken up in the same province of the same country as that in which the owners of the vessel hypothecated reside, with their consent and at their request (themselves being unable or unwilling to advance the required funds), is, as the deponent had been informed, and believed, a legal Bottomry bond, and valid by the laws of Sweden, and is recognised and allowed, and acted upon therein. And the deponent further said, that the Bond was not, as alleged, given to secure a former debt of the owners of the vessel, but, on the contrary, the bond was in reality and *bona fide* given to secure the sum of £392 15s. 11d., and for no other debt or sum of money whatever, and that such sum of £392 15s. 11d. was actually and *bona fide* and justly and truly ex-[468]-pended on such repairs and necessities as thereinbefore mentioned, and without such advance the vessel and her cargo must have remained at Stromstad, and could not further have prosecuted her voyage.

The Appellants brought in affidavits negating the fact of any repairs having been made at all, and alleging the value of the ship not to have exceeded £200. No evidence was offered in support of the allegation in the Appellants' answer that the Bond was invalid by the law of Sweden, or that it was given for a former debt, and it appeared that both these objections were abandoned in the Court below.

The Judge of the Admiralty Court (The Right Hon. Dr. Lushington) by an interlocutory decree, dated the 23rd of May, 1849, pronounced for the force and validity of the Bond, as applicable for the freight due for the transportation of the cargo lately laden on board the ship, and to that part of the cargo for which no appearance had been given; and further pronounced for the force and validity of the Bond, as applicable to the iron, part of the cargo, for the owners of which an appearance has been given, and condemned the Appellants to answer the action so far as regarded the iron in the proportion of the Bond and interest rateably, with the value of such part of the cargo for which no appearance had been given, deducting therefrom the costs of suit, and after the application of the proceeds of the vessel and freight in part discharge of the Bond and interest, and the costs of suit relative to the vessel and freight, and further condemned them in costs of opposition to the Bond (see case reported, *nom. The Bonaparte*, 3 W. Rob. Adm. Rep. 298).

[469] From this decree the present appeal was brought.

The points raised on the appeal, and argued at the hearing, by the Appellants, were:—

First. That the Bond was invalid, if not altogether, at all events as against the

cargo, on the ground of its having been given in the country where the owners of the ship resided.

Second. That it was invalid as regarded the cargo, because no sufficient means were shown to have been used to obtain money on bottomry of the ship and freight alone; for until the inability to obtain advances upon the ship and freight had been satisfactorily proved, it was not competent to the master to pledge the cargo at all.

Third. That the advances alleged to have been made were not sufficiently proved to have been made, especially the party who was alleged to have made them, and who took the Bond, being apparently the ship's agent, and having made no affidavit in support of the Bond.

Fourth. That no repairs to the extent alleged were proved; on the contrary, that the surveys showed that no repairs were done to any such extent, and that the Bond was, therefore, as well as for other reasons, a fraud, at least upon the owners of the cargo.

Fifth. That taking into account the value of the ship, as ascertained, if the repairs charged for were actually done, the cost thereof showed that she ought not to have been repaired at all under the circumstances, at least not at the expense of the owners of the cargo; and,

Sixth. That the cargo ought (under the circumstances shown and contended for by the bondholders), instead of being bottomried, to have been trans-[470]-shipped and sent to its port of destination in another vessel, or, if no such vessel could have been obtained, the cargo ought to have been landed, and that at any rate owners of the cargo should have been (and which it was not pretended that they were) communicated with, in order that they might have sent out another vessel for, or have given such other directions as they might have thought fit in respect of, the cargo.

The authorities cited by the Appellants were:—

As to the duty of the master to communicate with the Appellants, the consignees of part of the cargo, before resorting to a Bottomry bond on the cargo, *Wallace v. Fielding* (7 Moore's P.C. Cases, 398), *La Ysabel* (1 Dodson, 273), *Jones v. Simmons* (2 Q.B. Rep. 425), *Stonehouse v. Gent* (2 Q.B. Rep. 431, note), *Arthur v. Barton* (6 Mee. and Wel. 138), Emerigon, *Traité des Assurances*, tom. ii. ch. iv. sec. 3 (Edit. 1827).

That if any necessity existed sufficient to justify the master hypothecating the ship and freight, yet the Bond was invalid, as he had no power to hypothecate the cargo, especially at a foreign port. *Wilson v. Muller* (2 Stark. 1), *Duncan v. Benson* (1 Exch. Rep. 537), *Benson v. Duncan* (3 Exch. Rep. 644), *Duncan v. McCalmont* (3 Beav. 416), Emerigon, *Traité des Assurances*, tom. ii. ch. iv. sec. 12 (Edit. 1827).

The Respondents objected to the question raised by the appeal, of the want of communication with the consignees of the cargo, being entertained, as that point was not alleged in the pleadings—*The Cana*-[471]-*dian* (1 W. Rob. 343)—and, therefore, they had had no opportunity of meeting such objection.

Upon the question of the validity of the Bond, they submitted, upon the evidence, that the master was in such a case of unprovided necessity as justified him in resorting to bottomry and hypothecating the cargo. *The Gratitude* (3 C. Rob. 240), *The Vibilia* (1 W. Rob. 1), *The Lord Cochrane* (1 W. Rob. 312), Story "On Agency," ch. vi. sec. 118, Abbott on Shipping, pp. 143, 321 (7 Edit.); and, that the Court favoured Bottomry bonds, *The Kennerley Castle* (3 Hagg. Adm. Rep. 7), *The Reliance* (3 Hagg. Adm. Rep. 74), *The Calypso* (3 Hagg. Adm. Rep. 165), *The Cognac* (2 Hagg. Adm. Rep. 377), *The Vibilia* (1 W. Rob. 5), were cited.

Dr. Addams and Mr. Willes, for the Appellants; and Dr. Jenner and Dr. Twiss, for the Respondents.

The judgment of their Lordships was delivered by

The Lord Justice Knight Bruce.—The question in this case is the validity of a Bottomry bond, purporting to affect the ship, freight, and cargo; but the case now before us, is only so far as the cargo is concerned: the Appellants are the owners of



the cargo, or of the most important and valuable part of it; the Respondents are the persons to whom the Bottomry bond has been transferred.

It is alleged by the Appellants, that so far as the cargo is concerned, the Bottomry bond was not warranted by maritime law, and is void: the contrary is [472] asserted by the Respondents, who claim the full benefit of the Bond against the cargo, so far as it has been satisfied by the ship and freight.

The circumstances under which this Bottomry bond was given, may be taken, for the present purpose, from the affidavit of the master.—[His Lordship read the affidavit (*Ante* [8 Moo. P.C.], p. 464), and proceeded:—]Now it appears that the master, with the aid of the Consul at the port of Stromstad, proceeded to have the repairs done; but their Lordships collect from the materials before them that the repairs in effect were not commenced until the 17th of January. The time, therefore, during which the master might have communicated, or endeavoured to communicate, with the owners of the cargo, was the interval, in one mode of viewing the matter, between the 30th of November and the 17th of January; in another mode of viewing the matter, between the 3rd of December and the 17th of January. He did communicate with the person who had shipped the cargo, or the greater and more valuable part of it, but that person declined to have anything to do with the repairs, alleging that what he had shipped had been shipped on the account and risk of all concerned. The whole, or by much the greater part of the cargo was addressed and consigned to the port of Hull, and that portion of it in question in this appeal, the more valuable portion of it, consisting of iron, was consigned to a house of trade there, who are the Appellants.

It does not appear that in these circumstances, during any part of the interval—a long interval when the subject-matter is considered, and when the distance and means of communication between the coast of Sweden and England are considered—that any communication took place from the master to Hull, or [473] that any attempt at communication was made; and one question for consideration is, whether, upon the materials which are before their Lordships, it was not the duty of the master, before hypothecating the cargo, to have had that communication, or at least to have attempted to have had that communication. That it is an universal rule, that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt.

Now, in this case, considering the distance between Sweden and England, considering the length of time that elapsed before the repairs were done, their Lordships are of opinion that, supposing the point to be open on these papers, the materials before their Lordships show that the master did not do his duty to the owners of the cargo, and was not warranted, therefore, in hypothecating it.

A question has been suggested whether the pleadings before the Court of Admiralty were so framed as to admit this point. Their Lordships are of opinion, that they were, and they are strengthened in that view by the manner in which the learned Judge of [474] that Court dealt with this particular part of the case. He says (3 W. Rob. 308-9). “It has been contended, as a further objection in this case, on the part of the owners of the cargo, that the cargo ought to have been transhipped, or communication ought to have been made by the master to them, that is, the owners of the cargo, before the Bond was given. With respect to the first point, I am not aware that there is any general obligation on the master of a vessel which is in need of repairs to transship the cargo. In the present instance, the question appears to have been considered by the authorities at Stromstad; and I think it right to observe, that all the proceedings before them (and I have gone through the whole carefully) appear to me to have been conducted with the greatest possible care and attention, and I have no reason to doubt the fairness of all

persons concerned. With respect to the second point, it appears, however, by the affidavit marked No. 3, that information of the necessities of the vessel was conveyed to the shipper of the cargo, and he refused to advance any money at all. Under this state of circumstances, does the law require that the master, as a matter of necessary obligation upon him, should have made a communication to the owner of the cargo in England, if indeed he knew who that owner was? As far as the evidence before me goes, there is nothing either in the bill of lading or in the other circumstances of the case which shows that the master knew in whom the property of the cargo was. I know of no authority which renders it imperatively necessary that such a communication should always be made, and I certainly do not perceive that the circumstances of this [475] case particularly required it. So far as the authorities go, in the case of *The Gratitude* [3 Rob. C. 240], Lord Stowell said, and said truly, it was exceedingly desirable that application should be made to the consignee of the cargo where practicable; but in no case whatever to my knowledge, and none has been cited, has it ever been laid down by this Court that there was an absolute necessity of making such communication. It may undoubtedly be expedient so to do for various reasons; amongst others, to take away all suspicion of fraudulent intention on the part of those concerned in the bottomry transaction."

Now, their Lordships, having considered the whole of the case, find no reason whatever to dissent from any part of the judgment of the learned Judge, except the single portion to which my observations have been directed. But their Lordships are of opinion, that upon the materials before the Court of Admiralty, there was a case in which it was the duty of the master to communicate, or endeavour to communicate, with the owners of the cargo, or at least with the Appellants, and that there is no evidence that he did so, or attempted to do so. Assuming, therefore, that the entire case, capable of being adduced in point of evidence, was before the Court of Admiralty and is before their Lordships, their Lordships are prepared to say, that, as against the cargo, this Bottomry bond cannot stand. But their Lordships are also of opinion, that the point upon the pleadings has not been so distinctly brought forward as to render it safe to justice to conclude the cause, as to this part of it, upon what was before the Court below. Their Lordships, therefore, are disposed, if the parties to this contest, or either of them, should desire the opportunity of adducing further evidence before the Court of Admiralty, on the question of communication, or the absence of communication, the attempt at communication, or the absence of attempt at communication between the master and the owners of the cargo, and, if there was no communication, if there was no attempt at communication, then as to the existence or the absence of circumstances which might have justified the master in not making the communication, or in not making the attempt,—if the parties, or either of them, I repeat, are desirous to have that opportunity, their Lordships are determined to afford it.

Are the learned Counsel prepared now to say, whether they desire the opportunity?

Dr. Jenner.—On the part of the Respondents, we do. Is it your Lordships' intention that the Act should be written further to, or that there should be fresh affidavits?

Lord Justice Knight Bruce.—Our opinion is, that without a fresh Act, further affidavits should be brought in. If the Respondents adduce fresh affidavits, the Appellants will have the opportunity also, but the affidavits must be confined to the point which on behalf of their Lordships I have mentioned. We dissent from the judgment below on the single ground mentioned. We remit the cause to the Court of Admiralty for the purpose of receiving further evidence as to that portion of the case. No costs to be given on either side.

Their Lordships reported to Her Majesty in favour of the appeal and complaint, that the inhibition served on the Court below ought to be relaxed, and the cause remitted to the Judge from whom the appeal was [477] brought, with intimation of the opinion of their Lordships that the force and validity of the Bottomry bond proceeded on in the cause, as affecting the iron, part of the cargo, could only be impeached on the ground of no sufficient communication having been made, prior to the execution of the Bond, to the owners or consignees thereof, and that the Judge



ought to be at liberty further to proceed in the principal cause for the purpose only of receiving proof on both sides, in respect of such communication, and to make such final decree, and to make such order as to costs incurred in the Court below as to him might seem meet: and that the question of costs before the Committee ought to be reserved. This report was approved by Her Majesty, and an Order in Council made in terms thereof.

Upon this remit, evidence was gone into as to the point of communication. This evidence consisted of the affidavit of a merchant of Gottenburg, named Wesslan, the shipper of the wood laden on board the vessel, who deponed, that Toren applied to him, on behalf of the master, to advance money to repair the damage, which he refused to do, and immediately informed, or caused the consignees at Hull to be informed, of what had occurred, that they might protect their interest, and an affidavit of the master stating that he did by means of his agent, Toren, inform the consignees both of the wood and iron, which composed the cargo, of the disasters which had befallen the vessel, of his want of money, and that he asked the consignees to assist him by the advance of funds: that he saw the letters written, and had them before him at the time of dispatching them by the regular mail; and that [478] neither he nor his agent, Toren, ever received any answer to those letters; also an affidavit made by Kihlman, the agent of Good and Co., of Hull, the consignees of the wood, that he wrote to them that the master contemplated a Bottomry bond on ship, freight, and cargo. An affidavit by Mr. Norberg, Her Majesty's Vice-Consul, and agent for Lloyd's, at Stromstad, stating that he, by the desire of Toren, addressed the following letter, dated the 23rd of December, 1848, to Messrs. Wilkinson and Co., at Hull:—"Gentlemen,—Although it is in a very disagreeable case I have to address you these lines, I find it necessary to advertise you about the adversity of Captain C. F. Anderssen of the schooner *Bonaparte*, who got into this port the latter part of November last in a distressed condition, arising from heavy gales at sea, having lost the greater part of his canvas, as well as booms, yards, etc., of the rigging, and about three feet of water in the vessel. The captain has employed Mr. W. M. Toren here, as his agent, and the protest is made at the Magistrate's Court here, in conformity to the log-book. I, being engaged here as British Consul, and agent to Lloyd's Insurance Company in London, as also to part of British Clubs, have been called upon by the captain's agent, Mr. Toren, to examine the log-book and to be present as surveyor, as well on the vessel as cargo. I have found the first mentioned to be in a miserable state, and the iron is, to a great extent, very rusty, from the salt water having got to it; and as I observe you, Gentlemen, to be the owners hereof, so I find it proper to communicate the case to you as it is. As for the rest of the cargo, consisting of wooden articles, the property of Messrs. Good, Flodman, and Co., in Hull, I beg you will have [479] the goodness to communicate the case to them hereabout. The iron is in weight forty tons, and the wooden articles consist of [describing them]. I beg you will have the goodness to address me or Mr. Toren what will be the best to undertake in this affair for the future." The Respondents by their affidavit admitted having received this letter on the 16th of January following, and that they returned no answer. They stated that at no time in 1848 and 1849 did they receive any letter from Toren or any other person as agent of the master applying for assistance in effecting the repairs, and they denied that they had received any other letter intimating that the master could not obtain money from his owners, or that he was unprovided with funds for the repairs, or that the hypothecation of the iron was an event likely to occur.

After considering this further evidence, the Judge of the Admiralty Court pronounced his decree on the 31st of December, 1852, sustaining the Bond. The learned Judge was of opinion, that the evidence established that there had been sufficient communication to the Respondents; that, according to his experience in the case of masters of small vessels, mostly people of inferior education and knowledge, the usual practice of the masters was, if the owner had no agent at the port which they happened to put into in consequence of disasters, to choose some house of business to transact their affairs, and upon the agent so selected devolved such correspondence as he might think necessary with the owners. The learned Judge then proceeded to observe as follows:—"The letter of the 23rd of December, 1848, was a very full and complete communication of all the facts in the case, and [480]

I am a little surprised that this letter having been received by Wilkinson, Whitaker and Co. say on the 16th of January, 1849, they deemed it consistent with their interest to pass by the whole matter in silence, and to leave the vessel and the cargo to their fate without a single line of instructions to their own agent there. Warn, or an answer to the British Consul, who had addressed to them this letter, and who I must presume, from the offices he fills as British Consul and agent to Lloyd's, is a person of respectability. They chose to entertain the notion, or idea, that the vessel would be repaired, no matter how. They were not aware of the absolute want of money, it has been said, but they expected the vessel to be repaired, and the cargo to be saved, but yet for any assistance they gave it might remain there for ever.

"On the whole it is manifest to my mind that the consignees had ample information of the disasters which had befallen the vessel; that they were called upon in law to take measures for the protection of their property, and that they declined or neglected so to do, and I therefore think, that there was a sufficient communication within the meaning of the remission.

"But I cannot conclude this judgment without observing that this question, which was so much discussed in the Court above, and remitted for consideration here, was neither distinctly, nor at all, in my opinion, raised upon the pleadings in the Court below. It was merely an argument suggested in the course of the hearing of the cause, and perhaps I was to blame in not having noticed it at all in my original judgment.

"And, now I will see whether this opinion of mine [481] is or is not well founded upon the proceedings. The Act on petition stated facts which I need not advert to, but now look at the answer—the defence. It denied that the Bottomry bond, being made under the circumstances alleged by the bondholder, is valid by the laws of Sweden, at least so far as respects the cargo on board the ship, at the time when the said Bond was executed. This puts into contest the law of Sweden. And it further alleged, that the Bond was in reality given to secure a former debt of the owners of the ship, and that the master by whom the Bond was given had so admitted that it related to the question of former debt. And it further alleged, that the whole of the cargo laden on board the ship at the time the Bond was executed, and which purports to be included therein, was and is the property of British subjects. This is an allegation introduced, for what purpose I cannot say, and for these and other reasons they submitted, that the Bond could not be enforced by this Court. Now, unless it is included under the words 'these and other reasons,' which I cannot suppose, because it would be contrary to the usual mode of pleading, the absence of communication was never hinted at in the slightest degree in the course of these pleadings.

"Now, I must say, this in my judgment is greatly to be lamented, both on account of the great expense which has been occasioned to the parties in the cause, and the disgrace it reflects on the practice of the Court, that so very loose a mode of pleading should have been adopted, and which the Court, as it does not see the pleadings till the case comes on for hearing, has no means of correcting. If this had been the [482] defence intended to be relied upon, as a matter of common justice as well as correct pleading, it ought to have been stated with sufficient distinctness for the other parties to have taken issue thereon.

"I hope, if this case goes back again, that the Judicial Committee will be apprised, if they were not before, that this is not the ordinary mode of pleading adopted in this Court, nor sanctioned by it."

Against this decree the Appellants, the consignees of the cargo, again appealed, insisting, that the additional evidence did not establish that there had been such sufficient communication made to the owners of the cargo, prior to the execution of the Bond, as the Court below had held.

The Respondents, the bondholders, submitted that the further evidence taken in the Court below upon the remit, clearly proved, first, that on the 23rd of December, 1848, more than three months before the Bond, a letter was addressed by the British Consul at Stromstad to Messrs. Wilkinson and Co., the consignees of the iron, in which he acquainted them with the full particulars of the disaster which had happened to the *Bonaparte*, and of the damaged state of the iron on board, and requested that advice and directions relative thereto might be addressed to himself or Toren, the agent of the master; secondly, that this letter was received by Messrs.



Wilkinson and Co. on the 16th of January, 1849, and that no answer was ever returned thereto; and thirdly, that this letter was in the possession of Messrs. Wilkinson and Co. at the very time that the absence of any communication with them was assigned in their former case as a reason for the decree of the Court below being reversed.

Dr. Addams and Mr. Willes were heard for the Appellants.

Dr. Jenner and Dr. Twiss appeared for the Respondents, but were not called upon to address their Lordships.

Lord Justice Knight Bruce.—Their Lordships were of opinion when this appeal was originally before them, that the case of the Appellants failed, except upon one point, namely, upon the sufficiency of the evidence of the fact of any communication being made to the owners of the iron, part of the cargo, before the Bottomry bond was given. The additional evidence now produced on that point has removed their Lordships' doubts, and they, therefore, must affirm the decree of the Court below, with costs.

[Mews' Dig. tit. SHIPPING: A. X. BOTTOMRY; 2. *Validity*; b. *Authority of Master*. S.C. below, 3 Rob. W. 298. Considered in *Lloyd v. Guibert*, 1865, L.R. 1 Q.B. 125; *The Lizzie*, 1868, L.R. 2 Ad. and E. 258; *Australasian Steam Navigation Co. v. Morse*, 1872, L.R. 4 P.C. 223; *The Onward*, 1873, L.R. 4 Ad. and E. 56; *Kleinwort v. Cassa Marittima of Genoa*, 1877, 2 A.C. 157; *Acatos v. Burns*, 1878, 3 Ex. D. 291; *The Gaetano and Maria*, 1881, 7 P.D. 4. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict. c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict. c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty, was, except as to prize, transferred to the Court of Appeal.]

[484]

## ON APPEAL FROM PORT NATAL

The Hon. HENRY CLOETE, Recorder of Natal,—*Appellant*; HER MAJESTY THE QUEEN,—*Respondent* \* [Feb. 20, 1854].

An order of suspension from the Office of Recorder of the District of Natal, made by the Lieutenant-Governor and Executive Council of that district, under the powers of the Ordinance, No. 14, of 1845, for alleged misconduct as a Judge, founded upon charges of having permitted an affidavit reflecting upon the personal character of the Lieutenant-Governor of the Colony to be reformed, instead of rejecting it altogether, or treating it as a contempt of Court, and for allowing private feelings to interfere with the administration of justice, held to be unfounded and frivolous, and ordered to be rescinded.

The Judicial Committee, in reversing such order, advised the Crown that the salary attached to the Appellant's office of Recorder should be paid to him as if no order of suspension had been made.

In this appeal, the Appellant, the Recorder of the District of Natal, complained of an order, dated the 12th of April, 1853, made by the Lieutenant-Governor, under the public seal of that District, whereby the Appellant was suspended from his office of Recorder, and from the discharge of the duties thereof, and the salary attached thereto, for alleged misconduct as a judge in discharge of his judicial duties.

This order was made under the authority of Ordinance, No. 14, of 1845, passed by the Governor and the Legislative Council of the Cape of Good Hope, entitled, "An Ordinance for creating a District Court in and for the District of Natal," which, *inter alia*, enacted, "That the District Court of the said District shall consist of, and

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson, Knt.

be holden by and before, one [485] Judge, to be called and known by the style and title of the Recorder of the District of Natal; and that it shall and may be lawful for the Governor of the said Colony of the Cape of Good Hope, for the time being, by Letters Patent, to be by him for that purpose made and issued, under the public seal of the said Colony, to nominate and appoint some fit and proper person to be and act as such Recorder as aforesaid for the District of Natal;" and it also further enacted, "That the said Recorder shall hold his office during his good behaviour: provided, nevertheless, that it shall and may be lawful for the Lieutenant-Governor of the said District, by an order to be by him for that purpose made, and issued under the public seal of the said District, or with the advice of the major part in number of the said Council, upon proof of the misconduct of such Recorder, to suspend him from his office, and from the discharge of the duties thereof."

The Appellant was appointed Recorder under the provisions of this Ordinance, and continued to exercise the functions of that office until the 12th of April, 1853, when, by an order of the Lieutenant-Governor of the District of Natal, he was suspended from the office of Recorder, and from the receipt of the salary attached to that office.

This order of suspension was founded on certain charges, which had been preferred against the Appellant at the instance of the Lieutenant-Governor, by which the Appellant was called upon, on the 23rd of March, 1853, to show cause in writing, for the consideration of the Council, why he should not be suspended from his office and salary upon the following charges:—

[486] First. "For allowing private and personal feeling towards the Lieutenant-Governor, and Mr. Meller, the resident magistrate of D'Urban, to interfere with the fair and impartial administration of justice; as shown, among other cases,

"A—By the Appellant having permitted an affidavit of Mr. D. D. Buchanan, dated 8th July, 1852, containing impertinent scandal upon the Lieutenant-Governor, to be reformed, instead of rejecting the said affidavit altogether in its original state, or of treating the same as a contempt of Court.

"B—By having permitted an affidavit of Mr. A. Walker, dated 3rd September, 1852, containing an insulting description of the said Mr. Meller, to be reformed, instead of rejecting the same altogether in its original state, or of treating the same as a contempt of Court," etc.

Second. "For allowing private and personal feeling towards Mr. Meller to interfere with the fair and impartial administration of justice; as shown by his conduct in the case of libel and slander of '*Meller v. Buchanan*,' and in the proceedings arising therefrom."

The Appellant, on the 31st of March, 1853, sent in a written answer to these charges, in which he positively denied that he had ever permitted any private or personal feeling towards the Lieutenant-Governor or Mr. Meller to interfere in any matter brought before him judicially; and with regard to the charge of having permitted the affidavit of Mr. Buchanan to be reformed, he answered that it was not founded on fact, and he urged that he had on judicial grounds ordered all that part of the affidavit reflecting on the Lieutenant-Governor to be expunged, for the [487] reasons he therein set forth; and, as to the charge of not treating that document as a contempt of Court, he set out certain legal objections to the mere production of an affidavit, or the use of language reflecting on other persons, being by the Roman-Dutch law or the English law, treated as a contempt of Court; and urged that the same remarks applied to the charge that he permitted an insulting description of Mr. Meller to be reformed; and with regard to the last charge, he positively denied that he had betrayed a private or personal feeling towards Mr. Meller during the trial of the action "*Meller v. Buchanan*;" and alleged that, although he had received many and serious provocations during the hearing of that trial, such, for instance, as that made by Mr. Meller, who in his address openly charged him in his character of Judge with hostility to him, yet that he had not committed Mr. Meller for contempt, but had acted fairly and impartially in the administration of justice.

No further inquiry took place, nor was any other opportunity afforded the Appellant of defence; but on the 12th of April, 1853, the Secretary to the Executive Council informed him that the Council had given his defence against both of



the charges the greatest consideration, but that they found themselves wholly unable to resist the painful conclusion that they had been satisfactorily established, and that it was their duty to advise the Lieutenant-Governor to suspend him from his office. On the same day the Lieutenant-Governor, with the advice of the Executive Council, suspended him from his office of Recorder, from the discharge of the duties thereof, as also the salary attached thereto, from and after that date, until Her Majesty's pleasure should be known.

[488] From this order of suspension the Appellant presented a petition, and applied for leave to appeal to the Queen in Council, which their Lordships granted upon terms of the Appellant lodging his case and proceeding forthwith (Nov. 28, 1853.)\*

The Crown appeared as Respondent, in support of the order of suspension, and put in a formal case: submitting that the misconduct so charged against the Appellant in his office of Recorder was proved; that for such misconduct the Lieutenant-Governor, with the advice of the Executive Council, had authority to suspend the Appellant from his office, and that the order suspending him from such office was rightly made, and ought not to be set aside.

Mr. Macaulay, Q.C., and Mr. J. B. Karslake, for the Appellant.—By the seventh section of the Ordinance, No. 14, of 1845, the Appellant holds his office during good behaviour, and can only be suspended from office upon proof of misconduct. The Appellant had, therefore, a right to be heard before a proper tribunal before any order of suspension was pronounced against him. *Bagg's Case* (11 Co. 99, c.; and see *The King v. Benn and Church*, 6 Term Rep. 198; and *Montagu v. The Lieutenant-Governor of Van Dieman's Land*, 6 Moore's P.C. Cases, 489). The maxim "*Audi alteram partem*" has been entirely overlooked. No opportunity was given him to appear to answer the charges made against him. But taking the charges as stated, we submit, that the [489] Lieutenant-Governor totally failed to prove any misconduct in the Appellant as Recorder. There is no evidence that he acted or was influenced by corrupt motives: which is the shape the charges assume: indeed, the charges, as set forth by the Lieutenant-Governor, in his order of suspension, are not of the nature of such misconduct as is contemplated by the terms of the Ordinance. The allegation of misconduct mentioned in the first charge in the order of suspension is in fact unfounded, as the Appellant did not permit the affidavits of Buchanan and Walker to be reformed, as alleged. He acted in the exercise of his judicial discretion, and upon public grounds, in electing to retain the affidavits on the file, and striking out the objectionable passages: which was the proper and judicial course. The Appellant, as Recorder, could not legally reject the affidavits of Buchanan or Walker, or treat either of them as a contempt of Court. There is no evidence to establish the other charge, and it is contrary to the fact that the Appellant allowed any private or personal feeling towards Mr. Meller to interfere with the fair and impartial administration of justice, with reference to the case of "*Meller v. Buchanan*," and the proceedings which arose thereon: but the whole of those proceedings were conducted according to the principles of law and justice. We have certificates of the Appellant's conduct as a Judge in the Colony.—[Mr. Pemberton Leigh: Are they admissible here? Does this case come regularly before us as an appeal, or is it referred to us by the Crown for advice. If the former, we cannot refer to them.]—The Order in Council upon the petition for leave to appeal, simply gives leave to enter and prosecute this appeal.

[490] Mr. Solicitor-General (Sir R. Bethell), and Mr. Welsby, for the Crown.—As advisers of the Crown, we think, that the charge against the Appellant, that he, as Judge, permitted scandalous and abusive words, reflecting upon the Lieutenant-Governor's character in an affidavit to be expunged, instead of rejecting the affidavit altogether, is a most frivolous ground of complaint.—[Mr. Pemberton Leigh: We are of the same opinion.]—Only paralleled by the extraordinary conclusion of the Executive Council, that the Appellant, the Judge, was to treat these expressions of personal abuse of the Lieutenant-Governor as contempt of Court. The next charge of permitting the affidavit of Walker, containing an insulting description of Meller, to be reformed, instead of being rejected altogether, or treated as a con-

\* Present: The Right Hon. Dr. Lushington, the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., and the Lord Justice Turner.

tempt of Court, cannot for a moment be sustained. Neither is there any evidence to justify the suspension of the Appellant upon the serious charge of permitting private and personal feelings towards the Lieutenant-Governor and Mr. Meller to interfere with the fair and impartial administration of justice.—[Mr. Pemberton Leigh.—How is it that the case put in by the Crown supports the order of suspension?] —It is to be regretted that a mere formal case was put in by the Crown, without examining the facts of the case.—[Mr. Pemberton Leigh.—I think it would be very desirable in cases of this description, that in the first place, although the law-officers of the Crown may not have perused the documents at the time they sign the case, the solicitor of the treasury or whoever prepares the case, should be acquainted with them. It would be of considerable convenience to this Court to have [491] some information given to them before the case comes on for hearing. It is, in effect, as if the case came on *ex parte*.]—Neither is it fair to the Appellant, who prepares himself at a greater expense, from the uncertainty of the grounds to be relied upon by the Crown.

Without calling for a reply, their Lordships delivered judgment, as follows, by

The Right Hon. Dr. Lushington.—Their Lordships are of opinion, that it is wholly unnecessary for them to enter into any investigation of the facts set forth in these proceedings, and they would, undoubtedly, have come to that conclusion had they not been favoured with the observations of Her Majesty's learned Solicitor-General, who, in almost every part of his address, expressed the opinion which their Lordships themselves entertain, namely, that the charges preferred against the Appellant were frivolous and totally unfounded.

But there is one in particular, which we think it our duty to notice. It has been said, that the Appellant in a part of one of his judgments, used language of a very strong description, reflecting upon the character of Mr. Meller; and that fact is true. But when we consider the provocation which the Appellant had had to submit to—when we consider that Mr. Meller had denied, in his affidavit, the use of that very language which afterwards the Council, *ex parte*, came to a resolution that he had used, and which it is indisputably true he did use, insulting to a Judge upon the bench—we cannot but think that the Judge, in the vindication of his own character, is to be pardoned [492] for any warmth of language in which he might be led to indulge.

Their Lordships are all of opinion, that they can safely recommend to Her Majesty to restore the Appellant to the situation which he has filled; that there is not any blame to be attached to any part of his conduct through the whole of these transactions, and, moreover, if we find that it is consistent with the practice of this Court, we shall, undoubtedly, with pleasure, avail ourselves of the opportunity of advising the Crown that he be indemnified for the expenses to which he has been unjustly put to.

The following Order in Council was made upon the recommendation of the Judicial Committee:—

“That the said order of the Lieutenant-Governor of Natal, of the 12th of April, 1853, be and the same is hereby rescinded, and that the salary attached to the office of Recorder be paid to the Petitioner, as if no such order of suspension had been made.”

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 4. *Judges and Courts*: see note to *Montagu v. Van Dieman's Land* (Lieutenant-Governor of), 6 Moo. P.C. 500. As to expression of unanimity or divergence of opinion among members of Judicial Committee (8 Moo. P.C. 492), see O. in C. of 4th Feb., 1878, and authorities collected in Phillimore's *Eccl. Law*, 2nd. ed., p. 975.]



## [493] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

HENRY AUSTEN,—*Appellant*; ROBERT HAY GRAHAM,—*Respondent* \*  
[Feb. 21, 22, 1854].

AN Englishman, who had resided for many years in India, and become imbued with eastern notions, professing himself, at different times, a believer in the Hindoo and Mahomedan faiths, and to a great degree adopting the habits of life of the latter, by his Will (which, with the exception of a small legacy, excluded his brother, his only next of kin, from any benefit), after bequeathing several legacies and specific bequests, gave the residue of his property to the Turkish Ambassador, or the person for the time being representing him, to be applied for the benefit of the poor of the city of Constantinople, and for the erection of a cenotaph at Constantinople, with a light burning, and a description of the Testator engraved thereon. This Will, which was in conformity with his written instructions, was duly executed during the last illness of the Testator. The Prerogative Court by its sentence refused probate, upon the ground of the extraordinary nature of the bequest, coupled with the wild and extravagant conduct of the Testator about the time of execution, which the Court considered as amounting to insanity. Such sentence reversed upon appeal, and the Will established: the Judicial Committee being of opinion, that as the Will was in conformity with the written instructions of the deceased, the true test to ascertain its validity was to look into the previous habits and opinions of the Testator to account for his extravagant behaviour and language, and that though the depositions in the Will might be absurd and irrational in a native of England and a Christian, according to English habits, they were accounted for in the case of the Testator, who had in early life adopted the manners and mode of living of a Mahomedan.

James William Graham, the Testator, died on the 22nd of June, 1849, at the age of sixty-six years, [494] leaving personal property of between £4000 and £5000. He was a widower, but left no children. The Respondent was his brother and only next of kin.

The Testator executed the Will in dispute on the 12th of June, 1849. By this instrument, he appointed the Respondent and Henry Browne executors, to whom he gave legacies of £100 each; and he also gave pecuniary legacies and bequests to several persons named therein. The Testator accounted for the smallness of the legacy to the Respondent in these terms: "Inasmuch as many years ago I gave up my share of the property of my late father to my dear brother Robert Hay Graham, M.D., who has since that time been in the enjoyment of it, I do not think it necessary to make him any bequest except as hereafter appears, seeing that he has already been largely benefited by me:" and after directing the conversion of his property and charging his debts and legacies thereon, he proceeded to dispose of the ultimate residue in the following terms:—"I desire that my said executors shall hand over the balance remaining to the Turkish Ambassador, or the person for the time being representing the same, such balance to be divided in such proportions as such Ambassador or person aforesaid shall think fit, amongst poor persons of the city of Constantinople, and also in the erection of a Cenotaph, with a light burning therein, at Constantinople aforesaid, on which cenotaph my name and description may be engraved: but I hereby declare that my executors shall not be bound to see to the execution of this my wish any further than by handing over whatever balance may remain after such payments as aforesaid to the Turkish Ambassador for the time being, or the person representing him as aforesaid."

[495] This Will, which was opposed by the Respondent on the ground that the Testator was of unsound mind, was propounded by Browne, one of the executors, in a common *condidit*, in which the deceased was described as a professor of the

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson, Knt.

Mahomedan religion. Other instruments of a testamentary character were also brought in, consisting of instructions by the Testator for a Will, and a testamentary instrument, bearing date the 8th of June, 1849, by which certain legacies were given to the Appellant and others, and by which he appointed the Respondent and Browne executors, but by which the residue was not disposed of: another paper, dated the 10th of June, 1849, in which the Testator had dictated the several items of his property: and a Will duly executed by the Testator on the 11th of June, 1849, which was afterwards cancelled. This Will was almost identical with the one in dispute. After the allegation had been put in, and before any witnesses had been examined, Browne declared that he would proceed no further in the cause. A decree was thereupon taken out on behalf of the Respondent, which recited the proceedings already had in the cause, and cited all the legatees named in the Will to appear and propound, and prove the same by witnesses in solemn form of law, or to show cause why letters of administration of the goods of the deceased, as having died intestate, should not be granted to him, as his brother and only next of kin.

The Appellant, one of the legatees, then propounded the Will in question.

The allegation given in by him pleaded the history of the deceased, his proficiency in several Eastern languages, his familiarity with the mythologies and [496] religions of several Eastern nations, and with their opinions, customs, and habits, many of which he liked and adopted, and that in consequence he was generally called and known as "Hindoo Graham"; that he openly favoured and approved of the Mahomedan and Hindoo religions, and occasionally professed his belief therein, and practised some of their forms and ceremonies; that he frequently corresponded, conversed, and associated with natives of India and other Mahomedans, when opportunities occurred, until the period of his death: that by reason of his eastern habits and of his cohabitation with one Sarah Gear, he lived in seclusion, and did not associate much with his equals. It further pleaded, that the Testator was a man of sound mind, and was at all times treated as such by the Respondent, who often remonstrated on his habits, opinions, and manner of life; that after the execution of the Will propounded, the Respondent endeavoured to persuade him to revoke or alter it, and also requested a Mr. Curzon, a friend of the Testator's, to get him to make a Codicil in the Respondent's favour: that after he had made the Will he spoke to several persons, expressing his satisfaction that he had provided for Sarah Gear and her mother.

The Respondent filed a responsive allegation, which pleaded, in substance, that in the month of May, 1849, the Testator became very unwell, suffered much from asthma and suffusion of water on the chest, and in consequence thereof became very weak and exhausted; that at such time, and until his death, he laboured under a chronic disease of the brain; that his appearance, manners, and language, were strange and wild; that he was passionate in his temper, and [497] inadequately and irrationally excited from trivial causes; that he frequently continued talking incessantly for hours together, in a wild, rambling, and incoherent manner, and until he became quite exhausted; that he wandered in talking from one subject to another without connection; that his attention could not be kept to one subject for any length of time; that when asked about his health, he gave absurd and irrational answers; that he bandaged and covered his face with handkerchiefs, and objected to allow them to be removed, and declared that he did so "to prevent false impressions being made upon his mind"; that he sometimes refused to take any food whatever, or to take the necessary medicines, and declared that "it was contrary to his religious principles and to the will of God to do so," and that "all depended on the will of God"; that he also declared that "God and he were one," and that "he was next to God," and was "a second prophet," and that "he knew he should not die," or expressed himself in an irrational and insane manner to that effect, and that he continued so to the day of his death.

Witnesses were examined on both sides. The tenor and effect of their evidence is sufficiently stated in the judgment of their Lordships.

On the 26th of July, 1852, the Judge of the Prerogative Court of Canterbury (Sir John Dodson) delivered judgment in the cause. In his judgment he stated, that if further evidence had been before him he should have been inclined to pronounce for the papers executed on the 8th of June, 1849; and as to the Will in question, he was of opinion, from the extraordinary nature of the bequest of the



residue, and the parol evidence of the extravagant language [498] of the deceased about the time of execution of such Will, that he was of unsound mind when he executed it, and he accordingly pronounced against its validity.

Against this sentence the present appeal was brought.

The sole question raised by the appeal, was the sanity and capacity of the deceased; whether the evidence established that he was of sound mind at the time when the Will in contention was prepared and executed. It was not in dispute, but that the Will was in conformity with the instructions of the Testator; but it was contended by the Respondent, that his wild and extravagant conduct about the time of the execution, and the extraordinary nature of the bequest of the residue, established that at that time he was of unsound mind.

The appeal was argued by

The Queen's Advocate (Sir John Harding), and Dr. R. Phillimore, for the Appellant; and Mr. Rolfe, Q.C., and Dr. Twiss, for the Respondent.

The cases cited were *Waring v. Waring* (6 Moore's P.C. Cases, 341), *Mudway v. Croft* (3 Cart. 671), and *Steed v. Calley* (1 Keen, 620).

Judgment was postponed, and now delivered (March 31, 1854) by

The Right Hon. T. Pemberton Leigh.—This is an appeal from a sentence of the Prerogative Court of Canterbury, pronouncing against the validity of an instrument, bearing date the 12th of [499] June, 1849, purporting to be the Will of James William Graham.

It was not disputed that the instrument was properly executed and attested, and that its contents were in conformity with the intentions of the deceased, so far as he was legally capable of forming any; but it was contended, that the deceased was of unsound mind when the alleged Will was made, and of that opinion was the learned Judge in the Court below.

The judgment appears to have been founded partly upon the inference to be drawn from an extraordinary bequest in the Will, by which the residue of the deceased's property is given, after erecting a cenotaph to him in Constantinople, to the poor of that city, and partly upon parol evidence of wild and extravagant language and behaviour of the deceased about the time when the instrument was signed, and particularly upon the testimony of a gentleman of the name of Ellaby, a solicitor, who prepared and attested the instrument.

The deceased died on the 22nd of June, 1849. He left neither wife nor child surviving him; his sole next of kin was his brother, the Respondent, Dr. Graham, who was named as one of the executors in the alleged Will, a Mr. Browne being the other. The Will was propounded by Mr. Browne, but Dr. Graham disputing it, Browne, on the 18th of April, 1850, withdrew from the suit, and the parties interested under the Will being cited, Austen, one of the legatees, on the 13th of June, 1850, took up the proceedings and filed a special allegation.

On the 13th of December, 1850, Dr. Graham put in his answer to the allegation, denying the sanity of [500] the deceased when the Will was made; and, on the 4th of March, 1851, he filed an allegation on his own behalf.

It is important to attend to this statement, because it shows the nature of the mental disorder attributed to the deceased, and at what time and under what circumstances it is supposed to have commenced.

By the first article it is alleged, "That in the month of May, 1849, the deceased became very unwell, and that during the latter part of that month, and thenceforth continually to the day of his death, to wit, on the 22nd day of June following, he was confined to his room, and principally to his sofa and bed." It then goes on to describe his sufferings from asthma and suffusion of water on the chest, alleging that in consequence, he became weak and exhausted. The second article alleges "That during the period in the next preceding article mentioned, the deceased was labouring under a chronic disease of the brain; that his appearance, manners, and language, were strange and wild." The third article alleges, "That in and during the latter part of the month of May, 1849, and thenceforth down to the day of his death, the said deceased was, and continued to be, insane and of unsound mind, and incapable of making his Will."

The insanity, therefore, here attributed to the deceased is not a monomania, or

madness confined to a particular subject, but a general mental derangement, appearing for the first time while he was labouring under the sickness which a few weeks afterwards terminated his life.

With reference to this allegation, and the evidence adduced in support of it, we must examine into the life, habits, and opinions of this gentleman previously [501] to the time when his insanity is alleged to have commenced; for the same behaviour, language, and testamentary dispositions which would be absurd and irrational in a native of England, living according to English habits, and entertaining or professing a belief in Christianity, might not necessarily bear the same character when proceeding from a native of India, or from one who, from an early period, had adopted its manners and modes of life, and who entertained or professed a belief in Mahomedanism.

Now, it appears that the deceased, in very early youth, at the age of fifteen, and before, probably, religious principles had taken any deep root in his mind, was sent to India. When there, he associated principally with natives of the country. He devoted himself to the study of Oriental languages, and acquired an extraordinary proficiency in them, being familiar, as it appears, with the Hindostanee, the Sanscrit, the modern Persian, and the Arabic. By these means he obtained, and held for some time, the appointment of interpreter to the Supreme Court of Judicature at Bombay.

In 1817, after a residence of nearly twenty years, as it appears, in India, he returned to England, where he contracted a marriage with a lady of the name of Austen, by whom he had one son, who died in his infancy. In 1821, he returned to India with his wife, who died there, and in 1832, he himself having lost a situation which he held in the East India Company's service, finally returned to England, and remained there till his death.

During his residence in England, between 1817 and 1821, it appears that he relinquished in favour of his brother, Dr. Graham, all the expectations which he [502] might reasonably entertain to share in the property of his father (who was then living) at his death; and his father accordingly, on the 20th of March, 1821, by his Will, devised the bulk of his estate to his younger son, Dr. Graham, assigning as a reason for it, "That his eldest son, Captain J. W. Graham (the deceased), was already provided for by his own talents and industry, and had voluntarily relinquished all expectations from him."

This circumstance becomes very important, in more than one view, with respect to what afterwards took place.

Of the opinions which this gentleman had formed, and the habits he contracted in India, Dr. Graham, in his answer to the third article of the Appellant's allegation, gives the following account:—He says, "That his brother associated much with the natives of India, and was familiar with the mythologies and religions of several Eastern nations, and with their opinions, customs, and habits, many of which he liked and adopted; and that, in consequence thereof, and also, as Respondent believes, of his strange and extraordinary conduct and behaviour, he was generally called and known as 'Hindoo Graham,' and also as 'Mad Graham,' and that he openly favoured and approved of the Mahomedan and Hindoo religions, and occasionally expressed his belief therein, and practised some of their forms and ceremonies."

Now this is the description given of this gentleman at a time when, however eccentric his conduct might be, no question was ever raised as to his perfect competency to manage himself and his affairs.

He continued to entertain, or at least to profess, these opinions, and to practise these customs, after [503] his return to England in 1832; he had no settled religious belief, affecting to take what he considered good of all religions; he studied the Koran and commentaries upon it, in Arabic, and other books in different eastern languages, shunned the company of Europeans, and lived in a very small house in great seclusion, with a young woman of the name of Gear, who seems to have been his mistress when she was only sixteen years of age. All that we hear of his proceedings is connected with the East; the only employment which we are told of is that of translator of documents in the office of an envoy whom the Rajah of Sattarah had sent over to this country; an employment in which he seems to have been



engaged for more than two years before his death; and the only further matter in which we hear of his taking part is the advocacy of the Rajah's claims at the India House, and the promotion of the return to Parliament of a gentleman who it was understood was to advocate them in the House of Commons. In all money matters he was precise and exact, and lived with great economy on a very small income.

In the midst of these engagements, and in the month of May, 1849, he was attacked by the illness of which in the following month he died. He consulted in the first instance Dr. Riding, a physician, who attended him till the 8th of June, when, being dissatisfied with the effect of the remedies which had been prescribed for him, he determined to resort to other advice.

The complaint under which he was suffering was of a very alarming character, and was attended, as Dr. Riding describes it, with paroxysms or fits of difficulty of breathing.

[504] On the night between the 7th and 8th of June, when he was suffering under these paroxysms, which he thought (very probably erroneously) had been aggravated by the medicines prescribed for him, he determined to send for the apothecaries who had attended him on some former occasions; two gentlemen, a father and son, of the name of Browne, who carried on business as surgeons and apothecaries in the neighbourhood of his residence.

He was immediately visited by Mr. Browne, junior, and what then took place is stated in this gentleman's answer to the ninth interrogatory. Upon carefully comparing this gentleman's evidence with the documents to which it refers, there is a discrepancy between the evidence and the instruments, which was not observed upon either in the Court below, as it would seem, or before us at the bar; but which serves to remove one difficulty which had occurred to us, in comparing the Will of the 8th of June with that which is now in question. By the first, the four Great North of England Railway shares are given absolutely to Sarah Gear; by the latter they are given to her only for life; but by Browne's testimony it appears that the latter bequest was what the Testator really meant, for the words attributed to him are:—"I have four North of England shares which I should wish to be held in trust; the interest to be for the benefit of Sarah Gear."

Some hours after this transaction had taken place, Dr. Riding called to see his patient, who mentioned the fact of having made his Will, and his satisfaction at having done so.

It is impossible, we think, for any Will made in the extremity of bodily sickness to be more free from [505] suspicion, or to show more powers of thought, judgment, and reflection, than that of which an account is thus given by Browne. The proposal to make it originates with the Testator; the urgent reasons for making it are stated by him; he enumerates carefully and accurately the different items of which his property consists; he dictates every bequest; he assigns the reasons for those which he makes, and for omitting one which might naturally have been expected to be found there; and, considering the little affection which subsisted between himself and his brother (a fact which is fully established by the evidence), and what he had already done for him, the Will seems as reasonable in all its provisions as any which could be suggested. We collect it to have been the opinion of the learned Judge in the Court below, that if this Will had been propounded, it must undoubtedly have been admitted to probate; and if nothing further had been done by the Testator, we should entirely have concurred in that opinion.

It occurred however, unfortunately, to Mr. Browne, senior, a day or two after this Will had been made, that it would be better that the Testator's intentions should be carried out in a more formal manner, and he made this suggestion to the Testator; a tolerably strong proof that he at least had no doubt of the Testator's capacity at this time. The Testator adopted the suggestion, and Mr. Ellaby, a solicitor (an acquaintance of Mr. Browne's), was called in.

On the 11th of June, about three o'clock in the afternoon, this gentleman attended with Mr. Browne, senior, at the house of the deceased; and his evidence throughout is very remarkable. The two papers containing the existing Will which had been [506] written by Mr. Browne, junior, were shown to him, and he says, "that he was asked if they were a legal or valid Will." He told them "No;" adding, that they would do for instructions, but that he had better draw up a proper Will." The

statement that these papers did not contain a valid Will seems very extraordinary from a professional man.

He took these papers, however, as instructions, together with a copy of the list of the Testator's property, which had been made out by Mr. Browne, junior, and from those materials, he tells us, that before he saw the Testator he prepared the draft of a Will; that he was afterwards shown into the bedroom where the Testator was lying, to whom he read over the draft. After a great deal of conversation, he says he called the Testator's attention to the fact, that the residue of his property was undisposed of. After some consideration, the Testator stated that he had been thinking of an eleemosynary bequest; and as he had been talking much about the Turks and Constantinople, and had told Mr. Ellaby that he was a Mussulman, Mr. Ellaby says he suggested that perhaps he would like to leave the residue to the poor of that city. He approved of this suggestion, and said that he would adopt it, and would have a cenotaph erected to himself at Constantinople, where a light might be kept constantly burning, and prayers be said for his soul.

A Will was finally prepared, containing a bequest to this effect, dated and executed on the 11th of June, and attested by Mr. Ellaby who had prepared it, and by Mr. McDonald, an assistant of Mr. Browne, senior, and who was in the house as the medical attendant of the deceased. Before Mr. Ellaby retired, the Testator [507] expressed a wish to communicate to the Turkish Ambassador the bequest which he had thus made; and as Mr. Ellaby suggested some doubts about the validity of the bequest of the residue, it was arranged that he should call again on the following day, and see the Testator on the subject.

Mr. Ellaby's doubts at this time were confined to the validity of the bequests of the residue, and were founded on its extraordinary character: doubts as to the Testator's capacity to make any bequest, he appears to have entertained none.

The result of Mr. Ellaby's further consideration was, that it would be better to omit the direction in the Will of the 11th, that prayers should be offered for the Testator at the cenotaph in Constantinople, and he, therefore, had the Will recopied with that alteration, in order that in its altered form it might be re-executed; an alteration hardly, under any circumstances, of sufficient importance to make it worth while to have a new Will, but which it is utterly impossible to suppose that Mr. Ellaby would for one moment have contemplated carrying into execution, if he had found the Testator on the 12th, in his opinion, less capable of testamentary disposition than he had been on the 11th: or if he (Ellaby) had then conceived doubts as to the Testator's sanity, which certainly had not entered his mind on the preceding day.

He went again to the Testator's house on the 12th, about three o'clock, with the copy of the new Will, and he found there two gentlemen from the Turkish Ambassador's office, who had been sent there in consequence of the Testator's wish to explain what he had done by his Will for the poor of Constantinople. [508] These gentlemen, natives of Turkey, were at that time in conversation with the Testator. One of them, Zohrab, has been examined as a witness; he speaks to the conversation which he had with the Testator, which lasted about half an hour, and in which the Testator professed himself to be a Mahomedan; and he concludes his testimony with these words:—"The said deceased was very ill at the time, but he was perfectly sensible, and was perfectly conscious that his dissolution was approaching. His bodily strength was prostrated by illness, but he had a great deal of energy of mind about him, and he was, in my opinion, when I then saw him, of sound and perfect mind, memory, and understanding, and fully capable of making his Will, and of doing any other act of business of that or the like nature, requiring thought, judgment, and reflection. I am a Christian myself, and the only peculiarity I remarked in the deceased was his being, or professing to be, a firm believer in Mahomedanism in a Christian country, and having been brought up a Christian. He appeared to have studied the Koran a great deal, and he quoted from commentaries upon it."

Is it possible to have more conclusive or more unexceptionable testimony than this, as to the Testator's state of mind, or applying more directly to the time of the execution of the Will in question? Immediately after these gentlemen had left the room, the new Will is executed, and attested by Mr. Ellaby and Mr. Fisher, a neighbour of the Testator, who was sent for to be a witness.

Mr. Fisher, in his evidence, says, "I conversed with the Testator both before and



after the signing of the said Will; he did not seem to be in any pain; he [509] was lying on the bed quite airy and comfortable. I said to him, 'I am sorry to see you so ill, Mr. Graham;' and he answered, 'Oh! I am not so ill: my lungs and my constitution are good, but I am troubled with this phlegm;' and he patted his chest in a manner which I considered as indicating the soundness of his chest and lungs. The deceased and I then kept on conversing, while the other gentleman was doing some writing to the Will. What that conversation was I do not remember. Then came the signing of the Will; and when that was finished, I wished the Testator good-bye. This is what I recollect took place. The deceased was upwards of sixty years of age, I imagine. He did not seem to me to be very ill at the time; he spoke cheerfully; he was reclining on the bed when I first saw him; but he sate up in his bed to sign the Will. I believe the deceased to have been, on the occasion to which I have now deposed, perfectly sane, of perfectly sound mind, memory, and understanding; perfectly capable of making his Will, and perfectly capable of doing any serious or rational act of that or the like nature requiring thought, judgment, and reflection."

Surely this is evidence entitled to very great weight. This is no stranger called in to witness the mere formal act of signing a paper; but a person who had a previous acquaintance with the Testator; who could judge whether there was anything unusual in his language and demeanour; who holds a conversation with him for some time, and states some of its particulars, and who speaks in the most unhesitating terms to his perfect sanity.

Zohrab's evidence extends to the moment before the Will is executed. Fisher speaks to the moment [510] of execution: the evidence of both is in perfect consistency; and that evidence is confirmed by the solemn attestation of Ellaby himself, who procures and witnesses the signature of the Testator to the instrument, not under any urgent pressure, lest the sick man should die intestate if he hesitated, but for no more serious reason than that the Testator might not direct prayers to be offered up for him in Constantinople after his death. It is plain, from this gentleman's conduct, that he could not at this time have entertained any doubts as to the Testator's capacity; and it is but justice to him to observe, that he tells us in his evidence that he did not entertain any. He says, "I did not at the time think him to be at all of unsound mind;" and such doubts about it as he now entertains appear, from a subsequent part of his evidence, to be "the result of what he has since heard, and the inquiries he has made." To such doubts no attention can, of course, be paid.

What passed after the execution of the Will is of much less importance. Mr. Ellaby remained a considerable time after this with the Testator, and had a long conversation with him, in which he says, the Testator expressed a belief in astrology and necromancy, and spoke of having told fortunes, and called up and seen a spirit, and other extravagant talk of the same description; but this was after the Will had been executed. The arts in which he professed to believe were such as were once believed and professed by some of the most learned men in Europe; and are still believed and professed by many of the eastern nations to which this gentleman was so strongly attached. If more weight could be attributed to particular expressions, separate from the context of [511] this conversation, than, we think, can be properly given to them, we should consider them, under the circumstances, rather as the effect of that temporary delirium which is a frequent attendant on severe illness, and great weakness and exhaustion, than of settled mental disorder; and, from any delusions of this kind the Testator is, in our judgment, clearly shown to have been free at the time when the Will was executed.

What passed when the Will of the 8th was prepared, affords, as we have already observed, the most conclusive proof of the Testator's capacity at that time. What passed when the Will of the 11th was prepared, we are unable to collect with much distinctness from Mr. Ellaby's testimony. We are unwilling to make any unnecessary remarks upon his evidence, particularly as the points to which we are about to advert were not the subject of observation at the bar, and possibly some explanation might be offered which does not occur to us; but it is plain that much must have passed of which no account is given by that gentleman, and he must be mistaken in some part of what he says did pass.

He states that the only instructions which he received for the new Will before

he prepared the draft, were the papers already written by Mr. Browne, junior; but, on comparing these instruments, it is clear that this cannot be so.

We have in the Appendix, copies of these documents. The draft which he says he drew from the original instructions and read over to the Testator, instead of being a draft Will, is a collection of confused memoranda of different bequests jotted down upon several loose sheets of paper, which could not have [512] been read over in the form in which they stand, so as to be intelligible to anybody.

Again, the bequests in the form in which they are there, could not have been taken merely from the former Will.

By that Will, as we have already observed, the four Railway shares are given absolutely to Sarah Gear; but by this draft and the subsequent Will they are given in trust to her for life, free from the control of any husband whom she might marry.

We had at one time feared that in establishing the Will now propounded, we should have defeated what was probably the real intention of the Testator, by diminishing the benefit given to Sarah Gear: but on a closer examination of Mr. Browne's evidence, to which we have already adverted, we find that this limited bequest was what he really intended. Is it possible to have stronger evidence that this bequest was not taken from the alleged instructions, but proceeded from the Testator himself, who had his real intentions thus carried into effect?

Again, in the draft and the Will of the 11th, we find these important words:—"And inasmuch as many years ago I gave up my share of the property of my late father to my dear brother, Robert Henry Graham, M.D., who has since that time been in enjoyment of it, I do not, therefore, think it necessary to make him any bequest, except as hereinafter appears, seeing that he has already been largely benefited by me."

Now, of this fact, there is not the slightest notice in the former Will; nor does it appear ever to have been communicated to Mr. Browne. It must, therefore, have been communicated by the Testator to Mr. [513] Ellaby verbally. It shows that much discussion must have taken place as to this Will between him and the Testator; it shows the Testator's memory and judgment at the time, and yet not one syllable is found respecting it in Mr. Ellaby's depositions.

There are many other circumstances in this draft which show that the particulars were taken, not merely from what are called the written instructions, but from the Testator himself.

In these instructions, or, as we should rather call them, Will, two notes of the East India Company are disposed of, but without mentioning either their dates or numbers. In this draft and subsequent Will both the dates and numbers are mentioned. Can it be doubted that the notes themselves were referred to and produced by the Testator?

The same observations may be made with respect to the Indian brooch with nine gems, and the two Korans, of which there is no mention in the former Will: and the introduction of the name of "Nix" instead of "Gear" in describing the mother of Sarah Gear.

This minute examination of the evidence satisfies us, that the instrument now in question contains the clear, deliberate intention of the Testator expressed on the 8th, at a time when there is no question of his sanity, corrected in one particular, in which they had been mistaken, on the 11th, and on that day, with this correction, and some additions, confirmed by the Testator, under circumstances which show that he perfectly understood what he was doing, and again confirmed by him with respect to the only bequest open to any remark: the bequest of the residue on the 12th [514] and embodied in the Will of that date. The evidence should be very conclusive indeed which is to overturn such an instrument. It is true that there may be cases of the class so elaborately discussed in the judgment on appeal of *Waring v. Waring* (6 Moore's P.C. Cases, 341), in which a man may be clearly insane upon one particular subject, and one only: in which a permanent delusion rooted in the mind, and irremovable in sickness or in health, may create unsoundness, and yet may not show itself in any of the ordinary transactions of life. In such cases the reasonableness of the Will, or the rational conduct of the individual who makes it, may be no proof of sanity: but this is not a case of that description. The insanity attributed to this Testator is a general derangement of the intellect, showing itself



in wild and maniacal demeanour and incoherent and irrational language. That this gentleman's mind ultimately sank under his disorder, and was destroyed before life was extinct (as is not unfrequently the case), seems proved by the evidence of Dr. Marsden, who saw him on the 19th of June, three days before he died; but the question is, what was his state on the 12th? and on this the *evidentia rei* is most important. It is completely confirmed by the evidence of Dr. Walshe who saw him on the 11th, 12th, 13th and 14th; who examined the state of his intellectual faculties, and states, that they did not appear to be affected by his bodily ailments; that, on the contrary, they appeared to be clear above the average. He says, that he did not from his examination detect the slightest evidence of any organic disease of the brain, acute or chronic; that, in his opinion, the deceased, when he saw him, [515] was of sound mind, memory, and understanding, and was capable of making his Will, and of doing any other serious or rational act of that nature.

In this opinion, after much and anxious consideration, we are obliged to concur. We feel the utmost respect for the opinion from which we are compelled to differ; but the subject is one upon which, more than perhaps any other, different minds are likely to come to different conclusions on the same evidence; and we must humbly advise Her Majesty to reverse the judgment complained of, and to admit the disputed instrument to probate.

Practically, perhaps, the result will not be very different from that which would have attended the establishment of the Will of the 8th; for, as we shall advise that the costs of all parties, both in the Court below and in this Court, should be paid out of the estate, it is to be feared that there will be very little residue left to provide for the objects either of the Testator's vanity or of his benevolence.

[Mews' Dig. tit. WILL: I. TESTAMENTARY CAPACITY: g. *Soundness of mind*. See note to *Waring v. Waring*, 1849, 6 Moo. P.C. 370.]

## REPORTS OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, 1854-55. By EDMUND F. MOORE, Barrister-at-Law. Vol. IX.

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*In re SCHLUMBERGER* \* [Nov. 28 and 29, 1853].

The Judicial Committee have, under the 4th section of the 3rd and 4th Will. IV., c. 41, jurisdiction to entertain a petition, referred to them by the Crown, seeking to revoke an Order in Council, made upon their recommendation, upon an application by Patentees for a prolongation of Letters Patent under the Statute, 5th and 6th Will. IV., c. 83, and to recall the warrant for sealing such Letters Patent [9 Moo. P.C. 11, 12].

The Crown can at any time before the Great Seal is affixed, upon a proper case being made out, countermand the warrant for sealing.

An alien resident abroad, who was interested in an English Patent by a foreign inventor, and who had also considerable dealings in this country in respect of sales of the patented machine and in granting licences for the use of such Patent, held, in the circumstances, to have a *locus standi* as to entitle him to petition the Crown to revoke an Order in Council for granting an extended term of an English Patent, and to recall the warrant for sealing such Patent [9 Moo. P.C. 15].

Whether an alien living abroad, without such interest, could inform the Crown by petition as to any matters touching Letters Patent. *Quære?* [9 Moo. P.C. 15].

Patentees applied under the Statute, 5th and 6th Will. IV., c. 83, for an extension of the term of Letters Patent, and the Judicial Committee recommended a prolongation for six years, which recommendation was confirmed by the Crown by an Order in Council, and a warrant issued for sealing the Letters Patent. No step was taken by the Patentees to procure the sealing of the new Letters Patent, and, after a delay of nearly three years a party interested in opposing the renewal, petitioned the Crown to revoke the Order in Council and the warrant to seal. It did not appear that the Petitioner, or the public, had suffered any loss by the laches of the Patentees. The Judicial Committee, to whom the petition was referred, considered the laches not of sufficient magnitude to deprive the Patentees of all benefit of the renewed Patent; but made it a condition, before dismissing the petition, that the Patentees should pay the Petitioner a gross sum for costs, and give an undertaking not to prosecute for any infringement which might have occurred from the date of the Order in Council to the date of dismissal of the petition [9 Moo. P.C. 16-17].

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\* Present: The Right Hon. Dr. Lushington, the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Turner, and the Right Hon. Sir John Patteson, Knt.



*Quære.* Whether an action would lie in consequence of an infringement, under such circumstances? [9 Moo. P.C. 17].

This petition was presented by Nicholas Schlumberger, a Frenchman resident within the French ter-[2]-ritory, praying Her Majesty to revoke an Order in Council, dated the 7th of February, 1851, granting an extension for six years of certain Letters Patent originally granted to Messrs. Gibson and Campbell, for an improved process in the manufacture of silk and other fibrous substances, and also praying that the warrant issued for making such new Letters Patent might be annulled, and the grant of new Letters Patent revoked, on the ground of the negligence of the Patentees in not sealing new Letters Patent, or taking steps for the sealing of such Letters Patent.

The petition, after stating that Letters Patent had been granted to John Gordon Campbell and John Gibson, in November, 1836, for fourteen years, for an invention made by them of a new or improved process, or manufacture of silk, and silk in combinations with certain other fibrous substances; and that in the year 1850, the Patentees had presented a petition to Her Majesty in Council, praying for a prolongation of such Letters Patent, which petition had been referred to the consideration of the Judicial Committee of Her Majesty's Privy Council, and having been considered by them, a report was made to Her Majesty in Council on the 17th of December, 1850, whereby they recommended that such Letters Patent [3] should be prolonged for the further term of six years, and which report Her Majesty was pleased to confirm by an Order in Council, dated the 3rd of February, 1851; proceeded to allege, that for two years and a half, or thereabouts, from the time when the Order confirming such report was made, and upwards of two years after the expiration of the term granted by the Letters Patent, no further steps had been taken by the Patentees to obtain new Letters Patent. That, in consequence of the neglect of the Patentees to obtain such new Letters Patent, it did not appear but that the exclusive right and privilege of the Patentees, and those claiming under them in the invention, had ceased and determined, and the Petitioner, in particular, did not know or believe, or had any ground to suppose until as thereafter mentioned, that the Patentees had or claimed any exclusive right or interest in the invention, or had prosecuted or were prosecuting any application for such prolongation, or that any new Letters Patent would be granted for the invention. That in February, 1846, Letters Patent were granted to one Josue Heilmann, since deceased, for the sole use of an invention of "improvements in certain machines used for preparing to be spun, cotton, wool, and other fibrous materials, within England, and the other places therein mentioned, for the term of fourteen years." That since the death of Heilmann the Letters Patent so granted to him, or the beneficial interest therein, and ownership thereof, had become vested in the Petitioner and others, in divers shares. That the invention of Heilmann was of great value, and applicable to the combing of cotton, wool, and other fibrous substances, including waste silk, in a manner [4] much more advantageous than was previously known, and the same had been very extensively used; and the Petitioner, and the other persons interested in such Patent, had been and were desirous of extending the use thereof in reference to waste silk, to which it might be applied with great advantage, if the silk, when combed according to Heilmann's invention, could be afterwards manufactured according to the invention of Campbell and Gibson, and that such application would be of great public use and benefit, especially with regard to the relative position and progress of the silk manufacture in this and in foreign countries. That certain of Her Majesty's subjects in England, in consequence of Gibson and Campbell having neglected to act on the Order in their favour, by proceeding to obtain such new Letters Patent, and not having reason to believe that such new Letters Patent had been applied for or would be obtained, had purchased from the Petitioner and the other persons interested in Heilmann's Patent, machines constructed according to Heilmann's invention, for the purpose of combing certain descriptions of silk, and for manufacturing such silk when so combed, after a manner which, it was alleged, would infringe on the invention of Campbell and Gibson if protected by new Letters Patent, and the utility and advantage of which machines would be very greatly diminished and restricted if the silk so combed thereby could not afterwards be manufactured in manner aforesaid. That in or very shortly before the month

of April, 1853, the Petitioner first heard of the application of Gibson and Campbell for new Letters Patent, and he thereupon caused a caveat to be entered at the office of the Solicitor-General against the prolongation of [5] the original Letters Patent; and Gibson and Campbell having, in June, 1853, caused an application to be made to the Solicitor-General for his signature to a warrant for the renewal of such Letters Patent, counsel on behalf of the Petitioner was, on the 9th of July, 1853, heard before the Solicitor-General in opposition to the signature thereof, when the Solicitor-General decided that it was not competent to him to take any course except attaching his signature to the warrant. That the Petitioner had been informed, that Gibson and Campbell were proceeding to obtain new Letters Patent in pursuance of the warrant. That the Petitioner and the persons interested in Heilmann's Patent, and the purchasers of the machines, would sustain great loss if such new Letters Patent should be granted. That the Petitioner verily believed that Gibson and Campbell had abstained, during such period as aforesaid, from prosecuting the Order so made in their favour, and from obtaining the actual grant of new Letters Patent in pursuance thereof, in the expectation of being able, by means of the Order, to obtain, in effect, the benefit of a renewal, without paying the stamp duties and fees legally payable in respect thereof of renewed Letters Patent and the proceedings incident to the making out and grant of the same. That in consequence of the great laches which Gibson and Campbell had been guilty of, their right to such prolongation in pursuance of Her Majesty's gracious intentions had been virtually forfeited, and that they had lost all claim as against the Petitioner and the other persons interested as aforesaid: and the Petitioner prayed, that Her Majesty would revoke Her Order in Council, and revoke and annul any warrant which Her Majesty might have [6] caused to be made for the making of any such new Letters Patent, or for granting any such prolongation as aforesaid. And also, that Her Majesty would not grant any such new Letters Patent or prolongation unto Gibson and Campbell, or either of them, or to any other person or persons in respect of the invention of Campbell and Gibson, and for further relief.

This petition was referred to the Judicial Committee.

Upon the petition coming on for hearing, Messrs. Gibson and Campbell, the Patentees, took a preliminary objection to the jurisdiction of the Judicial Committee to entertain it.

Mr. Campbell, Q.C., and Mr. Drewry, in support of the objection.—There is no jurisdiction in the Judicial Committee to entertain such a petition as this. Their jurisdiction is statutory and of a two-fold character; first, as a Court of appeal, under the 3rd and 4th Will. IV., c. 41; and, secondly, power is vested in them by the 5th and 6th Will. IV., c. 83, to recommend the Crown to grant an extension of Letters Patent. Before the passing of the latter Statute, the Crown had no authority to extend the original grant of Letters Patent. The fourth section empowers the Crown to refer to the Judicial Committee any petition to extend Letters Patent, and to grant new Letters Patent for a time not exceeding seven years. In the present case the requisitions of the Statute have been complied with: a petition for extension has been properly presented, referred to, and heard by the Judicial Committee, who made their report, recommending an [7] extension of the term of the original Letters Patent, which has been confirmed by Her Majesty in Council: the Judicial Committee cannot, therefore, now reverse its previous judgment, or rehear the case. *Rajundernarain Rae v. Brijji Gorind Sing* (1 Moore's P.C. Cases, 117). It is similar to the practice in the House of Lords, where a judgment when pronounced is conclusive, and cannot be reversed or cancelled, except by Act of Parliament. *Exp. White v. Tommey* (4 H.L. Cases, 313). The original jurisdiction under the fourth section of the Statute having been thus exercised and exhausted, there is no power to refer such a petition as this, involving the rescinding of an Order made by Her Majesty in Council for a grant of new Letters Patent, or of cancelling the grant already made. It is, in fact, asking for the repeal of the Patent. —[Lord Justice Knight Bruce.—Are we not sitting here as Privy Councillors, as well as members of the Judicial Committee?—No power exists in your Lordships in Patent cases, except as members of the Judicial Committee, and we submit that, when the report was made by the Committee, its jurisdiction as a Court terminated. It is an established principle of law, that where a jurisdiction is statutory, you



must find the jurisdiction, *in ipsissima verba*.—[Lord Justice Knight Bruce.—If the Patent was sealed, it can only be revoked by *scire facias*?]—Yes.—[Dr. Lushington:—The fourth section of the 3rd and 4th Will. IV., c. 41, empowers the Queen to refer any matter to the Judicial Committee for advice thereon, and under that section we have had questions of an extraordinary nature referred to us.]—The effect of the fourth section of that Statute was merely to give the Crown power to refer to the Judicial Com-[8]-mittee those matters which the Crown had then jurisdiction in. Now, before the 5th and 6th Will. IV., c. 83, the Crown had no power to extend Patents. It is not pretended that the Order in Council is wrong, or informal, or has been improperly obtained: and certainly it ought not to be discharged and annulled by reason of any subsequent matter. In any circumstances, the Committee will not exercise a jurisdiction to advise the Crown against the grant already made, except upon such grounds as would justify a repeal of the Letters Patent by *scire facias*. The Order in Council says, "Let the Patent be prepared;" which is in effect an equitable grant of the new Letters Patent, although to complete it the Great Seal must be affixed.

Mr. Malins, Q.C., and Mr. Hindmarch, for the Petitioner.—The argument on the other side proceeds upon a misconception of what this application really is. We do not controvert the position, that a judgment of this Court is final; neither do we wish the adjudication made upon the application for an extension to be reconsidered, or to urge that it was not rightly decided; therefore, we contend, that the 5th and 6th Will. IV., c. 83, has nothing whatever to do with this petition. The ground we proceed on is this: that the subsequent conduct of the Patentees in neglecting to take the benefit of the recommendation, by obtaining the sealing of the new Letters Patent granted to them, is sufficient to authorise this Committee to recommend the Crown to rescind the Order for granting such new Letters Patent. The power of the Crown to refer this petition to the Judicial Committee is [9] clearly within the provisions of the fourth section of the 3rd and 4th Will. IV., c. 41, which gives Her Majesty authority to refer any matter whatever Her Majesty may think fit to the Judicial Committee. It would be a most narrow construction to hold otherwise. In the present case there has been no grant; the Order in Council merely gives directions to prepare proper Letters Patent. Now, it cannot be questioned, that until the Great Seal has been affixed to the Letters Patent they are inoperative, and it is, therefore, competent for any person, having an interest, to interpose by petition to the Crown, to withhold the exercise of its prerogative in making a new grant. This, we contend, it is competent to any one to do before the new Letters Patent are sealed. At any time the Crown can countermand the warrant for sealing. It is analogous to a *dedimus* to a Magistrate, or the Commission of the peace, which may be terminated at any time. So it was with the Judges, before the Statute, 12th and 13th Will. III., c. 2, s. 3, when their commissions were "*durante bene placito*."

Mr. Campbell, Q.C., in reply.—The fourth section of the 3rd and 4th Will. IV., c. 41, does not apply. That section must be read in conjunction with the third section, which clearly has reference only to such matters as could have been before that Act referred by the Crown to the Privy Council. It cannot apply to the extension of Letters Patent, because the Crown had at the time of the passing of that Act no power to grant a prolongation. It is only by the subsequent Statute, 5th and 6th Will. IV., c. 83, s. 4, that the Crown is invested with such power, and [10] the Statute expressly directs that all petitions shall be referred to the consideration of the Judicial Committee.

The Attorney-General (Sir Alexander Cockburn), for the Crown.—No doubt can be entertained that this Court has jurisdiction. The Crown refers this petition to the Committee for advice, under the fourth section of the 3rd and 4th Will. IV., c. 41, which must be read in its largest sense, as giving the Crown power to refer any matter that it shall think fit for the consideration and advice of the Judicial Committee. The authority exercised by the Committee under the Statutes, 5th and 6th Will. IV., c. 83, and the 7th and 8th Vict., c. 69, in recommending an extension of this Patent, was in a *quasi* legislative character. Here the Committee has a special reference made to them by the Crown, of this petition, which prays Her Majesty to revoke the Order in Council for granting an extension of Letters Patent,

by reason of the laches of the Patentees. It is undoubtedly in the discretion of the Crown to stay the sealing of Letters Patent, if any matter should arise, sufficient, in the judgment of the Crown, to justify the exercise of such a prerogative.

The Right Hon. Dr. Lushington.—The question which their Lordships have now to dispose of, is a preliminary objection which has been taken to their hearing and considering this petition, which has been referred to them by an Order in Council. Now, the case of the Petitioner, for the present purpose, may be very briefly stated. It is a petition praying that their Lordships will advise [11] Her Majesty in the following terms:—that she will be pleased to revoke an Order in Council which was made in the year 1850, in pursuance of advice given by the Judicial Committee to extend certain Letters Patent, being the Patent in question, for the term of six years, and also praying Her Majesty to revoke and annul any warrant which Her Majesty may have authorised for the making of any such new Letters Patent, or for granting any such prolongation as aforesaid; and also that she will be graciously pleased not to grant any such new Letters Patent or prolongation unto Gibson and Campbell or any other person in respect of the same; and that Her Majesty will grant the Petitioner such other relief as to Her Majesty might seem meet.

It appears that this petition has been referred to the Judicial Committee by an order in Council, couched in the usual and ordinary terms; and if the objection was confined to the Judicial Committee entertaining the substance of this petition, under the 5th and 6th Will. IV., c. 83, it might require serious consideration to ascertain the meaning and extent of that Statute; but it is contended, on behalf of the Petitioner, that the Judicial Committee are bound by the terms of the fourth section of the 3rd and 4th Will. IV., c. 41. On the other hand, in opposition to this prayer, it is alleged that that Statute ought to be read in a more confined sense, and ought to be considered as not applicable to the case of the renewal of a Patent, or of anything with reference to a Patent at all.

Now their Lordships are all of opinion, having read the petition, and without saying whether every part of it which is set forth would or would not pro-[12]-perly fall under their cognizance, that there is enough stated to justify and require them to proceed further to the hearing of the petition, because they apprehend, that the only construction which can be placed upon the fourth section of the 3rd and 4th Will. IV., c. 41, is a construction which shall give full and complete meaning to the words therein contained, without limitation whatsoever. That section is as follows:—"It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid." Now, these words have already been the subject of some discussion before the Judicial Committee, and I believe one or two attempts were made in the first instance to impose a limitation upon them; but the Judicial Committee were of opinion, though it did not come before the public, that they were not entitled to put any limitation upon these words, in any of the matters referred to them by the Crown. The same opinion is entertained by their Lordships upon the present occasion, namely, that they are bound to advise Her Majesty as to Her revoking the Order in Council and annulling any warrant which Her Majesty may have caused to be made for the making of any such Letters Patent, as prayed in the petition. Their Lordships are of opinion, that there is enough in this reference not merely to justify, but absolutely to require them to proceed, because this is referred to them by an Order in Council: and the Order in Council which refers it to them, falls within the purview of the provisions of the Statute, 3rd and 4th Will. IV., c. 41, sec. 4, which [13] enacts and prescribes what shall be their duty, and in compliance with that duty they must entertain the prayer of this Petition, and hear it.

The case of the Petitioner was then gone into. It appeared from the evidence, that the Petitioner, Schlumberger, was a Frenchman, resident in France, and was interested, together with others, in certain shares, in Letters Patent which had been granted to Heilmann, for machines used for preparing to be spun, wool, cotton, and silk. No deed of assignment of Heilmann's Patent to the Petitioner and his cosharers was produced, nor was any agreement or contract to convey proved. The only evidence of his interest in the Patent was, that of the manager of the works



abroad, who deposed, that the Petitioner had some interest in the Patent, though to what extent he knew not. This witness also deposed, that he had largely dealt with spinning manufacturers in this country, and entered into negotiations for granting licences and the sale of the Patent machines, on behalf of the Petitioner, and that he was ignorant, during the negotiations, that Gibson and Campbell's Patent had been extended; and although he afterwards learnt that fact, yet upon inquiry at the proper office he found that the Great Seal had not been affixed, which fact induced him to go on and to sell Heilmann's Patent machines, to a very large amount, namely, for flax to the amount of £20,000, wool, £30,000, and cotton, £30,000. It also appeared that an action had been brought by Gibson and Campbell, for an infringement of their Patent.

After this evidence had been taken, the Patentees [14] submitted, that the Petitioner had no *locus standi* to entitle him to be heard.

Mr. Campbell, Q.C., and Mr. Drewry, in support of the objection.—As an alien, residing abroad, the Petitioner has no *locus standi*. He has, moreover, failed to establish any special interest in Heilmann's patent. To entitle a party to oppose the grant by the Crown, of Letters Patent, he must show an interest. No instance can be produced of an alien being allowed to oppose, unless he was a Patentee, or interested under some Patent right. It is notorious that the legal interest in Letters Patent can only be transferred by deed, or an equitable interest by a written agreement. No such instrument has been produced. The only evidence is the parol evidence of a witness, a sort of manager, who knows nothing at all of the Petitioner's title.

Mr. Malins, Q.C., and Mr. Hindmarch, *contra*.—Sufficient *prima facie* evidence of title in the Petitioner has been shown. It is not necessary, in a case like the present, to produce title deeds, any more than that of a landowner opposing a railway bill. The parol evidence establishes, that the Petitioner had some interest in Heilmann's Patent, and that is sufficient. Opposition against the Lord Chancellor's affixing the Great Seal to Letters Patent is open to any person having an interest. *Exp. O'Reilly* (1 Ves. jun. 112). No authority has been shown that an alien cannot oppose a grant. Foreigners can acquire all the rights of Patentees in this country, just as in the case of copyright, and an alien resident abroad has been permitted to put the Court in motion. *Ollendorff v. Black* (4 De Gex and Smale, 209).

[15] Their Lordships inquired if the Attorney-General, on the part of the Crown, interposed any difficulty on the ground of want of title in the Petitioner to be heard.

The Attorney-General [Sir Alexander Cockburn].—No. Without admitting the proposition that any foreigner could appear, I think in the present case sufficient interest has been shown.

The Right Hon. Dr. Lushington.—Assuming, for the purpose of the argument, and for that purpose only, that a foreigner would have no *locus standi* unless he can show an interest, the question then arises, whether a sufficient interest has been shown upon the present occasion to entitle the Petitioner to be heard before their Lordships upon the subject of this petition. Now, it is true, that there is no proof of any assignment, or of any written or verbal agreement, for the sale to the Petitioner of Heilmann's Patent, but distinct evidence has been given before their Lordships, that dealings to a very large extent have taken place in this country; that sales have been made to the amount of £80,000 under this Patent, and on behalf of persons connected with the present Petitioner, and of whom we assume the present Petitioner to be one. It has also been proved to their Lordships' satisfaction, that it was in consequence of the renewal of Gibson and Campbell's Patent, that the Petitioner was unable to effect a further beneficial sale under Heilmann's Patent. It appears, therefore, to their Lordships, that the Petitioner has established a sufficient interest to entitle him to be heard on the present occasion, and they [16] have the more readily come to that conclusion, because the Crown does not object.

Evidence was then gone into by the Patentees, to account for the delay in getting the Great Seal affixed. Carpmael, a patent agent, deposed that he had the conduct of the application for the prolongation, and that the delay arose from doubts,

whether the renewed Patent was to contain the recitals which were required by the old law, or whether it was to come under the new practice then introduced. That the omission of the recitals made a considerable difference in the amount of the fees, but that those doubts were removed by the Act of 1852. That the consequence of the delay in sealing was, that they could not sue for an infringement. It did not, however, appear that the public had suffered any damage by the delay.

The Right Hon. Dr. Lushington.—Their Lordships are of opinion, that a great and serious delay has taken place in respect of getting the Great Seal affixed to the Letters Patent, and that that delay has not been satisfactorily accounted for: but they are also of opinion, that it has not been established by any evidence brought before them, that the Petitioner has suffered any loss in consequence of that delay. It has also been the duty of their Lordships to take into consideration, whether it has been proved that the public have suffered any detriment in consequence of the delay; and it appears to their Lordships that there is no evidence to justify them in coming to such a conclusion.

Now, much as their Lordships lament the delay, and [17] determined as they are, so far as lies in their power, to prevent the recurrence of a transaction of this sort in future, yet they are not disposed to visit the Patentees with the heavy penalty of the total loss of the benefit of the renewal of their Patent. Under these circumstances, their Lordships are prepared to advise Her Majesty to dismiss the petition, upon the terms which I am now about to state.

They are of opinion, that the Patentees must pay a sum, amounting to £200, to the Petitioner in consideration of the trouble and expense he has been put to.

Their Lordships are also of opinion, that the Patentees must give an undertaking not to prosecute for any infringement of their Patent which may have occurred from the date of the Order in Council up to the present time. At the same time their Lordships must be understood as expressing no opinion whatever, as to whether any action or other proceedings would lie in consequence of such infringement.

These conditions having been complied with, the following report was made, and confirmed by an Order in Council:

“Their Lordships agree humbly to report to Your Majesty, as their opinion, that the petition ought to be dismissed, upon payment by Messrs. Campbell, the Patentees, to the Petitioner, of the sum of £200, and likewise upon the signing of an undertaking by the Patentees not to bring or prosecute any action or other proceedings for any infringement of the Patent which might have occurred between the date of the Order in Council of the 3rd of February, 1851, and the date of Her Majesty's Order dismissing this Petition.”

[Mews' Dig. tit. PATENT; C. LETTERS PATENT, 2. *Sealing*; F. CONFIRMATION, RENEWAL, AND EXTENSION OF LETTERS PATENT, 2. *Renewal and Extension*, a. *Generally*; *Judicial Committee, Powers of*.—*In Favour of Opposer*, c. *Foreign Invention*. S.C. *sub nom. Schlumberger, In re*, 2 Eq. Rep. 1. As to extension generally, see Patents, Designs and Trade Marks Act (46 and 47 Vict. c. 57), section 25. As to award of lump sum as costs, see *In re Milner's Patent*, 1854, 9 Moo. 39; *In re Hill's Pat.*, 1863, 1 Moo. P.C. N.S. 258; *In re Johnson's Patent*, 1871, L.R. 4 P.C. 75; 8 Moo. P.C. (N.S.) 282; *In re Wield's Patent*, 1871, L.R. 4 P.C. 89; 8 Moo. P.C. (N.S.) 300; *In re Jones' Patent*, 1854, 9 Moo. P.C. 41; *In re Hopkinson's Pat.*, 1896, 14 R.P.C. 10.]



[18] ON APPEAL FROM THE COURT OF ERROR AND APPEAL  
FOR WEST CANADA.

ROBERT GEORGE BARNHART,—*Appellant*: JAMES BLACKWOOD GREENSHIELDS, WILLIAM HENRY PATTERSON, LEWIS MOFFATT, and ROBERT BEEKMAN,—*Respondents* \* [Dec. 5, 1853].

Where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor.

This equity of the tenant extends not only to interests connected with his tenancy, but also to interests under collateral agreements.

The principle is the same in both classes of cases, that the possession of the tenant is notice that he has some interest in the land, and a purchaser having notice of that fact is bound to inquire what that interest is [9 Moo. P.C. 32, 33].

But, a purchaser is not bound to attend to vague rumours, or to statements by mere strangers. A notice to be binding must proceed from some person interested in the property [9 Moo. P.C. 36].

B., the owner of land in West Canada, under a contract of sale from the Chancellor and scholars of King's College, being indebted to T. and Co., induced P. to assume the debt, and to secure him from any loss in consequence of such assumption, by deed poll endorsed on his original contract of sale, absolutely assigned the land to P. Up to the time of this assignment, B. himself had never been in the actual possession of the land, his father having managed the same as his agent. P. afterwards, in satisfaction of certain debts due by him, assigned the land conveyed to him by B., with other property, to G. This assignment was also endorsed on the original contract of sale. Prior to the execution of this assignment, G. made some inquiries about the ownership of the property, but it did not appear that he received any information that B. was the owner.

In a suit by B. against P. and G. for redemption,—Held, upon appeal (affirming the decree of the Court of Error and Appeal in Canada),—

First. That, under the circumstances, the transaction between B. and P., although in form an absolute assignment and sale, was in effect a mortgage only.

Second. That as G. had acted with proper *bona fides*, taking the assignment from a party who had the original contract of sale in his possession, and who had taken an absolute assignment of that contract, he had no notice, actual or constructive, of B.'s title [9 Moo. P.C. 38].

*Scembla*. Where the receipt of the consideration-money is acknowledged in the body of the deed, it is not the custom in Canada to have an additional acknowledgment endorsed on the deed [9 Moo. P.C. 38, 39].

This was a suit instituted by the Appellant for the redemption of an estate in Upper Canada, assigned by [19] him, as he alleged, by way of mortgage to the Respondent, Patterson, who had, however, treated such assignment as an absolute conveyance, and had himself, without notice to the Appellant, assigned the same to the Respondent, Greenshields.

The suit arose under these circumstances:—

In the year 1830, the Appellant contracted with the Chancellor, President, and Scholars of King's College, at York, in Upper Canada, for the purchase from them, in fee-simple, of the land in question, for £250, payable by instalments. This agreement for the purchase was duly carried into effect by a contract in writing, executed by both parties, on the 2nd of October, 1830. In the month of April, 1834, the Appellant, being indebted to the firm of Fisher, Hunter, and Co., of

\* Present: The Right Hon. Mr. Baron Parke, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patterson, Knt.

Montreal, in the sum of £296 0s. 3d., applied to the Respondent, Patterson, his brother-in-law, to assume the debt for him, to which Patterson assented; and to secure him against any loss, the Appellant, by a deed-poll under his hand and seal, dated the 4th of April, 1834, and endorsed on the contract of the 2nd of October, 1830, absolutely assigned to Patterson, his heirs, executors, administrators, and assigns, in consideration of the sum of £400, therein expressed to be [20] paid by Patterson, as well the therein within-written deed and land therein mentioned, as also all the Appellant's right of action on the covenant therein. It was alleged, that this assignment was made solely with a view of securing Patterson from loss by assuming the debt of the Appellant to Fisher, Hunter and Co., and that it was understood between the parties that the contract should be re-assigned to the Appellant, as soon as he should repay Patterson the debt of £296 0s. 3d., and interest up to the date of payment, together with all such sums of money as Patterson should in the interim pay to the Chancellor, etc., of King's College, under the contract above-mentioned.

No money was paid by Patterson to the Appellant upon the execution of this assignment, nor was there any receipt endorsed on the contract for the purchase-money, although it was acknowledged in the assignment.

Patterson afterwards became indebted to the firm of Gillespie, Moffatt, Jamieson and Co., of Montreal, in Lower Canada, to a large amount; and the Respondent, Greenshields, who was the agent of the firm, requiring from Patterson security for the same, Patterson, to secure the payment of such debt, as well as of any further advances which the firm might make to him, executed, on the 11th of December, 1839, an assignment to Greenshields, of the contract of the 2nd of October, 1830, which was also endorsed thereon. This assignment purported to be an absolute assignment; though it was, in fact, made only to secure the debt then due to Gillespie, Moffatt, Jamieson and Co. from Patterson, and such further advances as they might thereafter make to him.

[21] Prior to the execution of this last assignment, Greenshields made some casual inquiries as to the land proposed to be conveyed, and in the course of those inquiries was informed that the same was not the property of Patterson, but of the Appellant, or of the Appellant's father, John Barnhart, who in fact was acting as the Appellant's agent in the management thereof. It appeared that John Barnhart had been in possession, however, under a lease from the College, prior to the contract of purchase by the Appellant, and that he had never made any payment to the Appellant, or accounted to him for the rent; and Greenshields took it for granted that Patterson was in possession of the land, inasmuch as he had in his possession the contract of the 2nd of October, 1830. Neither the Appellant nor his father, nor Mr. Freddie, the tenant then in actual possession of the land, were privy to the assignment.

Greenshields paid the remaining instalments due under the contract of the 2nd of October, 1830, to the Chancellor, President, and Scholars of King's College, and took from them a conveyance to himself in fee, of the land in question.

On the 12th of October, 1841, the Appellant filed a Bill in the Court of Chancery in Upper Canada, against the Respondents, Patterson and Greenshields, stating, amongst other things, the contract of the 2nd of October, 1830, and the assignment to Patterson, of the 4th of April, 1834, that such assignment was made solely with the view of securing Patterson from loss, in assuming the debt of the Appellant to Fisher, Hunter and Co., and that it was understood, and fully agreed between the Appellant and Patterson, that the contract should be re-assigned to the Appellant. [22] as soon as the Appellant should repay the debt of £296 0s. 3d. due to the firm of Fisher, Hunter and Co., with interest up to the day of payment, together with such sums of money, if any, as the last-named Respondent should, in the interim, pay to the Chancellor, President, and Scholars of King's College, under the contract; and the Bill, after setting out at great length the facts and circumstances before-mentioned, charged that Patterson was never in possession of the parcel of land or any part thereof; but that the Appellant, by himself and his agents, had always continued in possession from the date of the assignment up to the present time, and that such fact could have been easily ascertained by Greenshields, if he had inquired who was in possession, or if he had inquired of Patterson respecting the same; that Greenshields had not at any time



demand possession of the land from the Appellant, or from John Barnhart, or from any person or persons acting on behalf of the Appellant, nor had Greenshields demanded any rent or other compensation for the occupation of the parcel of land, nor had he, or any other person or persons on his behalf, ever intimated any right to make such demand. And the Bill further charged, that at the time Greenshields first had notice of the Appellant's claim upon the land, there was only due from Patterson to Greenshields a small sum, and which sum was secured upon other property; but Greenshields and his partners, after Greenshields had such notice, made advances of cash and goods to Patterson, which he wished to charge upon the premises. And the Bill prayed, that an account might be taken of what, if anything, was due to Patterson on the security of the assignment made by the Appel-[23]-lant, and of the various sums received by him from the Appellant, on account of the liabilities incurred by Patterson for the Appellant on such security, and also an account of any sum or sums paid by Greenshields, or caused to be paid by him, on account of the purchase-money, to the Chancellor, President, and Scholars of King's College, in order to procure the conveyance of the land; and that the Appellant might be permitted to redeem the premises upon the usual terms; and that the Respondents might be decreed to convey the premises to him, as the Court should direct, free from all incumbrances by them; and if it should appear that Greenshields had advanced any sum of money to Patterson, on the security of the assignment from Patterson to Greenshields, without notice or fraud on the part of Greenshields, and the Court should be of opinion that Greenshields was entitled to hold the premises as a security for the same, then that an account might be taken of what, if anything, was due to him.

The Respondent, Patterson, put in his answer to the Bill, and thereby in effect admitted, that, as between himself and the Appellant an agreement existed as alleged in the Bill, namely, that he was to re-assign the contract; but he stated, that the existence of any such agreement as that the assignment made to him was upon condition, was wholly unknown to Greenshields, who neither knew nor suspected that the Appellant, or his agent, was in possession of the land, but believed that he, Patterson, was in such possession.

The Respondent, Greenshields, by his answer, denied unequivocally all knowledge, up to the time when the Bill was filed, that the assignment made to Patterson [24] was made upon any condition, or subject to any such agreement as alleged by the bill; and swore that he believed the same to be absolute and unconditional; and that he had not heard or been informed to the contrary; that he was always informed and believed that Patterson had entered into possession of the land immediately upon the assignment, and had continued in possession, but that he had no knowledge how the facts were. And he denied all knowledge of the accounts between the Appellant and Patterson; and he stated that Patterson, on or about the 18th of October, 1839, owed Gillespie and Co. a large sum, and being desirous of obtaining further advances of goods and monies from them, proposed, among other things, to assign the land in question to them as security, on the express understanding, that the firm of Gillespie and Co. should pay the balance due to the Chancellor, etc., of the College, and that the deed of conveyance should issue in his name on their behalf; and he stated, that he never visited the land in question to his knowledge, and he denied all knowledge that Patterson was not in possession of the land, or that the Appellant or John Barnhart was in possession, and said that he always believed that Patterson was in possession of the land up to the time when the Bill was filed.

He afterwards put in his answer to the amended Bill, and thereby stated that he made no inquiries who was in possession of the land, because he took it for granted and believed that Patterson was in possession, inasmuch as he held the contract of purchase.

Witnesses were examined by the Appellant. Their testimony was conflicting. One of them, John Barn-[25]-hart, stated that he had been in possession of the premises previously to and since the year 1830, alleging himself to have been in such possession after the 4th of April, 1831, as agent for the Appellant. Another witness, Bennet, a blacksmith, unconnected with the parties and the property, said that the Appellant was in possession, occupying, apparently as owner, from 1830 till the 4th of April, 1837; and that from that time till July, 1845, John Barnhart

was in possession, though he, witness, did not know whether he occupied as owner or otherwise. Charles Barnhart, a brother of John Barnhart, stated, that John had been in possession as lessee from the Appellant under a lease for 18 or 19 years, or more, executed in the year 1845, and witnessed by himself. He also, and a merchant named Hammond, and a labourer named William Phillips, deposed to certain loose conversations between the Respondent, Greenshields, and themselves, alleged to have been casually held in or about September, 1839, when, as they stated, the Respondent, Greenshields, asked questions of them about the land and its value. These witnesses stated certain answers to have been given to such inquiries, which were relied upon by the Appellant as evidence of notice to the Respondent, Greenshields, that either the Appellant or his father was the owner of the land. The credit of some of these witnesses was impeached on the one hand, and attempted to be supported on the other, by the testimony of other persons adduced for that purpose only.

The cause came on to be heard before the Vice-Chancellor of Upper Canada, and by his decree, bearing date the 26th of April, 1850, it was declared, that Patterson was mortgagee of the premises, and that [26] the Appellant was entitled to redeem the same, and it was further declared, that the premises were to stand as a security to the Respondent, Greenshields, for the amount paid by him to King's College, and for all advances made to Patterson, to the extent of such sums as might appear due from the Appellant to Patterson, on the security of the assignment from the Appellant to Patterson. And it was referred to the Master to inquire what the assignment from the Appellant to Patterson was intended to secure, and what remained due for principal and interest thereon, as between the Appellant and Patterson; and in taking such account the Master was to disallow against the Respondent, Greenshields, all payments made by the Appellant to Patterson, after notice of the assignment to the Respondent, Greenshields. Also to take an account of what was due from the estate of Patterson to Greenshields, on the security in the pleadings mentioned, including what Greenshields paid to King's College, for the completion of the purchase.

The Respondent, Greenshields, appealed to the Court of Error and Appeal at Toronto, against this decree, and stated his reasons for such appeal as follows:—First, because there was no sufficient legal admissible evidence that Patterson was but a mortgagee of the premises in question, or that Greenshields had notice of the Appellant's claim in respect thereof, before the making of the mortgage to Greenshields by Patterson, or indeed until after the filing of the Appellant's Bill. Second, because the evidence adduced by the Appellant to prove these matters, was inadmissible, and should not have been entered in the decree as read on behalf of the Appellant. Third, [27] because the decree was not such, as upon the admissible evidence in the cause should have been made, and on the contrary, upon such evidence, the decree should have been more favourable to Greenshields.

The present Appellant, in answer to the appeal, insisted that the decree, so appealed from, was good, for the following, amongst other, reasons:—First. Because the lands in the pleadings mentioned were conveyed to Patterson, upon an agreement to hold the same merely as a security, subject to the present Appellant's right to redeem the same, upon payment of the mortgage-money therein secured. Second. Because the agreement was in part performed, and it would be a fraud not to complete the performance thereof. Third. Because Greenshields, prior to and at the time of the execution of the assignment to him in the pleadings mentioned, had notice of the present Appellant's equity of redemption in the mortgaged premises, and took subject thereto.

The appeal of the Respondent, Greenshields, came on to be heard before the Court of Error and Appeal at Toronto, before Chief Justice Robinson and Justices Macauley, McLean, and Draper, and the Vice-Chancellors Esten and Spragge; and by the Order made, dated the 10th of July, 1851, it was ordered, that so much of the above decree, as declared that the premises were to stand as a security to Greenshields, for the amount paid by him to King's College, and for all advances made by him to Patterson, to the extent of such sum as might appear due from the present Appellant to Patterson, on the security of the assignment from him to Patterson; and also so much of the decree as ordered that it should be referred to the Master to inquire what the assignment from the [28] present Appellant to Patterson was



intended to secure, and what remained due for principal and interest thereon, as between the Appellant and Patterson; and also so much of the decree as ordered that in taking such account the Master was to disallow, as against Greenshields, all payments made by the present Appellant to Patterson, after notice of the assignment to Greenshields in the pleadings mentioned; and also so much of the decree as referred it to the Master to take an account of what was due from the estate of Patterson to Greenshields, on the security in the pleadings mentioned, including what Greenshields had paid to King's College, for the completion of the purchase in the pleadings also mentioned, should be reversed and varied; and after further reciting the decree appealed from, proceeded as follows:—and it not appearing to the Court, upon the hearing of the matter, that Greenshields was affected with notice that the assignment made by the present Appellant to Patterson, was made or given, or intended to be made or given, otherwise than as an absolute assignment, the Court declares that the premises in the original Bill of the present Appellant first mentioned, and such other lands (if any) as were then held by Greenshields, or the firm, in security for such advances, and, as had not been conveyed or agreed to be conveyed absolutely by Patterson to Greenshields, or the firm (the Court not intending to disturb any sales theretofore made by Patterson to Greenshields, or the firm, of any lands which had previously been held by him or them, in security for advances made by Greenshields, or the firm, to Patterson), were to stand as a security to Greenshields, as well for the amount paid to King's College, as for all advances made to the [29] firm of Gillespie and Co. (of which Greenshields was a member), to Patterson, and remaining due, and orders and decrees the same accordingly. And the Court further ordered, that an account should be taken by the Master of what was due from the estate of Patterson, as well in respect of the monies paid to the King's College, for the completion of the purchase in the pleadings mentioned, with interest thereon, as in respect of the advances made to Patterson, by the firm, or Greenshields, with interest on the same respectively, together with his costs. The decree then made provision for a re-conveyance of the premises upon certain terms.

The present appeal was brought from this decree.

The Appellant relied upon the following reason in support of the appeal:

Because having regard to the admissions and statements in the answer of the Respondent, Greenshields, and to the facts proved in evidence in the cause, the Respondent, Greenshields, must be deemed and taken to have had, before and at the time of the execution of the assignment to him of the 11th of December, 1839, knowledge, means of information, and notice, that the assignment by the Appellant to Patterson, of the 4th of April, 1834, was not an absolute assignment, but by way of mortgage only, and, therefore, that the Respondent, Greenshields, took subject to the Appellant's equity of redemption.

The Respondent, Greenshields, alone appeared to the appeal, and supported the decree appealed from, for the following reasons:

First. Because there was no sufficient admissible evidence to prove that Patterson was on the 11th of December, 1839, a mortgagee only, and not the abso-[30]lute owner of the premises in question; and because the evidence adduced by the Appellant to prove that Patterson was a mortgagee only of the premises, and that he the Respondent, Greenshields, had notice of the real nature of the interest of Patterson therein, and of the Appellant's title before the execution of the indenture of the 11th of December, 1839, or before the filing of the Bill, is inadmissible.

Second. Because, even assuming it to be shown that the assignment made by the Appellant to Patterson, was intended as between those parties to operate by way of mortgage only, the Respondent, Greenshields, was not bound or affected in equity by any agreement or understanding between them to that effect; but was a purchaser for valuable consideration, who had obtained the legal estate without any notice of such agreement or understanding.

Mr. Holt, Q.C., and Mr. Lake Russell, for the Appellant; and Mr. R. Palmer, Q.C., and Mr. E. K. Karlake, for the Respondent, Greenshields.—The points raised in the argument upon the appeal, were two:

First. The question of notice; that the possession by a tenant affected a purchaser with notice of the whole interest of the party in possession, and bound the purchaser in all respects with all the equities the party in possession had in the land.

*Bailey v. Richardson* (9 Hare, 734), *Taylor v. Stibbert* (2 Ves. jun. 437), *Daniels v. Davison* (16 Ves. 249), *Allen v. Anthony* (1 Mer. 282), *Jones v. Smith* (1 Hare, 43), [31] *Penny v. Watts* (1 Mac. and Gor. 151), *Jennings v. Moore* (2 Vern. 609), *Ozwith v. Plumer* (2 Vern. 636; S.C. Bacon's Abr.; tit. "Mortgage," (E.) s. 3), *Hanbury v. Litchfield* (2 Myl. and Keen, 629, 633), Cornwallis's case (Toth. 254), and Sugden's Vend. and Pur., pp. 473 and 1052, 3, 5 (10th Edit.), were referred to. And upon the parol evidence of notice it was strongly observed by the Respondent's counsel, that it consisted only of alleged conversations which had not been stated or charged in the Bill, so that it might have been denied by the answer, and did not affect Greenshields with notice of Patterson being a mortgagee only.

Second. As to the deed of assignment of the 4th of April, 1834, being an absolute conveyance, or a mortgage only, for securing money lent, *Cripps v. Jee* (4 Bro. C.C. 472, *Tull v. Owen* (4 Y. and C.C.C. 191), were cited.

It was also objected by the Appellant, that there was no endorsement on the assignment to Patterson, of the receipt of the purchase-money; but this objection was abandoned.

Judgment was postponed, and now delivered (Dec. 9, 1853) by

The Right Hon. T. Pemberton Leigh.—The Appellant in this case undertakes to make out against the Respondent, Greenshields, two propositions:

First. That the transaction between himself (the Appellant) and Patterson, though in form an absolute sale, was in effect a mortgage.

Second. That the Respondent, at the time when he took his security or advanced his money upon it, had notice that Patterson was only a mortgagee.

[32] Upon the first point—if it were necessary to decide it, we should perhaps take further time for consideration—our impression is, and we shall assume, that the evidence upon that subject is sufficient to establish the Appellant's case. Upon that assumption, we proceed to the consideration of the second question.

It is insisted in this case, that there is both actual and constructive notice. It is said, that the possession of the property at the time of the assignment to the Respondent, was such, as of itself to affect him with notice of the Appellant's title; that the Appellant was in possession, or, at all events, Patterson out of possession, and that this circumstance was sufficient to put the Respondent upon inquiry; but that, in addition to this, the Respondent is proved to have had distinct notice from several individuals of the Appellant's title, or if not, at least information which made it his duty to ascertain by further inquiry, what the title of Patterson really was.

We will consider the law and the evidence, as they apply to the possession and to the conversations, separately.

With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor v. Stibbert* (2 Ves. jun. 437), but also to interests under collateral agreements, as in *Daniels v. Davison* (16 Ves. 249), *Allen v. Anthony* (1 Mer. 282), the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a pur-[33]-chaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be.

This is the doctrine to be collected from the judgment of Lord Rosslyn, in the case of *Taylor v. Stibbert* (2 Ves. jun. 437), and from the earlier authority to which he refers; and the decision itself, and the principles on which it is rested, are referred to with approbation, by Lord Redesdale, in his judgment in *Crofton v. Ormsby* (2 Sch. and Lef. 583). The language of Lord Eldon, in *Daniels v. Davison* [16 Ves. 249], which was decided in 1809, is to the same effect; and when, some years afterwards, in *Allen v. Anthony* [1 Mer. 282], he had again occasion to consider the subject, he states the rule in these words:—"It is so far settled as not to be disputed, that a person purchasing, when there is a tenant in possession, if he neglects to inquire into the title, must take, subject to such rights as the tenant may have."

The rule is stated in the same way by Sir James Wigram, in his most elaborate



judgment in the case of *Jones v. Smith* (1 Hare, 60). "If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land;" and, referring to the authorities which I have mentioned, he adds, "for possession is *prima facie* evidence of a seisin in fee."

The last case on the subject, *Bailey v. Richardson* (9 Hare, 734), rests on precisely the same principles; and although in the argument at the Bar it was suggested that the language of the learned Judge in that case, goes further, and lays down that it is the duty [34] of a purchaser to make inquiries of a tenant in possession, not only for the purpose of protecting himself against any interest of the tenant, but for the purpose of guarding against interests of other persons: it is clear from the context, that such is not the meaning of the words used, and we know from the learned Judge himself, that he had no intention of laying down any such doctrine.

In all the cases to which we have referred, it will be observed, that the possession relied on was the actual occupation of the land: and that the equity sought to be enforced, was on behalf of the party so in possession.

There is no authority in these cases for the proposition, that notice of a tenancy is notice of the title of the lessor: or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject, is the other way. In *Orwith v. Plummer*, as reported in 2 Vernon, 636, it is said to have been ruled, that possession of the under-tenant was not sufficient to affect a purchaser with notice, and that case is generally regarded as a decision that a purchaser without notice cannot be affected by the circumstance of the vendor having been out of possession, though such want of possession may have continued for many years.

It must be observed of that case, that it is reported not only in Vernon and Bacon's Abridgment [E. s. 3], to which reports we were referred at the Bar, but that there is a full and apparently accurate report of it in Gilbert's Equity Reports, 13, by which the decision appears to have proceeded entirely on the ground, that there was no covenant to surrender the copyholds, and that in [35] truth there was no intention to include them in the Plaintiff's mortgage: so that no question as to notice could arise for decision. But whatever may have been the grounds of the decree in that case, it is not improbable that *dicta* to the effect stated by Vernon, who seems to have been Counsel in the cause, may have fallen from Lord Cowper: and, at all events, the rule itself appears to have been adopted and recognised by the Courts; it is referred to by Vice-Chancellor Wigram, in *Jones v. Smith* (1 Hare, 63), and by Lord St. Leonards, in his valuable Treatise on Vendors and Purchasers.

If we apply these principles to the case before us, there is no doubt as to the result.

There is not the least pretence for saying that the Appellant was ever in the actual possession of the land. Bennett's statement to that effect, is directly contradicted, both by John and Charles Barnhart, and is wholly unworthy of attention: as to the actual possession, there appears to be no doubt.

We take the statement of John Barnhart to be so far true. He says, that he had the management of the property as agent for the Appellant; that in 1831, he let it to Proctor, who remained in possession till May, 1834, when he let it to Freddie, who remained in possession till 1841: since which time he, the witness, has been in the actual possession. He says, that the tenants paid their rents to him as landlord, but that he made the lettings and received the rents as agent for his son, the Appellant. It is clear, therefore, that at the date of the assignment to the Respondent, in 1839, and of his advances, Freddie was the tenant in possession, by whose interests in [36] the land, whatever they were, the Respondent might be bound.

It is not necessary to consider in what character John Barnhart let the lands and received the rents. The statement that he acted merely as agent for the Appellant, is not very consistent with the fact that he never accounted to his alleged principal for a shilling of the rents, or with other passages in his evidence, and is in direct opposition to the oath of Charles Barnhart, who swears, that his father held the land under a lease from the Appellant, made in the year 1835, for a term of 18 or 19 years, or longer; and that he, Charles Barnhart, was an attesting witness to the lease. It is sufficient to say, that in any view of the case there was no possession of

the land, which could in any manner affect the Respondent with notice of the Appellant's title.

We now come to the parol evidence of notice. Upon this subject the rule is settled, that a purchaser is not bound to attend to vague rumours—to statements by mere strangers, but that a notice, in order to be binding, must proceed from some person interested in the property.

On examining the evidence, it is found to consist entirely of alleged conversations of different individuals with the Respondent.

None of these conversations are either charged or in any manner alluded to in the Bill, and though the old rule of the Court upon that subject appears to have been relaxed, yet, in judging of the weight to be given to such evidence under such circumstances, we agree with the Respondent's Counsel, that it must always be remembered, that if such conversations had [37] been alleged, they might have been denied; and if sworn to by only a single witness, would not have prevailed against the Defendant's denial; and that if not denied, they might have been explained by the introduction by the Defendant, of other circumstances, which would altogether have destroyed their effect.

The first witness on this subject (Bennett), we wholly disregard. His evidence, to which we have alluded, on the ninth interrogatory, is so directly contrary to the truth, that his loose testimony to the eighth is not entitled to the smallest attention. His evidence, besides, is open to the objection that the notice alleged to be given by him, proceeds from a person who had no interest in the property, and clearly knew nothing about it.

The next witness to whom we will refer, is Charles Barnhart, who is the son of John, and brother of the Appellant. He does not seem entitled to much more credit than Bennett. But if his statement be true, to what does it amount? He says, "I told him (the Respondent), that the land did not belong to Patterson, but that the Plaintiff had to my knowledge purchased it of the College or of the clergy, I am not sure which;" he then said, "Patterson tells me he has a title for it; and I said ["I do not believe it."

What fact is there stated in this conversation in the least degree inconsistent with Patterson's ownership? The land has been purchased by the Plaintiff, and had by him been assigned to Patterson, without the knowledge of the witness.

The last witness on this subject is Hammond, against whom no circumstance appears at all to [38] discredit him. His statement is this: that in 1839, the Respondent asked him who owned the lot in question; Patterson, or Barnhart? "I told him, I always thought that Barnhart owned it; that he had rented it to one Freddie, and appeared to be in possession of the place." He then says, on cross examination, "When I mentioned Barnhart, I meant John Barnhart, the father; I knew nothing of the Plaintiff having anything to do with it; I had no authority from any of the Barnharts to say who owned it, nor yet from Patterson."

This witness was a mere stranger, without any interest in the estate, and so far from giving any notice of the Appellant's title, he was himself wholly ignorant of it.

It would be inconsistent with the security of all property, and with every rule and principle of equity, upon such evidence as this, to affect the conscience of a purchaser.

The Respondent appears to us to have acted with proper *bona fides*. He took his mortgage from a party who had the original contract in his possession: who had taken an absolute assignment of that contract, and had himself, as it appeared by the contract, paid all the instalments which had been paid upon it, subsequently to the date of his assignment. We are satisfied that the Respondent had no notice, actual or constructive, of the Appellant's title.

The objection stated in the opening, that there was no endorsement on the assignment to Patterson, of any receipt for the purchase-money, was very properly given up in reply. The receipt is acknowledged in the body of the deed, and it is not the custom in [39] Canada, as it is in England, to have an additional acknowledgment on the back of the deed; and its absence, therefore, affords no ground of suspicion.

We have felt it due, both to the importance of the case in principle, the remarkable learning and ability with which it has been discussed by the learned Judges in



the Court below, and also by the Counsel at this Bar, to go thus fully into the grounds of our opinion; but we entertain no doubt about the case, and can have no hesitation in advising Her Majesty to affirm the decree complained of, with costs.

[*Mews' Dig.* tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America, Canada—Mortgage of Absolute Assignment*; tit. DEED AND BOND, A. VALIDITY AND OPERATION, 1. *General Principles—Receipt for Purchase Money*; tit. MORTGAGE, B. PARTICULAR MORTGAGES AND INCUMBRANCES, 7. *Of Colonial Estates, c. Canada*; tit. NOTICE, 4. BY TENANCY, *When Purchaser bound*. On point as to form of mortgage, see *Bell v. Carter*, 1853, 17 *Beav.* 11; *Douglas v. Culverwell*, 1862, 4 *De G. F. and J.* 20. On point as to sufficiency of notice, followed in *Hunt v. Luck* (1901), 1 *Ch.* 45, and see *Natal Land Co. v. Good*, 1868, *L.R.* 2 *P.C.* 129; 5 *Moore P.C. (N.S.)* 132.]

*In re* MILNER'S PATENT \* [Feb. 1, 1854].

The Judicial Committee will exercise a discretion as to the allowance of an Opposer's costs upon an abandoned petition for extension of Letters Patent. A gross sum allowed for costs of Opposers, instead of referring their costs to taxation.

An affidavit of merits by the Petitioner upon the question of costs, rejected, as no copy had been served upon the Opposers.

In this Patent the petition was withdrawn before the hearing, and the question now raised was, whether the Opposers were entitled to costs, consequent upon such withdrawal, as of course.

Mr. Webster, for the Petitioner, contended that it was not a matter of course to allow the opposers costs before hearing, but one of discretion (*a*). That there was no power by the Patent Extension Act, 5th and 6th Will. IV., c. 83, in the Com-[40]-mittee to give costs, and that the 3rd and 4th Will. IV., c. 41, s. 15, which authorised the Judicial Committee to award costs, did not apply to Patents, but to Colonial appeals only. That to grant costs upon the withdrawal, would be pernicious, as it would induce parties to persevere in the petition instead of withdrawing; and he referred to an affidavit of merits explaining the reason of the withdrawal.

Mr. Phipson, for the Opponents, objected to the reception of the affidavit, as the Opponents had not been served with a copy.—[The Lord Justice Knight Bruce.—The affidavit cannot be sued against the Opponents, without giving them an opportunity of answering it.]—We submit, that the withdrawal of a petition after notice of hearing, upon a threatened opposition, is like letting judgment go by default, which confesses the action. The presumption is in favour of the Opponents.—[Lord Justice Knight Bruce.—It is the same as electing to be nonsuited on the eve of trial.]

The Attorney-General (Sir Alexander Cockburn) appeared for the Crown, but took no part in the discussion.

Their Lordships inquired what the probable amount of one set of costs was, and were informed that they amounted to about £60.

The Lord Justice Knight Bruce.—Their Lordships have heretofore exercised, and continue to think that they ought to exercise, a judicial discretion as to costs, in cases of abandonment, of this description. The presumption, as the Opponents' [41] Counsel has properly said, is in their favour upon the question of costs, and nothing has taken place to remove or weaken that presumption. Their Lordships are of opinion, that the Opponents, viewing them as one body, are entitled to one set of costs, and their Lordships are disposed to give the Petitioner's Counsel the option

\* Present: The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Turner, and the Right Hon. Sir John Dodson, Knt.

(*a*) Mackintosh's Pat.; 1 *Webs. Pat. Rep.* 739 n.; and see *In re* Bridson's Pat. 7 *Moore's P.C. Cases*, 499; *In re* Hornby's Pat. 7 *Moore's P.C. Cases*, 503.

of paying the sum of £60, now fixed for costs, or to have them taxed under an order of this Court.

The Petitioner electing not to tax, an order was made for the payment by him of £60 for costs.

[Mews' Dig. tit. PATENT, F. CONFIRMATION, RENEWAL AND EXTENSION; 2. *Renewal and Extension*; e. *Practice on Application for, Costs of Opposition, Affidavit*. As to award of lump sum as costs, see note to *In re Schlumberger*, 1853, 9 Moo. P.C. 17. As to costs where petition withdrawn, see *In re Mackintosh's Patent*, 1837, 1 Webster P.C. 739; *In re Bridson's Pat.*, 1852, 7 Moo. P.C. 499; *In re Hornby's Pat.*, 1853, *ib.* 503; *In re Morgan Brown's Patent*, 1886, 3 R.P.C. 212.]

*In re* JONES' PATENT \* [Feb. 8, 1854].

Where there were two Opponents to an application for a prolongation of a patent upon substantially the same grounds of objection, the Judicial Committee, upon a successful opposition, allowed a gross sum for the costs of both parties.

Opponents' costs directed to be taxed at £100, and divided between the Opponents.

In this application for a prolongation, the Petitioners (the assignees of the Patentee) failed in establishing their case. It appeared that the chief merit of the Petitioners' invention for manufacturing starch, had been known prior to the Petitioners' grant, and that an action had been brought against one Berger, in the Court of Common Pleas, for an infringement; [42] when the jury, upon the point of novelty, and the claim of the Petitioner being the first inventor, found a verdict for the Defendant. Upon these facts, their Lordships were of opinion, that as there was a want of novelty there were no merits to entitle the Petitioners to an extension, and stopped the case. Caveats had been entered by two sets of Opposers, and separate objections filed by them. These objections were in substance the same, namely, the want of novelty and adequacy of remuneration.

The Opposers applied for costs of opposition.

Mr. Atherton, Q.C., Mr. Montagu Smith, and Mr. Chance, for the Petitioner.

Mr. Serjeant Channell, for the Opponents, Messrs. Irvine and Co.

Sir Frederick Thesiger, Q.C., and Mr. Grove, Q.C., for the Opponent, Wotherspoon.

The Attorney-General (Sir Alexander Cockburn), for the Crown.

Mr. Baron Parke.—It being a fair case in which there should be opposition, it ought not to be made at the expense of the parties opposing. Their Lordships in cases of this kind find it exceedingly difficult to decide every minute question with respect to costs. They are of opinion, that in this case it was very proper, not only that the Attorney-General, but the persons interested in the subject to which the Patent applies, should come forward to oppose the extension. Of course complete justice cannot be done unless parties so interested come forward, for otherwise we should not [43] have known several of those matters upon which our opinion now proceeds. We think that this is a case in which the parties applying for an extension of the Patent had no reasonable ground for making such application, and they ought, therefore, to pay some of the costs of the Opponents. We do not, however, see any reason for allowing two sets of costs, and with a view of doing justice, their Lordships think these costs ought to be taxed at £100, and divided between the two opposing parties.

[Mews' Dig. tit. PATENT, F. CONFIRMATION, RENEWAL AND EXTENSION OF LETTERS

\* Present: The Right Hon. Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan, Knt.



PATENT, *c. Practice on Application for, Costs of Opposition.* As to award of lump sum as costs, see note to *In re Schlumberger*, 9 Moo. P.C. 17.

*In re* AUBÉ'S PATENT \* [Feb. 8, 1854].

Section 25 of the 15th and 16th Vict., c. 83, enacts "that no Letters Patent for or in respect of an invention for which any such Patent or like privileges shall have been obtained in any foreign country, and which shall be granted in the United Kingdom, from the expiration of the term for which such Letters Patent or privilege was granted or was in force, shall be of any validity." The 16 and 17th Vict., c. 115, s. 7, declared and enacted, that new Letters Patent granted by way of prolongation, should be granted according to the provisions of the 15th and 16th Vict., c. 83.

Application was made under the 5th and 6th Will. IV., c. 83, and 2nd and 3rd Vict., c. 69, by the assignees of a patentee for extension of an English Patent for a foreign importation patented in France. At the date of the application the French Patent had expired. Held, dismissing the Petition, that as the foreign Patent had expired, no renewed grant would be valid by section 25 of the 15th and 16th Vict., c. 83, as section 7 of the 16th and 17th Vict., c. 113, made an extended Patent a new Patent, within the provisions of section 25 of the 15th and 16th Vict., c. 83.

This was an application by the assignees of Bernard Aubé, a Frenchman, for an extension of the term of Letters Patent granted to him for "improvements in [44] the preparation of woollen and other stuffs, and in the process of obtaining the materials used for that purpose." No caveat was entered in opposition.

Sir Frederick Thesiger, Q.C., and Mr. Montagu Smith, for the Petitioners.

The Attorney-General (Sir Alexander Cockburn) appeared for the Crown.

Upon the petition being opened, it appeared, that the Patent was founded upon a foreign importation which had been patented in France, and that the French Patent had expired.

Mr. Baron Parke.—A doubt occurs to us whether, if an extension of this Patent was actually granted, such extension being in substance a new Patent, it would not be void by the proviso contained in section 25 of the 15th and 16th Vict., c. 83, which enacts, "that no Letters Patent for or in respect of any invention for which any such Patent or like privileges as aforesaid shall have been obtained in any foreign country, and which shall be granted in the said United Kingdom after the expiration of the term for which such Patent or privilege was granted or was in force, shall be of any validity."

Sir Frederick Thesiger.—That section does not apply. It can only affect Patents granted subsequent to the passing of such Statute. The Statutes, 5th and 6th Will. IV., c. 83, and the 7th and 8th Vict., c. 69, enabling the Judicial Committee to recommend an extension, was passed before this Patent was taken out, and the patentee [45] partly relied upon an extension, if the Patent did not turn out remunerative within the fourteen years.—[Mr. Pemberton Leigh: The 16th and 17th Vict., c. 115, s. 7, providing for the making and sealing of new Letters Patent, makes an extended Patent, a new Patent. Mr. Baron Parke: That section seems to put an extension of Letters Patent on the same ground as if new Letters Patent were granted. If a Patent is extended, it is upon the footing of a new Patent.]—If there is any doubt, a prolongation ought to be granted.

Mr. Baron Parke.—Their Lordships are all of opinion, that this is a case which is either expressly provided for by the Statute, 15th and 16th Vict., c. 83, or, if not expressly provided for, yet it is a case in which, if the Crown granted an ex-

\* Present: The Right Hon. Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan, Knt.

tension of the Letters Patent, which by the 16th and 17th Vict., c. 115, s. 7, is equivalent to an entirely new Patent, such grant would be void. Their Lordships cannot, therefore, recommend Her Majesty to accede to this application (see "*In re Bodmer's Patent*," 8 Moore's P.C. Cases, 282).

[Mews' Dig. tit. PATENT; F. CONFIRMATION, RENEWAL, EXTENSION; c. *Foreign Invention, When Foreign Patent expired*. As to grant of extended term being new grant see *Honiball's Patent*, 1855, 9 Moo. P.C. at p. 387.]

[46] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

RAMCHURN MULLICK,—*Appellant*: LUCHMEECHUND RADAKISSEN and GOBIND DOSS,—*Respondents* \* [Feb. 14, 15, 1854].

A foreign Bill of Exchange, payable after sight, must be presented for acceptance; and although there is no limited time defined by Statute for presentment, and no usage of trade to fix the time, yet such Bill must be presented within a reasonable time [9 Moo. P.C. 65].

What constitutes a reasonable time is a mixed question of law and fact for the determination of the Court and the jury [9 Moo. P.C. 66].

A Bill of Exchange was drawn at Calcutta on the 16th of February, 1848, by L. R. and Co. on D. and Co. at Hong Kong, payable sixty days after sight, and endorsed by L. R. and Co. to M., or order. M., in consequence of the depressed state of the money market at Calcutta, and the unsaleableness of Bills on China at that time at Calcutta, kept the Bill for five months and nine days, and then sold it to R. M., who did not present it for acceptance at Hong Kong till the 24th of October in that year, when D. and Co. refused to accept it.

Held, First, That the presentation of the Bill for acceptance was not made within a reasonable time, and that L. R. and Co., the drawers, were discharged [9 Moo. P.C. 67].

Second. That the want of presentment was not executed by reason of the drawers continuing solvent from the date of the Bill to the presentment, or that no actual damage was caused to them by the delay [9 Moo. P.C. 68].

This Court will not reverse the finding of a jury or of a Court that sits as a jury upon a question of fact, unless perfectly satisfied that they were wrong, as, from their knowledge of the local circumstances and the character and appearance of the witnesses, they are better able to form a correct opinion than the appellate tribunal [9 Moo. P.C. 67].

This was an action of assumpsit on a foreign Bill of Exchange, brought by the Appellant, as endorsee, [47] against the Respondents, as drawers. The Bill was drawn at Calcutta, on the 16th of February, 1848, for \$37,840 31c., on Dent and Co., at Hong Kong, in respect of certain opium consigned to them, payable to the Respondents, or order, sixty days after sight, and endorsed by them, in blank, and delivered to Muttylool Seal, and by him endorsed to the Appellant.

The Bill was transmitted to Hong Kong, and presented on the 24th of October in that year, to Messrs. Dent and Co., for acceptance, who refused to accept the same, whereupon the Bill was protested in due form at Hong Kong, and notice thereof was served on the Respondents, at their house of business in Calcutta, by the Appellant. The Respondents, however, refused to pay the amount due on the Bill, whereupon the Appellant, as indorsee, brought an action of assumpsit against them, as drawers and endorsers, in the Supreme Court of Calcutta.

The first count of the plaint, was a special count declaring on the Bill of Exchange; that the Defendants, on the 16th of February, 1848, at Calcutta, using the name, style or firm of Luchmeechund Radakissen, made their Bill of Exchange in writing, and directed the same to certain persons at Hong Kong, to wit, in China,

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therein designated by the name or description of Messrs. Dent and Co., and thereby requested Messrs. Dent and Co. to pay, to the order of themselves, the Defendants, Spanish dollars 37,840 and 31 cents, sixty days after sight of their the Defendants' first Bill of Exchange (second and third, of same tenor and date, not being paid), which period had then elapsed, and the Defendants, by and under their name or designation of Luchmeechund Radakissen, then endorsed the Bill of Exchange to the [48] Plaintiff, and the Bill was afterwards, on the 24th of October, in the year last aforesaid, presented to Messrs. Dent and Co. for their acceptance thereof, but Messrs. Dent and Co. then refused to accept the same, nor did nor would they then or at any other time accept the second or third Bill of Exchange in the Bill mentioned, or either of them, whereupon the Bill was then duly protested for non-acceptance thereof, of all which the Defendants then had due notice, and then promised the Plaintiff to pay him the amount of the Bill, with interest, re-exchange, and charges thereon, on request, etc.

The Respondents filed eleven pleas to the plaint, ten of which were pleaded to the first, or special count. By the first and second pleas, they pleaded that the Respondents did not make or endorse the Bill; and by their third and fourth pleas, that the Bill was not duly protested, and due notice was not given of its non-acceptance; by the fifth plea, that one Muttyloll Seal induced the Respondents to make and blank endorse the Bill by an untrue statement, set forth in the plea, for a special purpose therein stated; that there was no other consideration for making or endorsing the Bill; and that Muttyloll Seal, in contravention of such purpose, delivered the same to the Appellant; and that the Appellant, at the time of taking the same, had notice of the other facts. The sixth plea was similar to the fifth, stating that the Appellant took the Bill after it became over-due. The seventh was a similar plea to the fifth, stating that the Appellant took and held the Bill without consideration. The eighth plea was, that Muttyloll Seal obtained the Bill from the Respondents by fraud, covin, and misrepresentation, and without consideration, and delivered the same, blank endorsed by the Respondents, to the Appellant, and that the Appellant took the Bill with notice of the above facts. The ninth plea was similar to the eighth, stating that the Appellant took the Bill when overdue. The tenth plea was similar to the eighth, stating that the Appellant took and held the Bill without consideration. The eleventh plea to the residue of the plaint, pleaded non assumpsit.

A replication was filed by the Appellant, to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 11th pleas; and a demurrer to the 9th and 10th pleas. The demurrer was overruled by the Court, and, in consequence, a further replication was filed to the 9th and 10th pleas.

By a rule of the Supreme Court, leave was given to the Respondents to file an additional plea, "traversing the due and regular presentment of the Bill of Exchange for acceptance, upon payment of costs, and upon the Defendants undertaking to admit the protest of the Bill as conclusive evidence of the presentment at the date therein mentioned, and proceed to trial in the next term, if required." This additional plea was as follows:—"And for a further plea as to the first count, the Defendants say, that the Bill in that count mentioned was not duly and within a reasonable and proper time in that behalf presented to Messrs. Dent and Co. for their acceptance thereof, as in that count alleged, and of this the Defendants put themselves upon the Court, etc."

The cause came on for trial on the 11th of August, 1849, when the Supreme Court, after the examination of witnesses and of the documentary proofs which were put in evidence, found a verdict for the [50] Respondents on the additional plea, and on the plea to the common count, and a verdict for the Appellant on all the other issues. And the Court found specially, and declared, in giving the verdict, "That the Bill of Exchange was not presented to the drawees within a reasonable time. That there was no proof of any resulting damage. That it was proved that the drawees were then and still remained solvent, and that there was no proof of any failure of any party to the Bill."

A new trial was afterwards ordered by the Supreme Court, on the consent of both parties, and the costs of the former trial were directed to form part of the costs in the cause.

On the 21st of December, 1850, the cause was tried again. It appeared from

the evidence of the witnesses, that Muttyloll Seal had the Bill of Exchange for value from the Respondents, on the 16th of February, 1848; and that he took the Bill, not with the view of remitting it to China, but of selling it in Calcutta; and that he held the Bill until the 25th of July, in that year, when he sold it to the Appellant, who forwarded it for acceptance, by the China mail steamer on the 7th of September, in that year; and that the Bill arrived at Hong Kong, in October, and was presented for acceptance to Dent and Co., on the 24th of that month, who then refused to accept it. Evidence of the state of the money market at that time was given: from which it appeared, that the early part of the year 1848 was a period of great commercial difficulty and mistrust in Calcutta, and that great difficulty was experienced in selling Bills on China, uncovered by shipping documents accompanying such Bills. It was also in evidence, that Mutty-[51]-loll Seal had ineffectually endeavoured to dispose of the Bill before he sold it to the Appellant; that there was a monthly mail to China, by a steam-vessel leaving Calcutta at the beginning of each month, and that the Appellant held the Bill over the departure of one mail, though he forwarded it by the next. It was also in evidence, that there was no definite custom or usage in regard to the time for sending foreign sight Bills for acceptance. The witnesses all agreed, that but for the state of commercial affairs, the Bill ought not to have been kept so long in hand; that though Bills on China had been known to have been kept in hand for three or four months, none were ever known to be kept so long as five months. Evidence was also given to show that the Respondent's Gomastah [steward], by whom the Bill of Exchange was drawn, and by whom all the Calcutta business of the firm was managed, was aware in the month of May, that the Bill had not been forwarded to Hong Kong for acceptance, and that he made no objection then on the score of delay; also, that Dent and Co. had all along continued, and then were, solvent; and that all parties were *in statu quo*, no damage having resulted from the delay.

Upon this evidence the Supreme Court found a similar verdict to that given on the first trial, liberty being reserved to each of the parties to move to enter a verdict on the particular issues found against them.

Accordingly on the 24th of December, 1850, the Appellant obtained a rule calling on the Respondents to show cause why the verdict found for them on the additional plea should not be set aside, and a verdict for the Appellant entered instead, on the [52] following grounds:—First, that the parties being proved to be *in statu quo*, and no damage whatever resulting from the delay in the presentment, the *onus* of proving that the delay was improper or unreasonable lay upon Respondents. Secondly, that even if the *onus* was upon the Appellant, he sufficiently accounted for the same; or else why a new trial should not be had on the ground that the ruling of the Court in this respect was in the nature of a misdirection; or else why judgment should not be entered for Appellant, *non obstante veredicto*, on the twelfth (or additional) plea, on the ground, that no damage whatever was alleged therein to have accrued to the Respondents, and no reason assigned why the drawees should not have paid on presentment.

The Respondents also, on the 31st of January, 1851, obtained a rule under the leave reserved, calling on the Appellant to show cause why the verdict should not be entered for them on the 5th, 6th, 7th, 8th, 9th, and 10th special pleas, upon the ground "that those pleas respectively were established in substance by the evidence given on the trial of the cause; or, on the second plea, denying the endorsement upon the ground, that no interest in the Bill of Exchange passed by the signature or delivery thereof by the Respondents under the circumstances proved at the trial, or why a new trial should not be had, on the ground that the verdict was against the weight of the evidence, or that the ruling of the Court in respect of the above plea was erroneous and in the nature of a misdirection.

The rules were fully argued; and on the 14th of March, 1851, the Supreme Court delivered judgment on both rules. After stating the nature and circum-[53]-stances of the case, and the material parts of the pleading and evidence as already detailed, the learned Judges proceeded to state the law of the case as applicable to their view of the facts, as follows:—"The history of this Bill is important to be considered with reference to the ground on which the Plaintiff attacks the finding of the Court, namely, the question of reasonable time in the presentment of the Bill for acceptance.



It has some bearing on the question of the cause for detaining the Bill. The cases *Mudman v. DeQueno* (2 H. Bla. 565), and *Fry v. Chapman* (7 Taunt. 397), show that the question of laches would be left to a jury. The question of due presentment of a foreign Bill, payable so many days after sight, for acceptance, is certainly a mixed question of law and fact; but if the Judge were to direct a jury that they must consider the question with reference to the interest of the holder as well as to that of the drawer, and that the law prescribed no precise time nor other than reasonable time for presentment for acceptance of a foreign Bill drawn payable after sight, and that they must determine on the evidence if it had been presented within a reasonable time, or whether there had been laches in the presentment, we cannot see how any error of law could be ascribed to a Judge so directing a jury. Now, we considered this case under the authority of *Mellish v. Rawdon* (9 Bing. 417), and adopted the law as there laid down; therefore, we are unable to discover any error of law under which we were at the trial, and if we were in error it must be because we have drawn a wrong conclusion on the evidence as to the naked question of fact. Of course it is not to be expected that the same conclusion will be drawn from the same facts by all minds. If we [54] saw any ground for thinking that we should alter our opinion on a re-trial of this cause on this question, we should send it to a new trial; but we cannot see any error in the decision. The evidence is not nearly so strong in this case in excuse of apparent delay as it was in that of *Mellish v. Rawdon* [9 Bing. 416]. The case *Straker v. Graham* (4 Mee. and Wels. 721) bears on this point of apparent delay. Apparent delay was established there from the time which had elapsed and the means of communication. There, no explanation was offered, here none that we deem satisfactory. It does not appear, as it did in the case of *Mellish v. Rawdon* [9 Bing. 416], that the holder retained the Bill, because, if he had parted with it earlier he would have lost by the state of the exchange; on the contrary, it appears that if he could have sold the Bill at all, and have sold it at the then fair value, he would have been chargeable in account with the Defendants with the net sum only the Bill had realised. The evidence both for the Plaintiff and the Defendants shows this, that a Bill uncovered by shipping documents was then unsaleable. One witness for the Plaintiff says, that but for the then state of commercial affairs he should have considered the Bill to have been retained too long in hand. No Bill on China was ever known by any of them to have been retained so long; they speak to no Bill having been held for more than three or four months; we thought on this trial, and we adhere to that opinion, that the state of trade was no sufficient reason, and was not really the sole reason, for retaining the Bill so long. It is obvious that the more danger there is of the drawer's correspondent failing from the crash of other houses which may affect his house, the more strongly does the drawer's interest [55] demand that the presentment of the Bill for acceptance should not be retarded. The holders cannot insist that the Bill should be retained until times mend, when that time is indefinite and uncertain, and there is no immediate prospect of better times. It would be, in short, a claim to lock up the Bill for an indefinite time. Had the evidence shown that the holder really kept it in hand so long, five months, because, though he had failed to negotiate it, he had a reasonable expectation of doing so in a short time, our conclusion might have been different; but the evidence did not at the trial, and does not now on a review of it, satisfy us of that. There is no case in the books in which so long a period as this, five months, before putting a Bill into circulation, has been held a reasonable time. The date of the Bill is the 16th of February. The sale to the Plaintiff is evidenced by the acceptances given late in July. In *Mellish v. Rawdon* [9 Bing. 416], the time was somewhat shorter, the facts in excuse stronger. It is not intimated there, that, if the jury had found otherwise, the verdict would have been disturbed. The witnesses for the Plaintiff say that they have known Bills retained here three or four months,—under what circumstances they do not state. But one witness, Fergusson, states that Bills were often not sent forward, because, in consequence of the length of the voyage round the Cape, and the shorter transit of a letter overland, the Bills would arrive, even if retained for three or four months, as early as the proceeds of the shipment would be realised, which would be the fund for the payment. They speak, however, as to no such length as to Bills on China, and apparently there would be no justifying cause there, in the ordinary transactions [56] of trade, since the witnesses Mackenzie and Fergusson, both connected with the China trade, speak to the practice

of sending Bills forward there without delay. When the holder's interest is to put the Bill in circulation, there must exist a reasonable prospect of an unsaleable Bill becoming saleable to justify the detention; no witness fortifies his opinion by showing that in these times of distress any one single Bill was held longer on hand than usual. The interest of the drawer seems not sufficiently to have entered into the consideration of the witnesses for the Plaintiff when they allege the bad state of trade alone as the reason for holding over a Bill, neither is there the slightest proof of any inability to transmit Bills to China for acceptances and realisation, though the times were bad; therefore, we consider that the balance of testimony, viewing that of the Plaintiff and Defendants together, is really in favour of our view. It is a mere question of fact, on the point of laches, and we think correctly found. It was argued that as Muttylohl Seal had sold to the Plaintiff, it must be concluded that he had a reasonable expectation of finding a purchaser. We cannot draw that conclusion. We have not been able to find that the Plaintiff took otherwise than *bona fide*, notwithstanding that we doubt about this part of the case; must we make the very opposite conclusion as the basis of an inference as to another distinct fact? Neither reason nor law require that of us in finding a question of fact. The evidence of the broker shows that such a Bill was generally unsaleable: the Defendants' witnesses prove that also. There are circumstances of suspicion about this transfer, and to draw the desired conclusion we must view it in a light in which we do not [57] regard it, viz. as an ordinary transaction of business, affording proof of a reasonable prospect of a sale of the Bill.

"Lastly, it was urged that the drawer remained solvent, and, therefore, that it was immaterial if there were laches or not, or rather that loss incurred by the laches was a legal ingredient in that laches. The case quoted for this, *Robinson v. Hawksford* (9 Q.B. Rep. 52), was a decision on a banker's cheque, a different instrument. It is the simplest course to go to the fountain-head at once. The fountain-head is the statute, 3rd and 4th Anne, c. 9, sec. 7, which introduced a positive law on the point. That, it is true, applies in terms to inland Bills; but we never heard of any distinction in this respect between a Bill drawn in London payable in India or a Colony of the Crown, or drawn in one Colony or dependency of the Crown on another, in both of which the English law prevails, and a purely inland Bill. No trace of any such distinction can be found: see Byles 'On Bills,' title 'Notice of Dishonour,' p. 166, 2nd edit., and the cases there cited, *Dennis v. Morrice* (3 Esp. 158), *Hill v. Heap* (Dow. and Ry. N.P. 57). Mr. Justice Bayley, in his treatise 'On Bills,' in the chapter on presentment, makes no distinction whatever, and we can find in no writer, and in no decision, any trace of any. The law is enacted by statute free of any qualification: the debt is to be deemed paid if the party do not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid. If the law was as contended for, some trace of it would be found in the treatises on Bills and the decisions as to the due notice of dishonour. We know that notice of dishonour is not required where there are no assets [58] nor prospect of any before or at maturity; but it is nowhere to be found that if there be laches in fact, it is not legal laches unless loss be combined; such a decision would in effect alter the statute. In the case of *Mulman v. D'Eguino* [2 H. Bla. 565], the Bill was drawn in England on India, the drawees were solvent, and though the drawer had failed, yet he failed so early that by no possibility could laches have created loss thereby, for the Bill was drawn early in March in London on a house in Calcutta, and the drawer failed on the 17th of April next. We entirely acknowledge the authority of the decision in the Queen's Bench [*Robinson v. Hawksford*, 9 Q.B. Rep. 52], on bankers' cheques, that the drawer is liable on the cheque, though there have been failure in presenting in proper time, if the bank remain solvent. But a distinction is made and recognised between cheques and Bills payable after sight or date in this respect, and even in cheques the case of *Moule v. Brown* (4 Bing. N.C. 266) shows the non-existence of the supposed ingredient in laches of actual loss, when the action is not against the drawer of the cheque. The ordinary form of plea of satisfaction for a precedent debt by a Bill taken for it and not duly presented would be demurrable, if this objection were well founded. There is a form of such a plea in *Robson v. Oliver* (10 Q.B. Rep. 704), which case came on on demurrer.

"The hardship was insisted on as respects the Plaintiff; but it is proved that Muttylohl Seal put his name on the Bill, and, therefore, is a new drawer to the



Plaintiff. And, had any hardship existed, we should not be justified in deciding contrary to our opinion as to the law. On this ground also we think the decision was correct."

[59] From so much of this judgment as discharged the Appellant's rule, the present appeal was brought. A cross appeal was also brought by the Respondents from the same judgment, so far as it concerned the discharge of their rule. Both appeals were set down for hearing at the same time, but the first appeal was the only one argued, the decision of their Lordships upon it rendering the hearing of the second appeal unnecessary.

The Attorney-General (Sir Alexander Cockburn), Mr. Bramwell, Q.C., and Mr. Leith, for the Appellant.—There are two principal questions in this case. First, whether the Bill was duly and within a reasonable and proper time presented for acceptance; and, secondly, whether, even if it was not so presented, the Court below having found that the parties remained *in statu quo*, and the drawees solvent, such delay in presentment is a defence available to the Respondents in this action. There is also a question as to the sufficiency of the twelfth, or additional plea, which it may be convenient to dispose of in the first instance. No damage to the Respondents is averred by that plea to have arisen by the delay. The plea, therefore, was either bad for not alleging any damage to the Respondents by the delay in presentment, or, if it be taken to contain any allegation to that effect by implication from the statement, that the Bill was not presented within a reasonable and proper time in that behalf, then the plea was not proved; or, if the plea is to be taken to be no more than a traverse of the averment of presentment in the plaint, then we submit that such averment was proved, and that no [60] question of delay or damage arises.—Mr. Baron Parke: No doubt the plea is informal. The real issue raised by that plea is, whether the presentment was within a reasonable time.]—Upon the first question, we submit, that the Bill was, under the circumstances proved at the trial, and according to the principle of all the authorities, presented within a reasonable time for acceptance. It was a foreign Bill, dated the 16th of February, payable at Hong Kong, sixty days after sight, and the evidence shows that it is the usual course of business to sell such Bills in open market, and that such was the state of the money market, that though Muttyloll Seal made many attempts to sell the Bill, he could not effect a sale till the latter end of the month of July. The Bill was payable to the Respondents' order. It was no part of the arrangement that the Bill was to be forwarded forthwith to Hong Kong. It is doubtful whether there is any obligation at all upon the holder to present a foreign Bill, payable at or after sight, within any fixed time which can be defined by the term "reasonable." No criterion of what is a "reasonable time" is to be found in any of the authorities upon this subject, for they vary according to the circumstances of each case.—[Mr. Baron Parke: All Bills payable after sight must be presented in order to fix the time when the Bill is to run.]—It is a mixed question of fact and law, not governed by any fixed rule, but to be considered with reference to all the circumstances which may make it reasonable or unreasonable that the party should hold the Bill instead of sending it for presentment and acceptance. All the authorities show, that in the case of a foreign Bill of Exchange not payable in the country where it is drawn, you are not bound [61] to send it at once for presentment. *Mellish v. Rawdon* (9 Bing. 416), *Muilman v. D'Eguino* (2 H. Bla. 565), *Goopy v. Harden* (7 Taunt. 159), *Meggadow v. Holt* (12 Mod. 15; S.C. 1 Show. 317), *Butler v. Play* (1 Mod. 27), *Terry v. Parker* (6 Ad. and Ell. 502). In the case of *Straker v. Graham* (1 Mee. and Wels. 721), it is true the Court of Exchequer held that a Bill of Exchange, drawn on the 12th of August, in Newfoundland, payable ninety days after sight in England, which was not presented for acceptance until the 16th of November, was not presented for acceptance within a reasonable time; but there was in that case no circumstances proved in explanation of the delay, and it is, therefore, distinguishable from the present case. The state of the money market at Calcutta is a sufficient explanation why the Bill was not forwarded to Hong Kong and presented sooner for acceptance. There are two other cases, *Prudeau v. Collier* (2 Stark. 57), and *Hill v. Heap* (2 Dow. and Ry. N.P. 57), in which it was held, that presentment on the day the Bill is due is necessary. Those cases, however, are *nisi prius* decisions, and relate to notices of dishonour. The same rule as to presentment is recognised in America. *Wallace v. Agry* (4 Mason's U.S.R.

336; S.C. 5 Mason's U.S.R. 118), *Robinson v. Ames* (20 John. U.S.R. 146), *Aymar v. Beers* (7 Cowen's U.S.R. 503), Story "On Bills of Exchange," ch. viii. s. 231. So by the French law, Pardessus, *Droit Comm.*, tom. ii. part iii. tit. ii. chap. iv. sec. 2, arts. 358-9; Pothier, *Traité du Contrat de Change*, tom. ii. p. 185 (2nd Edit.)—[Mr. Baron Parke: By the *Code de Commerce*, Liv. i. tit. 8, s. 11, present-[62]-ment for acceptance must be made within six months from the date.]

Secondly. The refusal of the drawees to accept was not in consequence of any delay in presentment. But if the Court should be of opinion that there is a rule as to presentment for acceptance within a certain time, and that there was in this case unreasonable delay in presenting the Bill, this question then arises, whether, all parties being *in statu quo*, and no damage having accrued or proved to have arisen by such delay, can the drawers avail themselves of the want of presentment within a reasonable time, and set up such laches as a defence to the action? *Robinson v. Hawksford* (9 Q.B. Rep. 52) is a strong authority upon this point. That was an action against the drawer of a cheque on a banker, and the Court held, that it was no answer to such action, that the cheque was not presented in a reasonable time unless during the delay the fund had been lost by the failure of the banker. Here all the parties were perfectly solvent, from the date of the Bill to the time of presentment and dishonour, and we submit, upon all the authorities, that the fact of delay of presentment without damage having accrued did not warrant the judgment of the Supreme Court. It was incumbent upon the Respondents to show that they suffered damage in consequence of the delay.

Sir Fitz-Roy Kelly, Q.C., Mr. Serjeant Channell, and Mr. H. Clarke, for the Respondents.—The substantial question at issue really is, whether the twelfth, or additional plea, constituted a good defence in point of law to the action. It raises a point of mercantile law involving a question of great im-[63]-portance to the mercantile community, and may be considered under two heads. First. We submit, that the Court below, sitting as a jury to determine the question of fact arising out of the case, have come to a just conclusion upon the issue, whether Muttyloll Seal used due diligence in presenting the Bill in question for acceptance. Secondly, we submit, that as the Bill was not presented within a due and reasonable time, the doctrine contended for by the Appellant, that the drawers not being prejudiced or damaged by the delay in the presentment of the Bill, he was entitled to recover, is unsupported by principle or authority.

First. We utterly deny the proposition that a foreign Bill, payable at or after sight, does not require presentment.—[Mr. Baron Parke: You need not argue that point, as the Court is with you.]—The sole point then, upon this branch of the case, is, whether this Bill was presented for acceptance within a reasonable time. That was a question for the jury. By the verdict entered for the Respondents on the twelfth plea, it was found by the Court, that the presentment of this Bill for acceptance was not within a reasonable time. Such finding was, we submit, justified by the evidence, as no sufficient explanation was given for the delay proved. The retention of the Bill in the possession of Muttyloll Seal for a period of five months and nine days was an unreasonable time. *Mellish v. Rawdon* (9 Bing. 416) is referred to by Story "On Bills of Exchange," ch. viii. sec. 231, and its subsequent detention by the Appellant is by no means satisfactorily explained.

Secondly. Assuming that the Court, sitting as a [64] jury, found correctly, that the delay was unreasonable, the question then arises whether the Appellant can recover, notwithstanding the delay, upon the assumption that the drawers were not prejudiced or damaged by the delay in presentment. Such an objection cannot now be entertained. If the Appellant intended to have relied upon it, it ought to have been the subject of a special replication, or of a special allegation in the plaint.—[Mr. Baron Parke: In *Carter v. Flower*, (16 Mee. and Wels. 743), the Exchequer Court held, that if the declaration alleges notice, if in fact notice was given, the question of reasonable notice arises. If no notice was given, the circumstances excusing notice must be pleaded specially.]—That is the present case if you substitute the word "presentment" for "notice." *Robson v. Olive* (10 Q.B. Rep. 711) is also an authority on this point. The facts relied upon by the Appellant, if they establish anything, establish an absolute excuse for non-presentment, which ought to be put upon the record. But the question of damage is no ingredient or element in the question of "reasonable time." The only excuse for non-presentment, or the



delay in the presentment, would be that which does not exist here, the absence of funds, or of the expectation of them. The law upon this point is clearly laid down by Story "On Bills of Exchange," ch. viii. sec. 231, and he refers to Chitty "On Bills of Exchange," *Whitehead v. Walker* (9 Mee. and Wels. 515).—[Mr. Baron Parke: The same law is laid down in *Carter v. Flower* (16 Mee. and Wels. 743).]—The case of *Robinson v. Hawksford* (9 Q.B. Rep. 52), relied upon by the Appellant, is distinguished from the present: it relates to a [65] cheque. In that case it was held, that as against the drawer of a cheque upon a banker, the time before presenting the cheque for payment, although unreasonable, is no objection, if the result has not been attended with damage from failure of the bankers. Here it is a foreign Bill of Exchange, payable after sight, and is entirely different from a cheque.

The case stood over for consideration: judgment was now pronounced (Feb. 20, 1854) by

Mr. Baron Parke.—The question on which their Lordships are to give their opinion in this case, is, whether the Supreme Court at Calcutta rightly decided the issue on the twelfth or additional plea, in favour of the Defendants. The plea is certainly informal, but there is no doubt, as has been already intimated, that the true issue raised by that plea is, whether the Bill of Exchange on which the action is brought, was presented for acceptance in a reasonable time.

There is as little doubt, that it is now much too late to contend, that the law does not require a presentment for acceptance of a foreign or other Bill of Exchange, payable at, or a certain time after, sight. How otherwise can the time the Bill has to run be fixed, where it is payable after sight? Indeed, the Statute of 3rd and 4th Anne, c. 9, sec. 7, makes an inland Bill of Exchange, received in satisfaction of a debt, a full and complete payment if the holder does not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and, therefore, in some cases, undoubtedly, it requires the presentment for acceptance; and as the law has been [66] long settled that the holder of a Bill, payable after date, is not obliged to present it for acceptance, it must apply to Bills payable on or after sight. Presentment, then, being necessary for acceptance, the inconvenience of an indefinite postponement of the time of payment of such a Bill, which the unlimited power of presenting when the holder might please would necessarily lead to, long ago suggested that there should be a limit. In some foreign nations it is provided for by positive enactment, fixing the times of presentment with reference to the places where the Bill is drawn, and where the drawee resides, as in the French "*Code de Commerce*," Lib. i. part 8, sec. 11. But in our law, there being no such fixed limit by enactment, where there is no usage of trade to fix the time, it has long been established, that such Bill must be presented in a reasonable time, which is a mixed question of law and fact, for the determination of a jury, with the assistance of a Judge, where trial by jury exists, and for the determination of the Court, where they exercise, as they do in Calcutta, the functions of a jury as well as those of Judges. This rule is adopted for want of a better law not defining the time precisely.

We have then to pronounce our opinion, whether, in this case, the Court has proceeded to decide what is a reasonable time upon a correct principle, and whether the evidence warranted the conclusion they have drawn upon it, that the presentment, in this case, was not made in reasonable time.

The Court assumed, that the correct principle was laid down fully in the cases of *Mellish v. Raddon* (9 Bing. 416), which is in accordance with the prior case of *Mulman v. D'Eguino* (2 H. Bla. 565), and [67] *Fry v. Hill* (7 Taunt. 397), that in determining the question of "reasonable time" for presentment, not the interests of the drawer only, but those of the holder, must be taken into account; that the reasonable time expended in putting the Bill into circulation, which is for the interest of the holder, is to be allowed: and that the Bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. The Court, in acting upon that principle, concluded from the evidence, that the Bill was improperly detained for a portion at least of the time which elapsed between the 16th of February, 1848, when it was drawn, and the 26th of July, when it was endorsed over by Muttylohl Seal, the then holder, to the Plaintiff. They thought, that

the evidence proved, that for the whole of that time, a period of more than five months, Bills on China were altogether unsaleable in Calcutta; that such was the permanent and regular state of the market; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests, to keep the Bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion, that the evidence fully justified this conclusion from it, and that the Court, deciding on facts as a jury, were perfectly right. Indeed, we should not have reversed their judgment on a matter of fact, unless we were quite satisfied they were wrong, their knowledge of local circumstances, and the character and appearance of the witnesses, enabling them to form a more correct opinion than a tribunal of appeal in this country possibly could. But in our opinion, [68] they drew a proper inference from the evidence in the case.

It remains to consider only one point which was insisted upon in the Court below, and also argued at the Bar before us, namely, that as the drawers remained perfectly solvent from the date of the Bill to the present time, the rule as to presenting in a reasonable time did not apply, and that there was no laches which would constitute a defence by the drawers, unless they had incurred a loss by that laches. The Court below decided, that the solvency of the drawers and the want of proof of actual loss by laches, constituted no answer to the objection of laches. We think they were right. There is no trace of such a qualification in the elaborate judgment of Lord Chief Justice Tindal, in *Mellish v. Rardon* [9 Bing. 416], in which the circumstances which constitute a reasonable delay are fully discussed; no mention is made of the insolvency of the drawer subsequent to the drawing, although it did occur in that case, or some loss by the drawer, being an essential condition to the application of the rule laid down; and in *Muilman v. D'Eguino* [2 H. Black, 565], it was clear that the failure of the drawer caused no damage to the Plaintiff, being before the time that the Bill could possibly have been presented in India, yet that circumstance was not mentioned as dispensing with the obligation to present in a reasonable time; and, with respect to all Bills of Exchange payable after date, it is fully settled, that neither the want of presentment at the time the Bill is due, nor the want of due notice, are excused, because the drawer has continued solvent, or the holder incurred no loss by non-presentment, or want of regular notice.

This point was fully considered in the case of [69] *Carter v. Flower* (16 Mee. and Wells. 743), and we believe admits of no doubt, and we agree with the Court below, that the continued solvency of the drawers does not prevent the application of the rule, that the Bill must be presented in a reasonable time, with reference to the interest of the drawer to put the Bill into circulation, or the interest of the drawee to have the Bill speedily presented.

The authority on which reliance is placed on the part of the Appellant, in support of the doctrine contended for, is that of *Robinson v. Hawksford* (9 Q.B. Rep. 52), which is the case of a cheque presented some days after it was drawn, to the banker, and not paid, in consequence of the countermand of the drawer; and the Court held, that if the drawee continued solvent, and no damage has arisen from delay of presentment, the drawer continued liable.

If this had been a decision on a regular Bill of Exchange, payable on or after sight, it would have been a strong authority for the Plaintiff in error. It is not, however, the case of a Bill of Exchange, but of a banker's cheque, which is a peculiar sort of instrument, in many respects resembling a Bill of Exchange, but in some entirely different. A cheque does not require acceptance; in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of grace; and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving [70] the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a Bill of Exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that



place. There is a very good note on this subject in the case of *Serle v. Norton* (2 Moo. and Rob. 404), as to the difference between cheques and Bills of Exchange. We do not think that the case of a cheque is similar to that of regular Bills of Exchange, inland or foreign, drawn payable at or after date, and are satisfied with the view taken of this authority in the Court below.

We, therefore, think, that we ought to recommend Her Majesty to affirm the judgment of the Court below, with costs.

Then there remains the other appeal to be disposed of, and I suppose as the decision on this predetermines the whole case, the result will be to dispose of that appeal.

We, therefore, affirm the judgment in the other appeal, without saying anything about the costs of appeal.

[*Mews' Dig.* tit. BILLS OF EXCHANGE, E. ACCEPTANCE, 1. *Presentment for*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 5. *Principles on which Privy Council Acts.* S.C. 2 C.L.R. 1664. On point (i.) as to presentment for acceptance (9 Moo. P.C. 65), see Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), s. 39 (3), Act XXVI. of 1881, s. 61, Act II. of 1885, s. 4; (ii.) as to distinction between cheques and bills of exchange (9 Moo. P.C. 69), cf. *Keane v. Beard*, 1860, 8 C.B. N.S. 380, 381; *Hopkinson v. Forster*, 1874, L.R. 19, Eq. 76; *Lynn v. Bell*, 1876, 10 Ir. R.C.L. 487; Act of 1882, s. 73; Act XXVI. of 1881, s. 6.]

#### [71] ON APPEAL FROM THE HOUSE OF KEYS IN THE ISLE OF MAN.

ANN TOBIN,—*Appellant*; WILLIAM STOWELL,—*Respondent* \* [Feb. 17, 1854].

Grant of the use of a stream of water from an artificial flow over the grantor's land for the purpose of working "a mill or otherwise an instrument wherewith to plate iron, and likewise a smithy," the grantor engaging to keep up a full dam of water for that purpose. Held, in the absence of any objection by the grantor, or those claiming under him, to the use of the water during a period of fifty years, for other purposes than those limited by the grant, to confer by the law of the Isle of Man, on the grantee, a prescriptive right in the water granted, and damages awarded for a diversion of the stream by the representative of the grantor.

*Semble.* Whether if the grantor had prescribed the use of the water to a specific object, it could be used for any other purpose?

This appeal was brought by the Appellant (the Defendant in the Court below), from a judgment of the House of Keys, which in part varied the verdict of the Court of Common Law in the Island, made in favour of the Plaintiff (the present Respondent), whereby the Plaintiff's right to the use of certain water was established, and damages awarded against the Defendant for a disturbance and diversion thereof.

The action was brought under the following circumstances:—

The Plaintiff was seised in fee in possession of a parcel of land, part of the Quarterland of Pulroish, in the parish of Braddan, in the Island, whereon was erected a mill-dam and bulwark or dam-head, and also a building which had been used for various purposes by the Plaintiff, and by his ancestors, from whom he [72] inherited the property. Up to the 13th of September, 1849, when the disturbance and diversion of the water in question took place, the course of the water was, and immemorially had been, through and along the Defendant's meadow, which lay to the south and west, unto and into the Plaintiff's mill-dam, which abutted upon the Defendant's meadow. The mill-dam had been immemorially used to receive the stream, which, after filling the dam, was turned back over the bulwark at the neck

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson, Knt.

or upper end of the dam, near to where it entered the dam, by which means that part of the water which remained unused, or fell back, flowed into the Defendant's adjoining land, and so left the Plaintiff's premises. No part of the water so diverted over the bulwark had ever been appropriated to any use by the Defendant, or by any other person, until after it joined the tail-race below the Plaintiff's premises.

The mill-dam had been used in this way for upwards of fifty years by the Plaintiff or his ancestors, for various purposes. At one time, to work a sledge hammer; afterwards to turn the machinery of a flax-mill; and again, afterwards, and forty years ago, and thence down to the year 1838, it was so used by the Plaintiff and his ancestors for all the purposes of a brewery; and also for driving a malt-mill. Whenever the whole stream was not required for the purposes of the Plaintiff, it was prevented from flowing further into the dam than so far as the bulwark extended, and was then turned wholly over the bulwark, by placing a board or plank across the dam at the bulwark head. And when it was required to use the whole of the stream, the Plaintiff or his tenants, occupiers of the premises, for the purpose of more effectually preventing the water from flowing out of the dam over the bulwark, placed the plank along the upper edge of the bulwark, and so turned and confined the whole stream into the body of the dam.

In the year 1838, the business of the brewery ceased to be carried on, and the tenant of the Plaintiff, who then occupied the premises, placed the board before-mentioned across the stream, near to the upper part of the dam, so as to turn the water out of the dam and over the bulwark, as formerly accustomed. The placing of the board across the stream, after it entered the dam in the manner described, did not prevent some portion of the stream from flowing through the dam, and thence along the wheel-race to the wheel. From the time when the brewery ceased to be worked until 1849, no use was made of the water for machinery by the Plaintiff. And shortly previous to September, 1849, the action of the water had made some small breaches in the bank, in the Defendant's land, within a few feet of the neck of the dam, where the water entered the Plaintiff's property. Such breaches, however, did not prevent wholly the continuity of the stream into the body of the dam. In 1849, the Plaintiff rebuilt the mill, and converted it into a thrashing mill, and renewed the water-wheel, preserving as nearly as possible the ancient position and level of the former and ancient wheel; and on the 13th of September in that year, the Plaintiff restored the accustomed flow of water, by its accustomed course, into the dam, by means of repairs, which he made of those breaches in the bank, within a few feet of its entrance into the Plaintiff's dam, and commenced to use the wheel and machinery in the [74] thrashing of corn; whereupon the Defendant forcibly broke down and threw away the repairs and shut, which the Plaintiff had just made, and completely diverted the course of the water from the Plaintiff's mill-dam and mill, and in effect prevented any part of the water reaching the mill, or even the bulwark of the mill-dam, over which it had always flowed when not used for the mill, or for filling the mill-dam.

For this injury the Plaintiff brought an action for the disturbance and diversion of the water, and according to the course of the Common Law of the Island, a jury of view was duly sworn, and viewed the premises, at the trial of the cause on the 7th of October, 1851. From the evidence of the Plaintiff's witnesses, it appeared, that the course of the water had, for upwards of fifty years, been into the dam in question, and had been in the use and under the control of the Plaintiff and of his ancestors. And further, that the uses to which the water had from time to time during that period been applied by them, had been various and unrestricted. The Defendant put in evidence, and relied in defence upon a deed of sale, dated the 4th of March, 1761, whereby Robert Kermod and wife conveyed to William Stowell (the Respondent's grandfather), and his successors and assigns for ever, certain land therein described. By this deed it was provided that Stowell, or his assigns, was to erect a mill or otherwise an instrument wherewith to plate iron, and likewise a smithy, on the land so conveyed. And Kermod and his wife thereby engaged themselves, their heirs and successors on the estate of Middle, mentioned in the deed, to keep the water that ran alongside of the hedge, at the upper side of the great meadow, continuing to the dam that was then intended to be made at the upper end of the land for the use of the plating-mill, reserving to themselves and their successors all benefits that either they or their heirs could take of the waters.



but still to return the same again to the dam, so that a full dam should and might be kept for use, except in times of great drought, when the water would happen to be over scarce; and the Defendant relied upon the fact that the water was to be used for the sole purpose of supplying and working the plating-mill and smithy. A verdict was found for the Plaintiff, with £80 damages and costs. From this verdict the Defendant appealed to the House of Keys, who, on the 11th of March, 1852, reversed the verdict, and gave judgment as for a nonsuit, on the ground of a variance between the description of the premises in the declaration and the proofs in the cause; without prejudice, nevertheless, to the Plaintiff proceeding *de novo*.

Submitting to this nonsuit, the Plaintiff commenced a fresh action, and a jury having been duly sworn, and having viewed the premises, the cause came on for trial on the 12th of October, 1852. The depositions taken on the former trial were by consent read as evidence upon the new trial. The jury found a verdict in favour of the Plaintiff, establishing his right to the stream of water in question, with £200 damages and costs; the Defendant to make good the embankment, and convey the water into the mill-dam of the Plaintiff, who was to use the water for any lawful purpose.

From this verdict the Defendant appealed to the House of Keys; and upon the 18th of March, 1853. [76] that Court varied the verdict returned by the jury of view, by reducing the damages, and ordered and adjudged that the Respondent should recover from the Appellant the sum of £110 damages, with costs of the Court below, and that the Respondent was entitled to the use of the stream of water in the pleadings named.

Against this judgment the present appeal was brought.

The Appellant rested her case entirely upon the deed of the 4th of March, 1761, and, by her reasons of appeal, contended,

First. That the House of Keys ought to have set aside and reversed the verdict found for the Plaintiff, and to have ordered the verdict to be entered for the Defendant, inasmuch as it appeared by the evidence in the cause that the Plaintiff was not, at the time of the committing of the grievances mentioned in the declaration, entitled to the use, benefit, or advantage of the water of the stream, as claimed by him in the declaration.

Second. That as it appeared by the deed of the 4th of March, 1761, that Kermode granted the use of the water of the stream, and engaged to keep up a full dam of water for a limited purpose only, namely, for the use of the plating-mill and smithy therein mentioned, the Plaintiff was only entitled to the same for that purpose, and that it was proved that the premises had, long before the committing of the alleged grievances, wholly ceased to be used as a plating-mill and smithy, and had been converted to and used for other and different purposes; the right to the use of the stream and to the full dam of water had also [77] ceased, or at least had become suspended, and the Plaintiff was not entitled to the same for the purpose of working the machinery of a thrashing-mill.

Third. That there was no evidence to support either the first or second counts of the declaration, inasmuch as it appeared from the evidence that the water had ceased to flow to the mill of the Plaintiff solely in consequence of a breach in the bank of the stream, which was occasioned by natural causes, and not by any diversion thereof actually made or caused by the Defendant, and the Defendant was not under any legal obligation to repair the banks of the stream in her own land, or to make good the embankment, or to convey, or cause to be conveyed, the water into its alleged proper course, as found by the verdict of the 12th of October, 1852.

The Respondent principally relied upon his prescriptive right by the law of the Isle of Man, by which law he insisted that his possession and enjoyment for twenty-one years (Mills' Statute Laws of the Isle of Man, pp. 76, 94, 113, and 117) conferred upon him an indefeasible right and title; and by his reasons of appeal, he submitted, that the verdict ought to be sustained.

First. Because the right of the Respondent to the use of the stream of water in question was established by the evidence.

Second. Because the Appellant wholly failed on the trial in making out a defence to the action.

Third. Because the construction of the deed of 1761, contended for by the Appel-

lant, was not the true construction, as the deed did not in any respect, either in law or in fact, avoid the right of the Respondent, nor rebut the presumption of law in favour of his possession.

Mr. Atherton, Q.C., and Mr. Hance, for the Appellant, argued that the limitation prescribed by the words "a plating-mill or smithy," contained in the deed of 1761, determined the extent of the Respondent's right; and that the deed only bound the grantor to keep the water for the sole purpose of a plating-mill and smithy, and that there was no other stipulation in the deed imposing an obligation upon him to repair the banks and keep the water up to a certain point except for such qualified purpose, and that, therefore, he was not liable to the action. In support of this construction they cited Gale and Whatley "On Easements," p. 46, Comyn's Dig., tit. "Chimin," D. 6, *Liford's Case* (11 Co. Rep. 52), *Magor v. Chadwick* (11 Add. and Ell. 571), *Saunders v. Newman* (1 Barn. and Adl. 258, 261), *Taylor v. Whitehead* (2 Doug. 745), *Yard v. Ford* (2 W. Saund. 174), n. (2)).

Mr. Bramwell, Q.C., and Mr. Edmund F. Moore, for the Respondent, were not called upon to address their Lordships.

Sir John Patteson.—This was an action for the use of certain waters, and the Court below awarded damages against the Defendant for the disturbance and diversion thereof.

The question is, whether or not the verdict in the first instance found for the Plaintiff, and which has [79] been altered by the Court below by reducing the damages, will stand. Whether any of the counts are proved. The whole defence rests entirely upon the deed of 1761, the Defendant's case being, that the Plaintiff had only a limited right to the use of the water, namely, for the use of the plating-mill and smithy, mentioned in the deed, and nothing else.

Now, it seems admitted on all hands, that what was done by the Defendant was done on her own land, and done by removing the shut which the Plaintiff had placed; and breaking down the repairs made by him in order to revert the water to his mill-dam, the Defendant having suffered the water to flow away.

The second count in the declaration is founded on the deed of 1761, because it states the liability on the part of the Defendant to make good and repair the banks of the stream, or watercourse: certainly there was no common law liability on the Defendant to do so, therefore it seems doubtful whether that count can be maintained. The case turns entirely upon the construction of the deed of 1761, and upon the user which is stated to have accrued for a great number of years. The Plaintiff says for fifty years, and that the water has been used for a mill, and not as a plating-mill, the whole time, and for other purposes. Then, first of all, this question arises, Does the deed of 1761 restrain the right, and give the waters for the purpose of a plating-mill and smithy only, and nothing else? It is plain, that the right to the use of the waters is under that deed; the flow of the water would not have gone to the Plaintiff's mill unless there had been a way over the land of the Defendant, which land belonged to the grantor of the deed of 1761. It is a very simple grant for the purpose of [80] erecting a plating-mill, and supplying it with water: there may be some doubt, whether or not this deed so strictly restricted and confined the rights entirely to a plating-mill and smithy, so that the grantee under that deed could have no right to use the waters, except for a plating-mill and smithy. The words certainly are not very clear, because they say that the grantee is to "erect a mill or otherwise an instrument wherewith to plate iron, and likewise a smithy," which is to be for the use of William Stowell: there may be considerable doubt, whether or not, if the deed had used words, that he was to have no right to the use of the water at all for other purposes than those named, whether he could use it for other purposes, but there is an absence of any positive restrictive words.

It is unnecessary, we think, to give any opinion upon that deed, as their Lordships are all of opinion, that the user which has taken place for such a great length of time in applying the water, would be sufficient to give the Plaintiff the right which he insists upon: for it must be admitted, that there has been plenty of opportunity for the Defendant to interfere and restrict the right, if any such right of restriction existed.

It is quite clear, that if the grantor had restricted the right of the use of the



water to a particular purpose only, and the Plaintiff had used it for other purposes than those mentioned in the grant, and the Defendant had stopped the water from flowing there at all, he would have been justified; but if he choose to lie by for fifty years, we all think that it is too late for him to say that the right has not been acquired.

There is no distinction between natural flow of [81] water and artificial water-course in prescriptive rights, *Mayor v. Chadwick* (11 Ad. and Ell. 571); no question on that point, therefore, can arise.

The Court below, by the verdict, found that there had been a long user by the Plaintiff, and that such right existed in him; therefore, without expressing any opinion whether this deed is a limited grant or not, we are of opinion, that the appeal must be dismissed, and with costs.

[Mews' Dig. III. ISLE OF MAN: 2. LEGISLATURE, LAWS AND CUSTOMS.  
*Cf. Pearyn (Mayor of) v. Best*, 1878, 48 L.J.Ex. 103.]

#### ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

ELIZABETH WATTS, — *Appellant*; GEORGE BEAMAN, — *Respondent* \*  
 [April 6, 1854].

An Appellant who had not sued as a pauper in the Court below, admitted by the Judicial Committee to appeal *in forma pauperis*, upon the usual certificate, without giving security for the costs already incurred, and in which she had been condemned by the decree of the Court below.

This was an application by the Appellant to appeal from a decree of the Prerogative Court of Canterbury, *in forma pauperis*. The Respondent resisted the application, and insisted that the Appellant ought to give security for the costs in which she had been condemned by the Court below.

A certificate of an Advocate, that there was just and probable ground of appeal, was brought to the Surrogate, who administered to the party appellant the [82] usual oath of a pauper. The Proctor for the Respondent objected to the Appellant being admitted to sue *in forma pauperis*, and prayed to be heard on petition. The Surrogate admitted the Appellant to proceed *in forma pauperis*, but for the purpose only of trying the question as to her admissibility to sue in such form.

The petition brought in by the Respondent, alleged that the Judge of the Prerogative Court, by his interlocutory decree, pronouncing for the Will, condemned the Appellant in costs from the time of the giving in of the allegation on her behalf, upon the ground that she had clearly been guilty of deposing knowingly and wilfully falsely in her evidence in the cause, and had by herself and her agents applied to and induced certain witnesses, to give evidence on her behalf by promises of money in the event of her succeeding in the cause; and that she had also in her allegation made a charge of fraud and felony against one Mary Mills (a legatee in the Will) and her husband, gratuitously, and that there was no evidence to support her in the full costs was, that the Counsel of the Respondent had only applied for costs from the time of the giving in of the allegation. The petition further alleged, that the Respondent had necessarily paid and incurred costs and expenses to the amount of £450 at least in this cause, by far the greater part whereof was occasioned by the allegation and evidence of the Appellant; and that the costs and expenses which must necessarily be incurred on his behalf in the appellate Court, in the event of the appeal being allowed to be prosecuted and brought to hearing, would amount to a further sum of considerable amount, and in the whole would nearly [83] absorb the residue of the estate of the Testator. The petition also alleged, that the Appellant had assigned her interest in the estate of the Testator, or at least her interest in the legacy of £200 bequeathed to her by the Will, to her attorney or agent, or to a person named Hope, acting as such, as a security for the

\* Present: The Right Hon. Dr. Lushington, the Lord Justice Knight Bruce, and the Right Hon. Sir Edward Ryan, Knt.

costs incurred by him on her behalf; and the Respondent submitted, that he should be much injured and prejudiced in case the Appellant should be allowed to prosecute the appeal as a pauper, and without giving any security for the payment of the costs in which she had been already condemned, and prayed their Lordships not to admit her as a pauper until good and sufficient security had been given on her behalf for payment of the Respondent's costs in the cause, in which she had been condemned by the decree of the Court below, in the event of that decree being affirmed.

The answer of the Appellant stated, that she was reduced to utter beggary, and had no resource left to her but the workhouse. And with reference to what was alleged by the Respondent as to the grounds upon which the Judge of the Prerogative Court condemned her in costs, she alleged, that the circumstances respecting which she had incorrectly deposed in her evidence in the cause while pending in that Court, occurred thirty-five or thirty-six years previously; and that at the time of her examination she had been so reduced by poverty and trouble, that she was in a highly nervous and confused state, and hardly knew what she was saying, but that afterwards when she gave in her answers to the responsive allegation, and her thoughts were more collected, she stated the truth, and admitted that which in her state [84] of confusion she had previously denied. There was no denial of the assignment of the legacy of £200 given to her by the Will as alleged in the petition. Affidavits were filed by the Appellant and another, as to the extreme state of destitution the Appellant was reduced to.

The Surrogate referred the petition to the Judicial Committee, and the same now came on for hearing.

The Queen's Advocate (Sir John Harding), for the Respondent, the Petitioner, submitted, that as the allegation of the Appellant having assigned her interest was not denied, it justified the resistance made by the Respondent to the Appellant's admission to sue *in forma pauperis*, and as to the practice of imposing terms of payment of costs before allowing a party to sue *in forma pauperis*, after commencement of suit, he referred to *Jones v. Peerse* (McClell. and Y. 282) as a case in point, in the Court of Exchequer, and *Calvert v. Rooth* (4 You. and Col. 514) in the Court of Chancery, *Taylor v. Bouchier* (2 Dick. 504), *Davenport v. Davenport* (1 Phillips, 124), 1 Daniels' Chan. Prac. p. 43 (1st Edit.). That her vexatious conduct disentitled her to be admitted as a pauper, *Wagner v. Mears* (3 Sim. 127). He also took an objection to the certificate as being signed by the junior Advocate only.

Dr. Spinks, for Watts, *contra*, relied upon *Grindall v. Grindall* (4 Hagg. 1), *Matthews v. Warner* (4 Ves. 194), as authorities that the Delegates admitted a party to appeal *in forma pauperis*.

[85] The Right Hon. Dr. Lushington.—This is a petition by the Respondent, praying their Lordships not to admit Mrs. Watts to prosecute her appeal in this Court as a pauper until good and sufficient security has been given on her behalf for payment of the costs of the Respondent in the cause, in which she has been condemned by the decree of the Court below, in the event of that decree being affirmed by their Lordships. We are of opinion, that we cannot accede to such an application. It is entirely novel; no precedent of any such course of proceeding in the Ecclesiastical Courts before the Delegates, or before this Court, upon appeal, has been produced. The cases cited are not sufficiently in point. The other consideration is, whether their Lordships are at liberty to prevent the party appealing *in forma pauperis*, by reason of the certificate being signed by one Advocate only. We think also that this objection cannot prevail. It is very clearly laid down by their Lordships in *Lait v. Bailey* (7 Moore's P.C. Cases, 436), that before a party can be admitted to appeal *in forma pauperis* to the Judicial Committee from the Ecclesiastical Courts, he must have the certificate of an Advocate that there are good grounds of appeal. Here there is the certificate of an Advocate, and we fully rely that no Advocate would give such a certificate without sufficient reason and good cause. We, therefore, reject the prayer of the petition, but make no order as to the costs arising out of it.



[86] ON APPEAL FROM THE SUDDER DEWANNY COURT AT CALCUTTA.

GUADAHUR PURSHAD TEWARREE.—*Appellant*: MOOSUMAT SOONDERKOO-MAREE,—*Respondent* \* [June 29, 1854].

Appeal restored after being dismissed for want of effectual prosecution within the time limited by the fifth rule of the Order in Council of the 13th of June, 1853; the new rules having been only recently adopted by the Sudder Court at Calcutta, and the Appellant in ignorance of their existence, being engaged in taking steps to prosecute the appeal within the time and according to the practice previously existing.

This was a motion upon petition, to restore an appeal which had been dismissed for want of prosecution, pursuant to the fifth rule of Her Majesty's Order in Council of the 13th of June, 1853 (see Rules, 7 Moore's P.C. Cases, viii. [Stat. R. and O. Rev. vol. iv. pp. 305 *et seq.*]), six months having elapsed from the arrival of the transcript and registration in the Council Office, and no effectual step taken for the prosecution of the appeal.

The petition stated that the transcript arrived, and the appeal was registered at the Council Office, on the 28th of July, 1853; and that on the 1st of February, 1854, notice was given by the Registrar of the Privy Council to the Registrar of the Sudder Dewanny Adawlut, at Calcutta, in the terms of the rule, that as six calendar months had elapsed from its registration, and no effectual steps taken for the prosecution of the appeal, the same was, pursuant to Rule V. of Her Majesty's Order in Council of the 13th of June, 1853, dismissed without further notice. The petition further [87] stated, that the Petitioner was wholly ignorant of the new rules of practice, having previously had the usual notice to proceed with his appeal within two years, and was in no way prepared for this alteration, no order having been issued respecting such alteration by the Sudder Court, until the 16th of February, 1854, when the new rules were first adopted by the Sudder Court. That in the latter part of 1853, the Petitioner had taken measures for the due prosecution of the appeal, and that his *mookhtar* was in correspondence with his agent in England on the subject; and that he was prepared to proceed with the appeal in due course, and prayed that, under the circumstances, his appeal might be revived.

Mr. R. Palmer, Q.C., in support of the petition, urged, that it was a proper case for the indulgence of the Court, by restoring the appeal, as there was no laches in prosecuting the same, the dismissal being under the new Rules and Regulations, of which the Petitioner was necessarily ignorant, conceiving that the usual period of two years allowed by the Order in Council of the 4th of September, 1833, under the Statute, 3rd and 4th Will. IV., c. 41, sec. 22 (2 Knapp's P.C. Cases, xxvii.) [†], was still in force, the Sudder Court at Calcutta not having notified the existence of the new Rules till after the dismissal.

Mr. Leith opposed, submitting, that if the appeal was restored, it ought to be upon terms of paying costs, and giving fresh security, according to the usual practice.

\* Present: The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., Lord Justice Turner, and the Right Hon. Sir John Patteson, Knt.

[†] At the Court at St. James's, 4th of September, 1833: present,—The King's Most Excellent Majesty in Council.

It is this day ordered by His Majesty in Council, by virtue of the provisions of an Act passed in the last session of Parliament, intituled, "An Act for the Better Administration of Justice in His Majesty's Privy Council," that the United Company of Merchants of England trading to the East Indies do bring to a hearing before the Judicial Committee of the Privy Council on the 16th of November next, or as soon after as the said Committee may require, all the cases of appeal mentioned in the annexed list, the same being appeals from Courts of Sudder Dewanny Adawlut in the East Indies, in which no proceedings have been taken in England, on either side, for a period of two years subsequent to the admission of the said appeals respectively.

(Signed) C. C. Greville.

[Here followed a list of cases of appeal, containing eighteen from Bengal, ten from Madras, and fifteen from Bombay.]

[88] The Lord Justice Knight Bruce.—If we advise any positive departure from the new Rules and Regulations, it is only under peculiar circumstances. We think, in this case, that enough has been shown to justify us in recommending the restoration of the appeal, upon the terms of the sum of Rs. 4000 now deposited in India in Government paper, for costs to abide the appeal standing, without substituting any fresh security, the Appellant undertaking to appear forthwith and use due diligence to bring on his appeal. All costs of and consequent on this application and the dismissal, to be reserved.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; d. *Restoring*. S.C. 6 Moo. Ind. App. 201. Followed in *Seto Lutchemchand v. Seto Zorawur Mull*, 1854-55, 9 Moo. P.C. 352.]

## ON PETITION FROM BOMBAY.

*In re* THE NAWAB OF SURAT \* [June 30, 1854].

An Act of the Legislature of India, No. 18 of 1848, empowered the Governor in Council of Bombay to administer the private estate of the late Nawab of Surat, and it was, by section 2, enacted, "that no act of the said Governor of Bombay in Council in respect of the administration to, and distribution of, such property, from the date of the death of the said Nawab, should be liable to be questioned in any Court of Law or Equity." No provision was made for an appeal from the Governor's decision. In pursuance of the power conferred by this Act, the Government agent at Surat, to whom the matter was referred, made an award distributing the estate in certain shares, among the heirs of the deceased, which award was confirmed by the Governor in Council.

Upon an application by a claimant dissatisfied with the award to the Judicial Committee, for leave to appeal from the Governor in Council's confirmation of the award: Held, that the award was not such a judicial act as to come within the operation of section 3 of the Statute, 3rd and 4th Will. IV., c. 41, or the 7th and 8th Vict., c. 69, and could not be entertained by the Judicial Committee without a special reference to them by the Crown, under section 4 of the Statute, 3rd and 4th Will. IV., c. 41.

This was an application for leave to appeal against an adjudication of the Governor of Bombay, founded [89] on an award made under an Act of the Legislative Council of India, No. 18 of 1848, for the administration of the private estate of the late Nawab of Surat, which arose under the following circumstances:—The Petitioners were Meer Jafur Alee, the son-in-law of Meer Uzooloddeen Khan, the late Nawab of Surat, and father of Zeeoon-nissa Larlee Begum and Ruheemoonnissa Begum, infants (the grandchildren of the late Nawab), and Ameer-oon-nissa Begum, the widow of the deceased Nawab.

It appeared from the petition, that Meer Uzooloddeen Khan, from the year 1821 until his death, enjoyed the dignity and immunities of Surat with the sanction of the British Government in India, under the provisions of certain articles of agreement, entered into on the 13th of May, 1800, between the East India Company and Nusseeroddeen Khan, the father of Uzooloddeen Khan, whereby, in consequence of his surrendering up to the East India Company the civil and military government of Surat, it was provided, that he should continue exempt from the jurisdiction of the Courts of Justice, and should be at liberty to dispense justice over his relations or servants. Meer Uzooloddeen Khan died on the 8th of August, 1842, leaving no son surviving him, and the title was declared extinct, and the property taken possession of by the Government. On the 26th of August, 1848, an Act of the Legislature of India, No. XVIII., entitled, "An Act for the administration of the

\* Present: The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Turner, the Right Hon. Sir John Patteson, Knt., and the Right Hon. Sir John Dodson, Knt.



estate of the late Nawab of Surat, and to continue privileges to his family," was passed, which invested the Government [90] of Bombay with power to administer the private estate of the deceased Nawab, and after settlement and payment of the claims against the Nawab, at the time of his death, to make distribution of the remainder among his family. Among the claimants to the property, as heirs, were the Petitioner, Meer Jafur Alee, and his two daughters, who claimed the whole estate. The agent for the Government, Mr. Frere, to whom the matter was referred, by his award, was of opinion, that there was no proof of a custom in the family of the late Nawab, by which his children were exclusively entitled to the whole property, and that it was not proved that it was the intention of the late Nawab to constitute any particular person to the exclusion of those who would be heirs under the rules of the Mahomedan law of succession; and he, therefore, decreed that the property should be divided into sixteen shares, and awarded eight shares to Meer Jafur Alee's two daughters, and the other eight shares among the other relations of the deceased Nawab.

The Petitioner, Meer Jafur Alee, on behalf of his daughters, appealed to the Bombay Government against the above award, insisting, that it was against the late Nawab's intentions. On the 27th of July, 1853, the Government of Bombay informed the Petitioner that, on a full consideration of the appeal preferred by him on behalf of his daughters, against Mr. Frere's decision, they had, under section 2, of Act 9, No. 18, of 1848, adjudged the succession as follows: to his daughters, four shares each, to the Nawab's widows, one share each, and to the two great-grandsons of the Nawab's great-grandfather's brother in the male line, three shares each, and thus con-[91]-firmed the award. After an ineffectual application to the Board of Directors of the East India Company for a review of the case, the Petitioners presented a petition to Her Majesty in Council for leave to appeal, and for a reference of the petition to the Judicial Committee. The petition was in the ordinary form, but the Registrar of the Privy Council being doubtful whether it was within the provisions of the Privy Council Act, 3rd and 4th Will. IV., c. 41, sec. 3, the present application was made to their Lordships for leave to appeal.

The Solicitor-General (Sir Richard Bethell), and Mr. Ayrton, supported the motion.—We insist that the confirmation of the award by the Governor in Council, under section 2, of the Act of the Legislature of India, No. 18 of 1848, was of a judicial, and not a Sovereign character, and the proper subject of an appeal to the Queen in Council. It was similar to the judicial functions formerly exercised by the Governor-General, under the powers of the Statute, 21st Geo. III., c. 70, sec. 21, from whose award or decision an appeal to the King in Council was as of course. The jurisdiction of the President and Council, as a Court of appeal, was abolished by Statute, 37th Geo. III., c. 142, sec. 18, and the Bombay Charter founded upon that Act provides for an appeal to the King in Council from the Supreme Courts, thereby created. Statute, 47th Geo. III., sess. 2, c. 68, sec. 1, empowers the Bombay Government to make laws and regulations for the good order of the town of Bombay, but an appeal is given by sec. 2. So Bom. Reg. IV. of 1827, ch. 23, cl. 10 (Bom. Code, p. 159), expressly provides, that there [92] shall be no bar to the full and unqualified exercise of Her Majesty's pleasure, in receiving or rejecting appeals from the Sudder Courts. Although it is enacted, that the award is not to be questioned in any Court of law or equity, yet that cannot deprive a subject of the right of appeal to the Sovereign. There are no restrictive words taking away an appeal, and we insist that an appeal lies to the Judicial Committee as now constituted, the same as an appeal lay from the President and Council to the King in Council, before the passing of the Statute, 37th Geo. III., c. 142. The recognition of the Sovereign character of the Nawab of Surat, and the exemption of himself, family and servants, by Bom. Reg. II. of 1827, sec. 21, cl. 2, from the cognizance of the Civil Courts of Justice, are not unfrequent in India. Bom. Reg. XVII. of 1827, sec. 29, cl. 2. The fact of the Government making the Nawab, as it were, *solitus lege*, has created this anomalous position.—[The Lord Justice Knight Bruce.—Does any objection arise upon that point? Is not the question confined to this.—Is the award such a judicial proceeding as comes within the appellate jurisdiction of the Judicial Committee, conferred upon them by the 3rd and 4th Will. IV., c. 41, sec. 3, which authorises them to entertain appeals from any "determination, sentence, rul', or

order of any Court, Judge, or judicial officer?" If it is not embraced in these words as a judicial act, then we can only entertain the matter by a special reference to us by the Crown, under the fourth section of that Act. Under that section the Crown has power to refer any matter to the Judicial Committee for their advice.]—An appeal was entertained by this Court from an award made by the Bombay Governor [93] in an analogous case of heirship. *Luximon Row Sadasev v. Mullar Row Bajee* (2 Knapp's P.C. Cases, 60). This is clearly a judicial act. It was a tribunal established by an Act of the Legislature of India to determine rights of heirship, and in this country the entry of it might be brought up by *certiorari*. *The Queen v. The Aberdare Canal Company* (14 Q.B. Reps. 854). Even if a Statute directed a Court to hear and finally determine, it does not, in the absence of express words, take away the *certiorari*, as it is, in the language of Lord Kenyon, "a beneficial writ for the subject." *The King v. Jukes* (8 Term Rep. 544). The Act of 1848 was never intended to interfere with the right of appeal to this Court, which has more extensive powers than the Court of Queen's Bench.

The Lord Chief Justice Knight Bruce.—The late Nawab of Surat, having been placed in a peculiar position with reference to the Government of Bombay, by reason of the consideration shown him by that Government, in consequence of rights of Sovereignty, which, whether theoretically by delegation, or otherwise, he had in fact substantially exercised: he was placed, I say, in a particular position by law with reference to that Government, and to a certain extent, to use the expression of the Solicitor-General, was "*solitus lege*" himself, and placed as a law over his immediate family and dependants: a state of things which existed at his death. Some difficulties appear to have arisen upon that event; and, in consequence, some years after his death in 1848, an Act of the Supreme Legislature of India [Act xviii. of 1848] was passed to this effect: it is entitled "An Act for the administration of the [94] estate of the late Nawab of Surat, and to continue privileges to his family." It recites that "it is expedient to provide for the administration of the estate of the late Nawab." It then recites, that "the exemption from the jurisdiction of the Civil and Criminal Courts, enjoyed by the said late Nawab and his relations and servants, by virtue of the treaty concluded between the East India Company and the said late Nawab on the 13th May, 1800, recognised and confirmed by clause 2, section 21, Regulation II., 1827, and clause 2, section 1, Regulation XI., 1827, of the Bombay Code, ceased at the death of the said late Nawab, and it is deemed expedient that some of the said persons should continue to be privileged." It then enacts, that "No writ or process shall be sued forth or prosecuted against the person, goods, or property of the said several persons named in the schedule annexed to the Act, or any of them, unless with the consent of the Governor of Bombay in Council first obtained, such consent to be signified by one of the Secretaries to the Government; and any writ or process sued forth or prosecuted against the person, goods or property of the said named persons, or any of them, without such consent as aforesaid, shall be utterly null and void." The second section, which is the one which has been brought more immediately under the attention of their Lordships on this occasion, says, "The Governor of Bombay in Council is empowered to act in the administration of the property, of whatever nature, left by the late Nawab of Surat, in regard to the settlement and payment of the debts and claims standing against the estate of the said late Nawab at the time of his death, and to make distribution of the remaining property among his fa-[95]-mily; and no act of the said Governor of Bombay in Council, in respect to the administration to and distribution of such property, from the date of the death of the said late Nawab, shall be liable to be questioned in any Court of Law or Equity."

The Governor of Bombay in execution of the power or duty, or both, thus conferred upon him, has exercised that power or duty in a manner unsatisfactory to members of the family of the Nawab, and, in consequence, the present Petitioners seek to have the case re-heard, or the distribution, thought right by the Governor of Bombay in Council, brought under the review of the Judicial Committee, as a matter of right, and in the exercise of its ordinary jurisdiction: and the question before their Lordships is, whether that is a course authorised by the Statutes, under which



they, as members of the Privy Council, exercising the particular functions of the Judicial Committee, are now sitting.

The question is not whether this may hereafter be a case which their Lordships may have to hear, if it shall so seem fit to Her Majesty, under the 4th section of the Statute, 3rd and 4th Will. IV., c. 41, to refer it to them. The question is entirely confined to the 3rd section of that Statute. Their Lordships desire that nothing which is said on the present occasion shall be understood as referring, directly or indirectly, to anything that may be thought right to be done under the 4th section. That is, in point of fact, a matter with which they have nothing to do. The 4th section provides, "That it shall be lawful for His Majesty to refer to the said Judicial Committee, for hearing or consideration, any such other matters whatsoever, as His Majesty shall think fit; and such [96] Committee shall thereupon hear and consider the same." If, therefore, it shall hereafter be the pleasure of Her Majesty to refer the present petition, or any similar petition, to their Lordships, their Lordships will of course hear it, and report to Her Majesty upon it. At present no such case is before us. The only question is, whether, without a reference, and, as a matter of right, a petition complaining of what has been done by the Governor of Bombay in Council, under the particular power that I have mentioned, shall be brought here in ordinary course; and that depends upon the question whether, within the true meaning of the 3rd section of the Statute, 3rd and 4th Will. IV., c. 41, establishing the Judicial Committee, the act, of which complaint is now made, is the act of a Judge or judicial officer; the language of the third section being, "that all appeals, or complaints in the nature of appeals whatever, which, either by virtue of this Act, or any law, statute, or custom, may be brought before His Majesty or His Majesty in Council, from or in respect of the determination, sentence, rule, or order of any Court, Judge, or judicial officer, and all such appeals as are now pending," shall be heard in the way that is there mentioned.

Now, the 2nd section of the Indian Act of 1818 (Act No. xviii. of 1848) I have already read; and it will be requisite, in considering it more particularly, to look at the two portions of it separately. The first is, that "the Governor of Bombay in Council is empowered to act in the administration of the property, of whatever nature, left by the late Nawab of Surat, in regard of the settlement and payment of the debts and claims standing against the estate of the late Nawab at the time of his death, and to make distribution of the re-[97]-maining property among his family. Now, whether, if the section had stopped there, the discretion of the Governor in Council was one which could have been regulated or interfered with judicially, or was absolute, their Lordships do not mean to intimate any opinion. Let it be assumed for a moment, that it was not absolute, but that it was a discretion bound to be exercised, according to some law, some custom, some state of rights. The mode of complaining of that must have been to the ordinary Courts of the country, either in one branch of the local jurisdiction or in another, from which it might have been brought in regular course of appeal, before Her Majesty in Council. No such course has taken place, in the present instance, nor could it, for the obvious reason that I am about to mention. It is plain, therefore, that the Petitioners would not be right here, upon the supposition that the enactment that I am reading had ended at the point to which I have read. But the section proceeds, "And no act of the said Governor of Bombay in Council, in respect to the administration to and distribution of such property, from the date of the death of the said late Nawab, shall be liable to be questioned in any Court of Law or Equity." It is perfectly plain, therefore, that no local Court could have entered into the question of the propriety of the administration or distribution thought right by the Governor of Bombay in the exercise of this power. But the argument is, that though the ordinary Courts are excluded from interference the Queen in Council is not; and, perhaps (though their Lordships do not mean to pronounce any opinion upon it), the argument may be well founded, that if the Governor in Council was here constituted a Court, it might have [98] exceeded the limits of the Indian Legislature—the limits of their power, to exclude the judicial functions (if I may use the expression) of Her Majesty in Council. Their Lordships are of opinion, however, that the intention of this Act was not to create a Court; that the intention of the Act was to delegate, either

arbitrarily, or subject to certain limitations of discretion, the administration and distribution of the Nawab's property, but in such a way that the administration and distribution should not be judicially questioned. The expression, it will be observed, is not, "shall be liable to be questioned in any other Court of Law or Equity," but, "shall be liable to be questioned in any Court of Law or Equity." It may seem an anomalous and extraordinary proceeding to vest powers of this description, not liable to be checked by any ordinary course or powers of law, in any individual or in any body; but the Indian Legislature had power over the property; they might, in the exercise of that power which is inherent in legislation, have given the whole property at once to the stranger, or devoted to any purpose, and whether with moral justice or not, is not the question. Instead of doing that, they do what to their Lordships appears substantially the same thing; they vest the power of dealing with it in a particular individual or a particular body, and declare that its acts shall not be liable to be questioned in any Court of Law or Equity.

Their Lordships, therefore, consider, that in the ordinary exercise of their functions, they are without jurisdiction to interfere. They are of opinion, that the proceeding of the Governor of Bombay in Council has not been an act of a Court, Judge, or judicial officer, within the meaning of the third section of the Statute, 3rd and 4th Will. IV., c. 41, but has been the [99] act of a person or body not in any sense judicial; delegated and authorised to perform a particular function as to the responsibility for the exercise of which, or as to any appeal from that exercise, they were exempted by the Legislature which created them. In the extreme case which may be supposed, of corrupt or tyrannical abuse of such powers as these, which is not suggested, there must always be open to all the Queen's subjects those rights of complaint, in the last resort, either to Parliament, or to the Crown. The only question before us, is, whether, as I have said, the Governor of Bombay in Council has, in this instance, exercised a judicial function; and their Lordships are all clearly of opinion, that he did not exercise any such function, that he was not vested with any such function.

If their Lordships had entertained any doubt on this matter as to their jurisdiction, that doubt would probably have been removed by the language of the Statute, 7th and 8th Vict., c. 69, for amending the 3rd and 4th Will. IV., c. 41. Not only the recital contained in that Act of Parliament, but some portion of the provisions contained in the enacting parts of it, appear to their Lordships very much to strengthen the view which they would have taken of this case, even if that Act had not existed.

The Petitioners, therefore, will take such course as they may be advised, with reference to an application to the Crown, through the Board of Control, or otherwise. By possibility, in consequence of such application, if made, the matter may come here again; and their Lordships will readily do their duty in hearing it. At present they consider it not to be within their ordinary functions to do so.

[Mews' Dig. tit. COLONY; III. APPEALS to PRIVY COUNCIL: 1. *When an Appeal lies generally.* S.C. 5 Moo. Ind. App. 499. See *Cutto v. Gilbert*, 1854, 9 Moo. P.C. at p. 149.]

#### [100] ON APPEAL FROM THE COURT OF COMMON PLEAS OF THE ISLAND OF BARBADOES.

JOHN WILSON,—*Appellant*; TIMOTHY CALLENDER,—*Respondent*\*  
[July 20, 1855].

The Royal Instructions regulating appeals from Barbadoes to the Queen in Council, limit the right of appeal to cases in which the subject-matter involved amounts to £300.

The Court at Barbadoes held, that certain accounts and documents sought to be recovered in an action of detinue, were of no value in themselves, and re-

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Knight Bruce, and the Lord Justice Turner.



fused leave to appeal against a judgment of nonsuit in the action. Upon a petition for leave to appeal, founded upon an allegation that the value of the accounts and securities exceeded £300, their Lordships granted special leave to appeal. When the appeal came on for hearing, it appeared that the allegation as to the value of the accounts and documents was unfounded in fact, and unsupported by evidence, upon which their Lordships stopped the case, and dismissed the appeal with costs.

The appeal in this case was brought from an Order made by the Court of Common Pleas in the Island of Barbadoes, directing a verdict to be set aside and a nonsuit entered, in an action of detainee brought by the Appellant, as administrator of his deceased wife, against the Respondent, the trustee and executor of the Appellant's wife, to recover certain documents, consisting of accounts current, securities for money, and promissory notes, belonging and relating to the separate estate of the wife, and which were in the possession of the Respondent as such trustee and executor. The Appellant applied to the Court for leave to appeal to Her Majesty in Council, but the Chief [101] Justice, Boucher Clarke, held, that he was precluded by the Royal Instructions from granting such leave, as the Appellant had not proved that the subject-matter in dispute was of the value of £300, the amount required by the Royal Instructions regulating appeals in the Colony: the papers in question of themselves being proved at the trial of no value whatever.

In consequence of the refusal by the Chief Justice, the Appellant presented a petition to Her Majesty in Council, praying for leave to appeal; and by his petition he submitted, that the Court below ought to have granted leave to appeal, inasmuch, as though no value might have actually been proved in the cause, there was produced in the Court, at the hearing of the cause, one attested account of the administration of the personal estate of Mrs. Wilson against the Respondent, which alone amounted to £1043 2s. 6d., and the amount involved in the accounts and securities relating to the personal estate withheld by the Respondent, was upwards of £1000, and there was a further sum by way of costs incurred about the action, and a Bill of Discovery he had filed against the Respondent, amounting to upwards of £300, which he claimed as damages.

(June 29, 1854.)\* Mr. Hetherington, in support of the petition, applied *ex parte* for special leave to appeal, which their Lordships, upon the faith of the allegation in the petition as to value, granted, upon terms of the [102] Appellant giving the usual security for costs of the appeal.

Upon the appeal coming on for hearing, it appeared that the allegation in the petition as to the value of the accounts and securities was unfounded in fact, and unsupported by proof; whereupon their Lordships stopped the case.

Sir Frederick Thesiger, Q.C., and Mr. Leith, were for the Appellant; and Mr. Wigram, Q.C., and Mr. Druce, for the Respondent.

The Right Hon. T. Pemberton Leigh.—We shall dispose of this appeal upon a ground which we hope will in future prevent parties making *ex parte* applications, such as this, for leave to appeal, when, in truth, no grounds exist to warrant such application. Leave was given by their Lordships to appeal, upon the allegation that the accounts and securities which the Appellant claimed were of the value of £300, the sum limited by the Royal Instructions, which allegation, however, now appears to have no foundation in fact. The petition to Her Majesty for leave to appeal contained an allegation as to the value of these attested accounts, which it was alleged amounted to the sum of £1043 2s. 6d., and other securities to the value of £1000. It now turns out that they were not, and are not, of the value of a single shilling. Such conduct cannot be passed over in silence. When parties make an application for an indulgence, and obtain that in-[103]dulgence upon grounds which turn out not only to be unfounded, but absolutely untrue, they should know that their appeal will be dismissed with costs. The course their Lordships will, therefore, pursue in this case, without going any further, is to dismiss the appeal with costs.

\* Present: The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Turner, and the Right Hon. Sir John Patteson, Knt.

[Mews' Dig. tit. COLONY: III. APPEALS TO PRIVY COUNCIL: 2. *Appealable Value*;  
 3. *Leave to Appeal, Sum involved being below the Applicable Amount*. As to  
 (i.) dismissal of appeal with costs, cf. *Sibnardin Ghose v. Hallodhur Doss*, 1854,  
 9 Moo. P.C. 356; (ii.) special leave to appeal in civil cases generally, see note  
 to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125; (iii.) conditions of  
 appeal from Barbadoes, see O. in C. of March 3, 1859, under 13 and 14 Vict.  
 c. 15, s. 6 (Stat. R. and O. Rev. iv., 396), and O. in C. of 20th April, 1883 (*ib.*  
 p. 400).]

## ON APPEAL FROM THE SUPREME COURT AT BRITISH GUIANA.

JOSEPH NORTON.—*Appellant*: BENJAMIN SPOONER.—*Respondent* \*

[July 3, 4, 1854].

A civil action for recovery of damages against a Defendant for criminal conversation had with the Plaintiff's wife, lies by the Dutch law prevailing in British Guiana, and is recognised by the Ordinances of the Colony, Nos. 19 and 29 of 1846.

A plea of exception, "*Tibi adversus me non competit haec actio*," to such action, rejected by the Supreme Court at British Guiana. Such judgment affirmed on appeal by the Judicial Committee.

This was an appeal from a judgment of the Supreme Court of Civil Justice at British Guiana, rejecting a plea of exception by the Appellant in bar to an action brought in that Court by the Respondent against him, for damages on account of criminal conversation with the Respondent's wife, and the question raised by such plea was, whether a civil action for the recovery of damages for criminal conversation lay by the law in force in British Guiana.

The Appellant and Respondent were inhabitants of the country of Essequibo, in the Colony of British Guiana. In 1853, the Respondent brought an action [104] in the Supreme Court in the Colony against the Appellant, and by his claim and demand alleged, that the Appellant on divers days in that year, and in the Colony, had adulterous connection with his wife, and he claimed of the Appellant the sum of \$20,000, as damages.

The Appellant filed his conclusion of exceptions and answer, and therein pleaded, amongst other pleas, the exception "*Tibi adversus me non competit haec actio*."

Issue having been joined as well upon this exception, as upon the other matters pleaded by the Appellant, the cause came on for hearing on the 28th of June, 1853, before the Supreme Court, consisting of the Chief Justice Arrindell and the Justices Alexander and Harvey, when the Court decided to dispose first of the above-mentioned exception, before going into the other questions raised, and, after a full hearing, and having taken time for consideration, pronounced their judgment, in the matter of the exception, on the 1st of July, 1853, rejecting the exception with reservation of costs, and ordering the parties to proceed in the action.

The judgment of the Court was pronounced by the Chief Justice, (Mr. Justice Harvey, having been counsel in the cause, took no part in the decision.) who, after stating that it was not without considerable hesitation that the Court pronounced decision in the case, proceeded to observe, "that the arguments by the Attorney-General in support of the exception were exceedingly well put. Not only did they considerably stagger the Court, but the researches of the Court subsequently, led them to look to that side of the question with great consideration. The Attorney-General argued, that because in the books of practice there was [105] no mention of this remedy on the part of the husband, and of this mode and manner of proceeding it was to be inferred that it was not known in the Dutch law. He (the Chief Justice) conceded at once to the Attorney-General, that neither in Van der Linden nor in Van Leeuwen's Roman Dutch law, quoted by him, was there any mention made of

\* Present: The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Turner, and the Right Hon. Sir John Patteson, Knt.



such an action, *nominatim*, nor was there any paragraph that mentioned expressly 'adultery,' as one of the injuries for which an action could be maintained. But, if they looked at the passage in Van der Linden to which the Attorney-General referred, p. 353, it would be seen that Van der Linden treated there expressly of the criminal law, and that he had previously treated of the civil law. That was quite clear; and, when treating of the civil law, although he did not expressly allude to and mention the offence of adultery, yet he did say, in p. 248, as quoted by the Counsel for the Plaintiff,— 'Out of crime arise two kinds of obligation; the one, to suffer the punishment affixed by law to the act, which is of a public nature, whereof we shall treat in the following book; the other, to make good the damages occasioned by the criminal act: and in the latter view, as laying the ground of a civil action, we shall here consider it.' Now, here was a broad principle laid down in the Dutch law, and also recognised in the English law, that a criminal action, or, as we would say in the English law, a prosecution, did not denude the individual of the right to bring his action for damages; and, *vice versa*, a civil action did not preclude the public prosecutor from proceeding in the manner pointed out elsewhere. So universally was this principle applied in the Dutch law, that in speaking of crimes against life, or murder, it was stated that the [106] party who had committed a murder was bound to make good to the widow and children of the deceased who had been dependent upon him, the loss sustained by his death, by way of annuity. Now, if the children and widow of the murdered person had their remedy against the murderer for damages which had accrued in consequence of the murder, it evidently showed that this law differed widely from our own, wherein the civil remedy became merged into and was abolished by the public remedy or prosecution. He had been merely adverting to the authorities quoted, and referring, *en passant*, to the general principles of law. But when they looked a little further into the authorities, they found that there was certainly no precedent for an action of this kind by name, as he had before stated; but, they did find that all the authorities they had been able to read, treated this as a question of injury; and when they looked to Van der Linden's 'Manier van Procdeeren,' 1st vol., p. 197, (which was also supported by Merula's Practice, vol. i., p. 467,) they found, under the head of 'Reparation for injuries,' the form of conclusion in the claim and demand, thus stated: 'And making claim, concludes that the Defendant shall be declared to have atrociously injured the Plaintiff (Impetrant), and moreover be condemned to make amends for such injuries, honourably and profitably. *Honourably*, by appearing at the sitting of the Roll of this Court (or before Counsellor Commissaries of this Court), and there, with head uncovered, and within the hearing of every one, to ask the Plaintiff (should he wish to be present) pardon, declaring that he sincerely regrets having spoken and uttered the injurious words and language, as more fully set forth in the Plaintiff's [107] claim (mandament); and that he considers the Plaintiff to be a man of honour, against whose character and conduct he is not aware any thing can be said. And *profitably*, by paying to the poor of the Dutch Reformed Church of the town of — a sum of — silver ducatoons.' The injured party had the right there to require that the sum or damages should be paid to the poor or to himself. He (the Chief Justice) merely referred to this form, for the purpose of showing, that although Van der Linden did not mention anything about adultery, yet he, as well as Merula, gave a form which was applicable to injuries inflicted by that crime or offence, as well as to injuries by any other crime or offence. There was no other form for damages for injury, however, or by whatever means that injury might have been committed. So that, although there was at first an apparently strong argument on the ground of absence of precedents or cases, yet, when the matter was narrowly investigated and sifted, it was clear that Van der Linden gave but one form as applicable to all injuries. He gave it without stating what injuries it was for, although it was presumed that it related to injuries by slander or libel: yet, by looking at the part which related to the *amende honorable* and the *amende profitable*, it could apply to any injury whatever. The learned Counsel rested his whole case on the absence of all authorities. Now, on the other side, authorities had been quoted, and they appeared to the Court to be exceedingly pertinent and applicable. The first authority quoted was that of Grotius, as translated by Herbert: and, having had the issue book before him previously to coming into Court, and being desirous of seeing whether this was a cor-[108]-rect trans-

lation or not, he had taken the pains of comparing the translation with the original, and he had found it a very correct translation. What did Grotius say?—'Whoever commits adultery with a married woman, even with her consent, inflicts an injury on the husband, and is, therefore, in this respect liable to the husband, beside the compensation for the losses which the husband or children sustain by the same.' (B. iii. c. xxxv. s. 9.) Now, how could a man be liable to the husband if he was not so liable to make reparation or compensation in some way or other? The authority was, that whoever committed adultery with a married woman, even with her consent, inflicted an injury upon the husband, and was liable to him. He knew that it would be said, that when they searched other authorities, it would be seen that there was a remedy, both criminal and civil. By a reference to Voet, b. 47, tit. 10, par. 17 and 18, it would be seen that, according to the law of Holland, when a party brought his action against the wife for divorce on the ground of adultery, the Advocate-Fiscal had the right to come up and join in the same proceedings, and make claim that the party should also be fined. But look at the present state of the law. The law had been altered, and it would be impossible for the Advocate-Fiscal or the Attorney-General to come up and join in a proceeding of that sort. How could the jury try the double issue that would be joined? Besides, all criminal proceedings now were to be conducted by indictment, and how could they join an indictment with a claim and demand, according to their practice? Where, in an indictment, would be the conclusion for the Court to be ruled by? It was out of the question, he consi-[109]-dered; and he said so with great confidence, that at present the Attorney-General would not be allowed to join an individual seeking his remedy in an action for divorce. Then it was very clear, that the party was liable to the husband, and that this party was separate and distinct from and other than the wife against whom, according to a great number of authorities, the husband had his remedy for divorce. He might as well refer to the passages in the Digest referred to by Grotius, in support of the law as laid down by him; and it must be observed that at the time Grotius wrote this, he was not the premature man that he was known in history to have been in his earlier age. He did not write this book, as they were well informed, till after he had been in prison on account of his religious and political opinions, and that was not till after he had been in France as Ambassador to the French Court in the year 1613, and at that time he was upwards of 30, perhaps 35, years of age; therefore, he was no boy when he wrote this work, and he certainly would not have laid it down, that there was a remedy by the Dutch law to the husband if there was not one. He, however, referred to the Pandects first, but it was not necessary to quote that authority. He also referred to the Institutes. Now, if they looked at that authority, b. iv. tit. 4, they would find, by section 1, this laid down:—'An injury may be done, not only by beating and wounding, but also by convitious language, or, by seizing the goods of a man as if he were a debtor, when the person who seized them well knew that nothing was due to him. It is also manifest that an injury may be committed by writing a defamatory libel, poem, or history, or by maliciously causing another so to do: also, by [110] continually soliciting the chastity of a boy, girl, or woman of reputation;' and Justinian added generally, 'and by various other means which are too numerous to be specified;' thus including the whole catalogue of injuries, which he declared to be 'too numerous to be specified,' and amongst which it was the duty of the Court to include that of criminal conversation. Then he said, in section 2:—'A man may receive an injury, not only in his own person, but in that of his children under his power, and also in the person of his wife.' And then in section 10, he said:—'In fine, it must be observed concerning every injury, that the party injured may sue the offending party either criminally or civilly. If the party injured sues civilly, the damage occasioned by the injury must be estimated, and the penalty enjoined accordingly, as we have before noticed: but if he sues criminally, it is the duty of the Judge to inflict an extraordinary punishment upon the offender. But if he sues civilly, the damage occasioned by the injury must be estimated.' Now, in the present instance, the law had reasonably provided a mode and means of estimating damages of this kind, namely, a jury, and a better mode could not possibly exist. The next authority quoted was the Placaat of their High Mightinesses of the 4th of October, 1774; rather, he (the Chief Justice) had referred the learned Counsel to it, to support the



doctrine now advanced, which authority is to the effect that, in everything not specially provided for, recourse should be had to the written laws. Now, considering that this Ordinance was especially enacted for this Colony, and, therefore, superseded all other Ordinances, he did hold, and he believed the Court would agree with him, that it brought into operation, in a [111] manner, perhaps, not contemplated by those who framed it, but still it brought into operation, the *lex scripta*—the written law—where the law of Holland was not express on the subject. If there was no express law, according to the Law of Holland, then the civil law, under this Ordinance, was brought into operation; but, in a book of some authority, by Van Leeuwen, the ‘*Censura Forensis*,’ which was quoted by the learned Counsel for the Plaintiff, they found in a passage to which the learned Counsel referred, lib. v. c. xxv. s. 7, that ‘*Cujus publica poena est cum damni reparatione parti laesae facienda*.’ Now, he (the Chief Justice) really did not know what the words ‘*cum damni reparatione laesae*’ meant, if they did not declare the right of the party injured, the husband, to damages. If they did not mean that, he was at a loss to understand the language. Domat, who treated of the civil law, in the Supplement to the Public Law, b. iii. tit. 10, s. 6, has this passage: ‘The man who has committed adultery with another man’s wife, may be prosecuted out of the ordinary course by the husband of the woman with whom he has had unlawful commerce; but the punishment of the crime commonly ends in some alms to the poor, and damages to the husband that has been injured.’ It was true that he (the Chief Justice) and his brother Judge had looked, and wearied themselves in looking, at the different books, in the hope of finding some more apt and positive authority on the subject; but they had not been able to find any. Still, they had been able to find nowhere any law that said the husband should not have a remedy civilly for such injury. They had found no author who said that Grotius had stated that which was not the law. Even the annotations [112] on Grotius they had looked through, and they could not find any annotation on that particular passage. And what was the inference? Why, that it was not obsolete, or it would have been commented upon as other passages were; that it had not been altered, or the alteration would have been noticed. And, when they found two or three authorities stating this to be the law, and no authority stating that it was not the law, or that these writers had erroneously laid down the law, and when they had this Ordinance of 1774, which declared that if they could find no authority in the Dutch law, they should be governed by the civil law, to what were they to have recourse but to the law which had been quoted by the Counsel for the Plaintiff, and to which they themselves had made special reference? Whether the Legislature, at the time the Ordinance No. 19 of 1846 was passed, and which Ordinance had reference to Ordinance No. 22 of 1844, and, in the self-same words, but for the purpose of making some slight alteration, repealed Ordinance No. 22 of 1844; whether, when these two Ordinances, 22 of 1844, now repealed, and 19 of 1846, which was now found in its place, and also Ordinance 29 of 1846, sec. 22, were passed, the Legislature had any knowledge of this Ordinance of 1774, or any intention to give a remedy which did not before exist, was not the question. They found that there it was; if it was the law of the Colony, and the Court believed it was a mode and means given in the Ordinance of obtaining the remedy, namely, through the medium of trial by jury, and finding such to be the case, and looking at the whole question argued before them, and also that by the law under which they sat, and which they were bound to ad-[113]-minister, they were not only to decide, *secundum allegata et probata*, but also according to conscience, and looking also to the effect that might be produced, the injury that might be inflicted, if they should say that an individual who alleged this crime to have been committed with his wife was to have all redress taken away from him, to have the door against his obtaining redress shut in his face, and, considering on the other hand, that if the matter was brought to trial, and he was mistaken, the Defendant, if innocent, would be excused: the Court thought that, according to all these circumstances, these reasons, and this law, the safest and wisest course, (even were they incorrect in their law, and he believed that they were not,) would be to allow this matter to go to trial and be explained to a jury of twelve independent men who were unconnected with either party, rather than to shut the door against the Plaintiff, thereby stifling all inquiry and rendering him hopeless of redress, if he was entitled to it. The Court knew

nothing of the facts and circumstances of the case; but they considered that, under all the circumstances, the case ought to go on."

Mr. Justice Alexander stated, that in his opinion, "it was a question that must be decided on principle, for there was not to be found in any of the books any authority, except the three that had been cited, that pointed to any civil remedy for the injury; that it was the boast of the English law that there was no civil injury without its appropriate civil remedy, and it would be a great slur on the Dutch law if there was a civil injury of this sort without its civil remedy. And where he found a civil injury spoken of, and a total absence of any civil redress, it was not without some hesitation that he assented to the opinion of [114] the Chief Justice, who had taken great pains in the inquiry. But having compared all the principles of the English law with those of the Dutch law, he was induced, although with great hesitation, to come to the same conclusion as the Chief Justice."

From this judgment the present appeal was brought, and the question raised was, whether, according to the law in force in the Colony of British Guiana, it was, or was not, competent to the Respondent to bring his action for damages against the Appellant.

The Appellant submitted that the judgment of the Court below ought to be reversed, for the following reasons:—

First. Because, according to the principles of the Dutch law, in force in the Colony of British Guiana, it was not competent to the husband to maintain an action for a pecuniary compensation, in the shape of damages, against the person who has committed adultery with his wife.

Second. Because the husband is no less incompetent to maintain such an action according to the principles of the Roman law, which is in force in the Colony of British Guiana, as being incorporated into and also supplementary to the Dutch law.

Third. Because neither in the Dutch or Roman law, nor in the records of the Courts of Civil Justice of the Colony, was there any precedent of such an action; nor is there any authority, expressly or by implication, sanctioning such an action, nor is any form of pleading applicable to such an action to be found in the works on Dutch or Roman law.

Fourth. Because both by the Dutch and Roman law, adultery, which is in effect the charge made against the Appellant in the action, is considered [115] purely in the light of a criminal offence, and as entailing certain punishments, or certain penalties and forfeitures in the nature of punishments, and not as entitling the husband to pecuniary compensation in the shape of damages.

The Respondent, on the other hand, contended, that the judgment was right, and according to the law in force in the Colony of British Guiana.

Dr. R. Phillimore, and Mr. Walford, for the Appellant.—It is admitted that this is the first instance of an action for pecuniary compensation, in the shape of damages, for adultery brought by a husband in the Colony of British Guiana. In that Colony the Roman Dutch law prevails, and it is by that law that this case must be decided. The Court below admitted that the case was *primae impressionis*, and that no precedent for such an action could be found in the judicial records of the Colony: the learned Chief Justice also admitted, that there was not any positive authority to be found in the Dutch or Roman law for an action for damages by the husband for criminal conversation with his wife; yet, notwithstanding such admission, the Court rejected the plea in bar to such action. Now, we contend that there was no right of action in the husband by the Dutch law, or by the Roman law, upon which that law is founded, and to which reference is to be had when the former law is silent. Ordinance, 4th October, 1774. The question, therefore, must be decided upon principle: and we submit:—first, that the Court below was not warranted by the principles of the Dutch law in entertaining such an action: and, [116] secondly, that, according to the Roman law, the judgment was also incorrect, as, by that law, adultery is treated as a criminal offence, and the adulterer criminally punished. In the first place, it will be necessary to examine the authorities referred to in the judgment of the Chief Justice. The principal one is Grotius' "Introduction to Dutch Jurisprudence," b. iii. ch. xxxv. s. 9, as supporting this action: but it is plain that the Court was wrong in giving the meaning it did to



the passage in Grotius, "liable to the husband, besides the compensation for the losses which the husband or children sustain." It does not necessarily mean liable in civil damages, but that the adulterer was liable to a criminal prosecution. Now, adultery was not considered as an "*injuria*" by the Roman law; and it is upon that law that Grotius is treating, for civil damages were not recoverable, except in cases where either an adulterous offspring was the consequence of the adultery, or where the husband, divorcing the wife on the ground of adultery, lost the *dos* which she brought, and which the adulterer was compelled to repay the husband. In another work of Grotius, "*De Jure Belli ac Pacis*," b. ii. ch. xvii. s. 15, he says, "So an adulterer and adulteress are not only bound to free the husband from the expense of keeping the child, but to make the legitimate children reparation for whatsoever damage they shall sustain, by any share or portion that child shall claim in the inheritance," unequivocally excluding any mention of compensation to the husband. Puffendorf, "*De Jure Naturae et Gentium*," lib. iii. c. i. s. 9, is to the same effect. In the absence, then, of a positive rule upon this point, by the Dutch law, the practice is to call in the Roman law to supply the "*casus omissus*," as it is termed by Van der Linden, "Inst. [117] of Law of Holland," b. i. ch. i. s. 4. Ordinance, 4th October, 1774. By the Roman law, an "*injuria*" was in *invitum*—"volenti non fit injuria," and an action for damages for adultery was contrary to the jurisprudence of that law, to the very genius and habits of the Roman people, as proved, *inter alia*, by the mutual facility of divorce expressed in Martial's line, "*Quae nubit toties, non nubit; adultera lege est*" (Lib. vi., Epigr. vii., l. 5). An action for pecuniary compensation for adultery is not enumerated under the title of "*De [injuris] et famosis libellis*," Dig., lib. xlvii. tit. x.; nor is it to be found in any of the acknowledged references, Inst., lib. iv. tit. iv. s. 1, or the Code, lib. ix. tit. ix., "*ad legem Juliam de adulteriis et stupro*." Novell. cxvii. cxxxiv. Justinianus, "*De Causis Matrimonialibus*," lib. ii. art. 13. Heineccius, *Comm. ad Pand.* lib. 46. Gudelius, "*De Jure Novissimo*," lib. v. ch. xviii. Bynkershoek, "*Obs. Juris Rom.*," lib. v. ch. viii. Bynkershoek, "*Quaest. Juris privati*," lib. ii. ch. x. Julius Clarus, lib. v. tit. "*Adulterium*." Bergerii, "*Oeconomia Juris*," lib. iii. tit. xi. th. iii. Brouwer, "*De Jure Connub*," lib. ii. ch. xxvii. ss. 24, 25. Ayliffe's Roman Civil Law, p. 594. Sanchez, "*De sancto Matrimonii*," b. x. dis. 8, are authorities where, if damages could be recovered for an offence of that nature, it would be stated. Now the Dutch, founding their law upon the Roman law, like other Christian countries, modified the Roman law. In some States, a pecuniary fine, mulct, or *amende* was imposed, instead of the criminal punishment, inflicted at the instance of the Attorney-General, as Fiscal Advocate, and distributed in portions to the poor, or the Church, and the husband. We contend, that the learned Chief Judge misunderstood the effect of the passages contained in the authorities [118] relied upon by him, and that they did not support the conclusion arrived at by the Court. If the passage in Grotius' Introduction to "*Dutch Jurisprudence*" be compared with the passage of the same author in his work, "*De Jure Belli ac Pacis*," and with the Commentary of Lessius, lib. ii. c. 10, *dub.* 6, whom Grotius refers to, and whose opinions he adopts, it is clear that an action for damages did not lie, except in cases where an adulterous child was born, or an indirect injury to the property of the husband inflicted. Domat, "*Droit Publ. Suppl.*," lib. iii. tit. x. s. 6, was speaking of the French law of a fine, and it is remarkable that no other case is mentioned except what is cited in that particular passage. He gives no authority from the Roman law, but he states that corporal punishment was inflicted by that law upon the adulterer. No mention is made by Denisart, tit. "*Adultere*." The passage in Van Leeuwen, "*Censura Forensis*," lib. v. c. xxv. s. 7, distinctly referred to a case in which the adulterer's act injured the property of the husband derived through the *communis honorum* with his wife. It was not an "*injuria*" in the sense of the Roman law. In no country whose law is founded upon the Roman law, as Spain, France, Holland and Germany, did an action for damages for adultery lie. Such action is peculiar to the English law, and reprehended by foreign Jurists as a blot upon our legal eschuteon. Indeed, in England such an action can hardly be traced before the Restoration; it was unknown to the earlier text writers, Bracton, Fitzherbert, N. B. Wood in his "*Institutes*," lib. iii., speaks of the criminal punishment of adultery, but not of the civil remedy: *The Duke of Norfolk v. Germaine* (12 State Trials, 928)

is the earliest case. In Scotland, it was always treated as [119] a criminal matter. 1 Hume, "Comm. on Laws of Scotland, respecting Crimes," c. xix. tit. "Adultery;" and an action for damages did not obtain any footing in that country till the middle of the last century.

Dr. Bayford, and Mr. T. P. E. Thompson, for the Respondent.—The argument of the Appellant against the judgment of the Court below is really confined to this single point, that as in the Dutch law-books no mention is made of an action like the present for the recovery of pecuniary damages; or any instance to be found in the records of the Civil Courts in the Colony, therefore no such action lies by the law in force in British Guiana. Such an argument goes too far, for it might fairly be said in answer, that the Appellant cannot produce any instance of an adulterer being criminally punished in the Colony, or that adultery has ever been treated there as a public crime. The practice by the civil law, no doubt, formerly was to consider adultery chiefly as a crime, and punished by *publica justitia*. Inst. lib. iv. tit. 18. But it is equally clear, that, by the Roman law, a party so injured might sue the offending party either criminally or civilly, Inst. lib. iv. tit. 4, "*de injuriis*," s. 1. It is classed among civil obligations, "*de obligationibus quae in delicto nascantur*," Inst. lib. iv. tit. 4, ss. 1, 2, 7, 10; Dig. lib. xlvii. tit. 1, s. 3, tit. 10, ss. 1, 2, 3, and 9; Code, lib. ix. tit. 35, s. 2; and the Dutch jurists have adopted that principle. Van der Linden, b. i. c. xvi. s. 1 (Henry's translation, Edit. 1828); Van Leeuwen, "*Censura Forensis*," b. v. c. xxv. s. 7. Whether adultery was considered by the Roman law an "*injuria*" or not, is immaterial. It was considered so by Grotius, who, [120] in his "Introduction to Dutch Jurisprudence," b. iii. c. xxxv. s. 9 (Herbert's translation, Edit. 1845), broadly lays it down, that "whoever commits adultery with a married woman, even with her consent, inflicts an injury on the husband, and is, therefore, in this respect, liable to the husband, besides the compensation for the losses which the husband or children sustain by the same." Groenewegen, "*De Leg. abr. ad Novellas*," Anth., Collat. viii. tit. 18; Novell, Constit. 117, c. x. s. 7, is to the same effect. Merula, "*Manier van procederen*," lib. iv. tit. 37, c. 2, in treating of injuries, gives a form of proceeding similar to that adopted here, evidently showing that adultery was in his time treated as a civil remedy. Therefore, if you find such a positive authority in the Dutch law like Grotius, you need not go to the Roman law. Lessius, referred to by the Appellant, is no authority at all, for he is speaking of the Roman law as administered in Italy. It must be borne in mind, that the Roman law as a whole has never been received in this Colony, but has always been mixed up or modified with the law of Holland. A similar rule has been adopted in other countries whose laws are founded on the Roman law. Thus, in France, the French writers, before the passing of the Code Napoleon, treat of a penal action being joined with a claim for reparation. Domat's "Supp. to the Public Law," b. iii. tit. 10, s. 6 (translated by W. Strachan). In the *Code Matrimonium*, p. 237 (Edit. 1770), there is a direct authority of the injured husband recovering damages from the adulterer. Again, in Ferrière, "*La Jurisprud. du Code*," tom. ii. liv. ix. tit. ix. p. 450. So by the law of Scotland. There are several instances mentioned [121] by authorities of great weight, of offences punishable as public crimes, and also as civil injuries, and among them "adultery." 1 Stair's "Institutions of the Law of Scotland," tit. "Reparation," pp. 86, 96 (Edit. 1826); 1 Hume, "Comm. on Laws of Scotland, respecting Crimes," c. xix.; but it was not till the end of the last century that the very question now at issue was raised in Scotland, in the case of *Maxwell v. Montgomery* (Fac. Dec., 7th March, 1787; Morr. Dic. of Dec., tit. "Reparation," 13,919), when the Court of Session decided that an action of adultery by the husband against the adulterer was competent, and that decision was subsequently confirmed by the same Court in *Paterson v. Bone* (Fac. Dec., 10th December, 1803; Morr. Dic. of Dec., tit. "Reparation," 13,920), and is now settled law. 1 Fraser's Law of personal and domestic relations, p. 675 (Edit. 1846). If there was any old practice in the Colony to punish adultery criminally, it would naturally appear in the authorities upon criminal matters, but there is no instance to be found in treatises upon criminal practice there. An indictment for adultery will not lie in Ceylon, where the same law prevails as in British Guiana. Neither will it by the law of England, *Rigaut v. Gallifard* (7 Mod. 78; and see Rastal's Entries, "Trespass"). But the legislative enactments in the Colony are the best guides to



solve this question. In the Ordinance, No. 22 of 1844, introducing into the Colony trial by jury, an action to procure reparation by pecuniary damages for criminal conversation is expressly named. Again, in Ordinance, No. 29 of 1844, relating to insolvent debtors, provision is made by section 22 for the appropriation of the damages recovered in an action for [122] criminal conversation. It may be difficult to ascertain when such a right of action first originated in the Colony. In England, in ancient times, adultery was inquirable in towns and leets (3 Inst. 206), and punishable by fine and imprisonment, but at the present day it is considered merely as a civil injury, and the only remedy which the law affords is an action whereby the husband may recover against the adulterer damages for the loss of the society, comfort, and assistance of his wife. Selwyn's N. P., tit. "Adultery," p. 7 (10th Edit.). 3 Blackstone's Comm. 139 (15th Edit., by Christian). Dr. R. Phillimore in reply.

The Lord Justice Knight Bruce.—The question upon this appeal is, whether, by the law prevailing in British Guiana, the wrong committed by adultery, is a wrong on the part of the adulterer done to the husband, for which pecuniary compensation in that shape which the English law terms "damages" may be obtained by action. The Appellant denies the proposition. The Respondent, who, of course, being Respondent, has the judgment of the Court in British Guiana with him, asserts the affirmative, and, as already said, that is the single question to be decided.

Now the charge of adultery, as made the subject of an action, may be viewed possibly in two ways: one, where there is no damage proved, but the mere fact of the dishonour of the wife, bringing with it more or less, according to circumstances, dishonour upon the husband, without more substantial and tangible mischief; another, where, in addition to the wound in-[123]-flicted upon feelings of delicacy, there is also what I have called substantial and tangible mischief, or actual and positive damage. And it is possible to suppose a system of laws in which one case might be the subject of an action for redress, and the other not. Whether this is so in British Guiana, it is not necessary to say.

The question comes before us in that shape which in England is called a demurrer, namely, an allegation upon the part of the Defendant, that, assuming, for the purpose of the argument, all that the Plaintiff says to be true, he has no right to bring his action, "*tibi non competit*," as it is said in the legal language of the Colony. And, if it were necessary to draw any distinction between the more and the less substantial damage, the wound to delicacy of feeling and honour alone, and damage in that respect combined with damage in other respects, their Lordships would hold this case to come within the latter description: for the claim before us, after alleging the marriage, alleges that the Defendant, in January, 1853, and at other times, "wrongfully, injuriously, wickedly, and maliciously debauched" (this is confessed by what we have called the demurrer), "carnally knew, and had an adulterous connection with the said Sarah Johnston Spooner, then and still being the wife of the Plaintiff; and thereby the affection of the said Sarah Johnston Spooner for the Plaintiff was then alienated and destroyed" (this also, as I have said, is confessed by the plea "*tibi non competit*"). And, also, by means of the premises, the Plaintiff has thence hitherto wholly lost and been deprived of the lawful fellowship, society, and assistance of the said Sarah Johnston Spooner, his said wife, in his domestic affairs, which the Plaintiff during all the time ought to have had, and other-[124]-wise might and would have had, and might and would henceforth continue to have." It is their Lordships' impression, therefore, as I have said, that if it were necessary to draw a distinction between the two kinds of cases, this would be one rather of actual and substantial damage than of what may be called inferential damage. It is probably, however, not material to enter into any such distinction.

The Appellant contends that the Colony is governed by the old Roman law, except so far as that is altered by enactments or Ordinances having the force of legislation, or by long custom, having equally in some cases the force of legislation. And it is said that, by the Roman law, what we call an action for damages for adultery was not maintainable; and much learning has been ably brought forward, and many arguments better than ingenious have been addressed to their Lordships on that subject. Their Lordships, however, do not think it necessary, and, therefore,

they decline, to give an opinion upon that abstract point of Roman law. They consider that it is not for any purpose, or in any sense incumbent upon them, to trace up so high the law by which this Colony is governed.

It seems to be admitted—a confessed state of things—that that which was the law of Holland in the time of Grotius (we are not now upon the question whether Grotius understood the law), founded more or less upon the Roman law, with or without certain deviations from that law, which had gradually been introduced, is the law of this Colony, except so far as the law in that Colony has been altered by any means by which it was liable to be altered.

Grotius, as we know, represents upon this subject [125] the law of Holland in his time as being thus, book iii. c. xxxv. s. 9 (Herbert's translation of the "Introduction to Dutch Jurisprudence," by Hugo Grotius, being admitted to be correct on both sides):—"Whoever commits adultery with a married woman, even with her consent, inflicts an injury on the husband, and is, therefore, in this respect, liable to the husband, besides the compensation for the losses which the husband or children sustain by the same." Now, the able arguments of the learned Counsel for the Appellant have not convinced their Lordships that Grotius does not mean here to represent that the adulterer is civilly liable in damages to the husband for committing adultery with the wife. Their Lordships' exposition of the language of Grotius is that of the Respondent; an exposition made by them with the benefit of all the observations of Counsel that they have heard upon it. But how likely Grotius was, in what an eminent degree likely, to be accurate upon this subject, will not be denied by any person. Dr. Phillimore, as one would expect of him, was the first to acknowledge the great reverence due to the learning, the accuracy, and the just fame of that distinguished person; and their Lordships are perfectly satisfied, from that authority, that the law of Holland at the time when Grotius wrote was as Grotius represents it to be. This relieves their Lordships from the necessity of following the learned Counsel on either side, through the able comments and the judicious observations that they made both for the Appellant and against the Appellant, upon the language to be found in the works that we have had the advantage of having brought before us, of various eminent jurists both in Holland and elsewhere. There is nothing, we [126] believe, in any one of those jurists, calculated to shake the confidence which their Lordships entertain in the accuracy of the opinion of Grotius.

Dr. Phillimore brought forward a reference to the same subject in the greater work of Grotius, "*De Jure Belli ac Pacis*," and informed us that Grotius there mentions and seems to found himself upon the opinion of Lessius, a Jesuit writer of Louvain, whose view of the matter (he seems to have been a priest) was, that the mere act of adultery was a thing so shadowy, so immaterial, that it was not to be recognised by the law, and, causing no damage whatever to the husband, gave him no right of complaint. But even that reverend person was of opinion, that if the husband's purse was touched in consequence of the adultery there would be something to complain of. Dr. Phillimore founds himself, however, upon the circumstance, that the instance to which Lessius refers is not an instance existing in the present case, because there has been no spurious issue introduced that the husband has been obliged to maintain among his own. But without meaning to say that their Lordships attribute any weight to the authority of Lessius, considering the things that are to be found in the extraordinary books that he has left to posterity, their Lordships are of opinion, that Lessius gives merely an example of what the reverend father would consider substantial damage, that is, of something beyond delicacy, something beyond honour, something beyond feeling; and that anything which, independently of delicacy of honour and of feeling, would make the husband's position substantially worse, would, in that author's opinion, entitle the husband to recover damages. Their Lordships so understand the learned [127] Jesuit: and, therefore, whether his authority ought to be followed morally or legally, or not, it makes no difference in the view that they take of this case.

It has been said, that throughout every part of the continent of Europe where, more or less, the Civil law, in a state of less or greater deflection from its original condition, has prevailed, the action for damages against an adulterer is unknown. Their Lordships are not satisfied that the case is so. They believe that a full in-



vestigation would show that in one shape or another damages have been successfully sought in various instances upon the continent of Europe in such cases. Not less than two instances have been produced from France, in which damages were distinctly given to the husband; and their Lordships are of opinion that more might be found.

It is, however, said, and perhaps accurately said, because it appears to have been the opinion of the learned Judges of the Colony, that no instance can be found in the Colony of an action of this description. It would be very unsafe, indeed, with such an authority as Grotius before us, to say, that that is a reason for supporting the appeal. Instances frequently occur of cases brought within the influence of principles not specifically called into action, for whatsoever reason, during all previous time of which one has any knowledge. Very recently, in this country, two or three such examples have occurred; but why it should be taken for granted, quite as a matter of course, as the learned Counsel for the Appellant seems to have taken for granted, that adultery must have been committed in this Colony, I know not. We really cannot see why we may not as fairly presume that adultery was rare, and, when occurring, not pursued, as presume, [128] without any proof, that adultery was frequent, and only not pursued because there was no remedy at law for it. Their Lordships are rather inclined towards *benignam interpretationem* on such a subject. They cannot, therefore, depart from what their view of the law otherwise would be on any such ground.

If there were any room for doubt on the subject, however, the doubt would seem set at rest by a legislative Act of the Colony, of 1844 [Ordin. No. 29 of 1844], the Ordinance introducing into British Guiana trial by jury in certain cases. It is there enacted, "that whenever any action shall be brought or instituted in the Supreme Court of Civil Justice of British Guiana, to procure reparation for pecuniary damages for any breach of promise of marriage, or for criminal conversation with any wife, or for the seduction of any daughter or servant," or for other things there mentioned, "and in any such action the Plaintiff and Defendant shall join issue in any matter of fact, or the Defendant should suffer judgment by default, it should be lawful for the Plaintiff or the Defendant in every such action to apply to any one of the Judges of the Supreme Court for an order directing such issues to be tried, or such damages to be assessed by a jury; and on any such order being obtained, the trial of every such issue, and the assessment of all such damages on any judgment by default, should be before the said Court and a jury of twelve men." Without pursuing the details further, it is sufficient to say that the rest of the Ordinance provides what shall be the course on a verdict and judgment so obtained, and what a Defendant shall be liable to. Their Lordships quite agree that the main object of this Ordinance was to introduce and regulate the trial by jury; but when an Act of the Legislature of the [129] Colony declares that an action for a particular wrong shall be tried in a particular way, and, if the fact be found, the finding shall be attended with particular consequences, it appears to their Lordships that it would be not less than monstrous to say, that a cause of action thus recognised and thus provided for shall be treated as no cause of action at all. This goes far beyond a recital in an Act of legislation, which may, according to circumstances, be of more or less weight, and be often not conclusive. This is an express and a distinct enactment, that if an action be brought for such a cause as that now under consideration, and the parties shall join issue upon a question of fact in that action, or the Defendant shall suffer judgment by default, such and such shall be the consequences, ending in a judgment against the Defendant, which is to be prosecuted in a given way.

Their Lordships, on the whole, speaking by me, with great deference for the opinions of the learned Judges of the Colony, do not feel the difficulty, do not feel the hesitation, which their Honours felt upon the subject. They entirely approve of the caution upon which they acted, and of the research which they used; because, undoubtedly, as they were only to administer the law—an office which only, indeed, in a sense we have—it was fit that, when the action was charged with novelty, they should not hastily proceed to do that which was contended before them to be an act of legislation. In their Lordships' opinion, the act of the Judges now under appeal was in no sense one of legislation; it was an act of accurate and judicious adminis-

tration. Their Lordships entirely approve of the course which the learned Judges took; and they are of opinion that this appeal ought never [130] to have been presented, and that it should be dismissed with costs (a).

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 3. *British Guiana*.]

[131] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY

ANN CUTTO,—*Appellant*; ELIZABETH GILBERT,—*Respondent* \*

[July 6 and 7, 1854].

A Testator executed a Will in 1825, which was found uncanceled at his death, which event took place in 1853. In 1852, he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words, "This is the last Will and Testament." This latter instrument was not forthcoming at his death, but there was no evidence of its destruction. The Prerogative Court held that the instrument executed in 1852 was not to be considered as a Codicil, but as a substantive Will, which operated as a revocation of the prior Will of 1825, and that, under the Statute of Wills, 1 Vict., c. 26, sec. 22, the deceased must be considered to have died intestate, as the former Will was not revived by the destruction of the latter.

(a) The Editor has been favoured by the Registrar of the Judicial Committee with the following memorandum of the opinion of the Minister of Justice of His Majesty the King of the Netherlands, relative to the question, whether, according to the old Dutch law, an action of damages can be brought in that country by a husband in a case of adultery, or whether the plea to such action is "*haec tibi non competit actio*?"

"Hugo Grotius says, in his introduction to the Jurisprudence of Holland, book iii., c. xxxv., s. 9:—

"Whoever commits adultery with a married woman, even with her consent, inflicts injury on the husband, and is, therefore, in this respect, liable to the husband, besides the compensation for the losses which the husband or children sustain by the same."

"Grotius refers to L. 1, ss. 8, 9; Digest '*Ad L. Jul. de adult.*' L. 30, *Cod. eod. junct.* L. 1, ss. 3, 8, 9; Digest '*de Injur.*' s. 2; Inst. *Justin. eod. tit.*

"Van Leeuwen's Roman Dutch Law, Book iv., c. xxxvii., ss. 7 and 8.

"Huber's Modern Jurisprudence, book vi. caput 8, ss. 20 and 21.

"These three writers acknowledge, the one more and the other less expressly, a right of action, *actio ad id quod interest*, to the husband in a case of adultery committed with and by his wife.

"Van Leeuwen, *loco. l.* appears rather to have in view an action of one of the married parties against the other guilty of adultery; for he adds, that the compensation 'consists chiefly in this, that the adulterer forfeits, to the benefit of the injured party, all his rights, which by law, or by marriage settlement or otherwise, he would derive from the property of the wife.'

"The other writers before mentioned allow more especially an action by the husband against the party who commits adultery with the wife.

"The other writers who maintain the contrary.

"It would, therefore, appear that, according to the old Dutch law in this country, the rule is—*competit haec actio, competit marito*!

(Signed)

"The Minister of Justice,

"D. Donker Curtius."

\* Present: The Right Hon. Mr. Baron Parke, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, Knt., and the Right Hon. Sir John Patteson.



- Upon appeal: Held by the Judicial Committee (reversing such sentence, and decreeing probate to the Will of 1825),
- First. That the *onus probandi* lies upon the party setting up the subsequent instrument as a revocation of the former Will [9 Moo. P.C. 140].
- Second. That to establish a revocation of a former Will relating to personalty, by a subsequent testamentary paper not forthcoming, by parol evidence of execution only: in the absence of any draft or instructions for such instrument, such evidence must be strong and conclusive as to its contents [9 Moo. P.C. 140].
- Third. That the mere fact of such an instrument commencing with the words, "This is my last Will and Testament," does not render it a revocatory instrument; as those words do not necessarily import that such instrument contained a different disposition of the property; and that to make it operate as a revocation of a former Will, it must be proved that the contents of the later instrument were different from the former [9 Moo. P.C. 142].
- Fourth. That a subsequent Will (the contents of which were unknown) having remained in the custody of the deceased and not forthcoming, the presumption of law was, that it was destroyed by him *animo revocandi*, and did not revoke a prior Will uncanceled.
- Observations on the report of the case of *Moore v. Moore* (1 Phill. 375 and 406) [9 Moo. P.C. 145].
- Subsequent to the Order in Council made upon the appeal reversing the sentence of the Prerogative Court, a Will dated March, 1851, was discovered, and application was made to the Judicial Committee for probate. Such application refused, as the original suit being concluded, the jurisdiction of the Judicial Committee was exhausted; but the Committee intimated that if a petition was presented to Her Majesty to refer the matter specially to them, they would entertain the application [9 Moo. P.C. 149].
- Upon such petition being presented and referred, the Committee revoked the probate of the Will of 1825, and granted probate of the Will of 1851.

Abraham Cutto, the Testator, died on the 16th of July, 1853, leaving the Appellant, his widow, sur-[132]-viving, who was the sole executrix and universal legatee named in a Will executed by the deceased on the 11th of August, 1825, and the Respondent, his sister, and only next of kin, and, with the Appellant, the only person entitled in distribution to his personal estate and effects in case of his intestacy, him surviving.

In the year 1852, as pleaded in the allegation of the Respondent, the deceased duly executed, in the presence of two witnesses, another Will. That Will was not forthcoming at his death, and there was no copy or draft of it, and the contents of it were unknown.

In the Prerogative Court the proceedings were promoted by the Appellant against the Respondent, in a cause of granting probate of the Will dated the 11th of August, 1825. This Will was admitted by the Respondent to be duly executed, but she insisted that by the execution of the subsequent Will of 1852, such prior will was revoked, and that by reason thereof the deceased had died intestate.

The allegation asserted by the Respondent consisted of eleven articles, which, after admitting the Will of the 11th of August, 1825, to be a duly executed Will, and the parties who were entitled to his personalty, if he died intestate, pleaded: First, that the [133] Testator, at the time of his death, was possessed of personal estate of the value of upwards of £5000, but not of any real estate. Second, that the deceased was an attorney, and was for thirty-six years a clerk in the Post Office, which clerkship he resigned in the year 1851, and also retired from his professional practice, with the exception of that relating to certain trusts in which he was concerned, and which he continued to transact in the office, and with the assistance, of John White, a solicitor practising in Bargeyard Chambers, London. Third, the execution of the Will of 1825, and that the deceased was at that time possessed of property to a small amount only. Fourth, that about four years before his death, the Appellant inquired of the deceased whether it would be necessary to re-execute or to confirm his Will, and that the

deceased replied that it did not require any confirmation. Fifth, that the Appellant, out of the money allowed her by the deceased for housekeeping, saved a sum of £5000, and invested it for her own benefit in the public Funds; that shortly before the year 1852, the deceased became aware of such investment, and although he expressed himself displeased thereat, did not deprive her thereof. Sixth, that the deceased entertained great affection for his sister, the Respondent; that he visited and corresponded with her; that he also was acquainted with one Maples, the trustee of the deceased father's Will, to whom, in the year 1852, he intimated an intention of benefiting his said sister and her daughters by his Will. Seventh, that shortly after the month of August, in the year 1852, the deceased, with an intention to revoke his Will of the 11th of August, 1825, and to make a provision for the Respondent and her daughters, made a Will in his own handwriting, and afterwards produced it at the office of [134] Mr. White, to two of his clerks, and declared the same to be his Will, and duly executed the same in their presence; that the paper so executed was a substantive Will, and not supplemental or codicillary, and that from and after its execution the Will of 1825 was revoked; and it further pleaded the deceased's capacity in the usual terms. Eighth, that immediately on leaving White's office, the deceased met him, and told him that he had just executed his Will in the presence of two of his clerks. Ninth, that the deceased died on the 16th of July, 1853. And, tenth, that the Will last executed, and which could not be found, was all in the deceased's handwriting; that is commenced with the words, "This is the last Will and Testament," and was also described in the attestation clause as "The last Will and Testament."

This allegation was admitted by the Court, chiefly upon the authority of *Plenty v. West* (1 Robert. 264), the Court being of opinion, that the execution of a subsequent Will relating to personalty, amounted to a revocation of the former Will, whether the contents of the latter were known or not, provided there was, in substance and effect, revocatory words.

The Appellant, by her answers, admitted the first and second articles of the allegation to be true: as to the third, she denied that on the 11th of August, 1825, the property of the deceased was of very small amount, but otherwise admitted the article to be true: to the fourth, she said that the fact pleaded in that article to have happened about four years before the death of the deceased, happened (as she believed) about two years before his death: to the fifth she denied that she saved a sum of money, amounting to £5000, out of the money allowed to her by the deceased for [135] housekeeping, and explained the circumstances under which such sum was invested in her name in the Funds: as to the sixth, she denied that the deceased entertained or expressed great regard for his sister, the Respondent, and her family, but admitted that he occasionally corresponded with her, and visited her at Spalding: and she finally denied that the deceased and his sister were on intimate terms with one Maples, but admitted that they were acquainted with each other, and stated that she had no knowledge of the matters pleaded in the sixth article: to the seventh, she admitted that the deceased returned from a visit to his sister at Spalding, in or about the month of August, 1852; but denied that he shortly thereafter, with an intention to make his Will, and thereby to revoke his Will of the 11th of August, 1825, and to make a provision for his sister and her daughters, did, with his own hand, write a Will, and produce the same at the office of Mr. White: the answer then admitted that the deceased, in the autumn of the year 1852, went to the office of Mr. White, and requested two of his clerks to witness the execution of a paper, which he brought with him, and that he signed such paper in their presence, and that they then signed their names in the presence of the deceased and of each other: but the Respondent said she knew not whether the paper so executed was supplemental or codicillary: but that she disbelieved, and, therefore, denied, that the same was a substantive Will, and that after the execution thereof the former Will was revoked: to the eighth article, she denied that the deceased, on leaving the office of White, met him, and told him that he had just executed his Will in the presence of his (White's) clerks, but admitted that she had heard and believed that the deceased, on such [136] occasion, stated to White that he had got two of his clerks to witness some few lines which he had drawn up, or to that effect: she admitted the truth of the ninth article: and to the tenth article, stated that she had no knowledge whether the paper executed by the de-



ceased was in his own handwriting, and denied that such paper commenced with the words, "This is the last Will and Testament of," or that it was described in the attestation clause (if there were any thereto) as "The last Will and Testament" of the deceased.

Witnesses were examined on this allegation. Watkins and Floyd, the attesting witnesses, deposed to the Testator's going to Mr. White's office about twelve or eighteen months before his death, and asking them to witness what the Testator called "his Will," which was in his handwriting, but that he did not read it to them, nor were they aware of the contents of such instrument. Watkins had an impression that it was the Will of the deceased, but he could not positively depose that it was. Floyd, however, deposed to his impression being, that such instrument commenced with the words "This is the last Will and Testament of," etc. Maples, another witness, deposed that his conversations with the deceased were such as to impress him with the belief that he was going to make some provision by a Will in favour of the Respondent's daughters, and White deposed that the Testator when he met him told him "that he had made a Will."

No exceptive allegation was filed by Mrs. Cutto, and the Judge of the Prerogative Court (Sir John Dodson), on the 8th of March, 1854, by a final interlocutory decree, pronounced that Abraham Cutto had died intestate. The material part of his judgment was as follows:—"There is pretty clear proof that [137] this was a last Will. It is true that the mere circumstance of calling an instrument a Will is not quite conclusive; we have had some instances in which persons have described an instrument in writing as a 'last Will,' and have merely given one legacy additional to a former instrument, but, *prima facie*, an instrument so described must be taken as a Will. This gentleman had prepared an instrument, he called on two persons to witness it, and then made this declaration to Mr. White, 'that he had made a Will.' Since I consider that this was a regular *bona fide* Will, it must operate as a revocation of the former Will. I am, on the whole, of opinion, that the deceased must be considered to have died intestate; that the Will of 1825 was revoked by a later instrument, executed twelve or eighteen months before the death of the deceased, and that the former cannot be revived from any presumption. I, therefore, pronounce that the deceased died intestate. The costs to be paid out of the estate."

Against this sentence the present appeal was brought.

The Queen's Advocate (Sir John Harding), and Mr. Rolt, Q.C., for the Appellant, contended, that the evidence was not sufficient to prove that the instrument executed by the Testator in 1852, really was a Will; that, admitting the fact, that such paper commenced with the words, "This is the last Will and Testament," that would not make it a revocation of a prior Will; that the point in controversy was quite new in the Ecclesiastical Courts, there being no authority to be found for holding that such words operated as a revocation, and that it was not such by the Statute, 1 Vict., c. 26, s. 22. That the principle [138] recognised by Courts of law was, that, in order to revoke a prior Will, there must be either a distinct clause of revocation, or the latter Will must be inconsistent with and substantially different from the former; and that the *onus probandi* to establish that it was a revocation, lies upon the party relying upon such subsequent Will. They referred to and commented upon the following cases:—*Hutchins v. Basset* (3 Mod. 203; S.C. Comb. 90; 2 Salk. 592; 1 Show. 527; 1 Show. Cas. Parl. 146), *Seymour v. Nosworthy* (Hard. 376), *Goodtitle and Rolph v. Harwood* (3 Wils. 497; S.C. Cowp. 87; 7 Bro. P.C. 489 (2nd Edit.); and see Powell on Devises, p. 541 (3rd Edit.)), *Goodright v. Glazier* (4 Burr. 2512), *Duppa v. Mayo* (1 Wms. Saund. n. 278, h.), *Thomas v. Evans* (2 East. 488), *Lord Walpole v. The Earl of Cholmondeley* (7 Term Rep. 138), *Plenty v. West* (6 Com. Ben. Rep. 201), *Helyar v. Helyar* (1 Cas. temp. Lee, 472; and see note to 1 Phill. 427), *Moore v. Moore* (1 Phill. 375 and 406), *Wilson v. Wilson* (3 Phill. 543, 554), *Henfrey v. Henfrey* (2 Curt. 168; S.C. on appeal, 4 Moore's P.C. Cases, 29), *Plenty v. West* (1 Robert. 264), *Stoddart v. Grant* (1 Macq. Sc. Ap. Cas. 163), and 1 Williams, "On Executors," pp. 116, 117, 133 (3rd Edit.).

Mr. R. Palmer, Q.C., and Dr. Haggard, for the Respondent, argued, that as the property was personality, over which the Ecclesiastical Court had jurisdiction, the question was to be governed by the civil law. That the Ecclesiastical Courts had always adopted the principle of the civil law, "*Posteriore quoque testamento* [139] *quod jure perfectum est, superius rumpitur*," Inst. lib. ii. tit. xvii. s. 2, "*de*

*posteriore testamento.*" Dig. 37, tit. 11, c. 11; Code, lib. vi. tit. xxv. s. 21; Swinburne, pt. vii., s. xiv., pl. 4. That this doctrine had been recognised by Lord Mansfield in *Harwood v. Goodright* (Cowp. 92). That the evidence established that the paper of 1852 contained the words, "This is the last Will and Testament," which was sufficient to revoke the Will of 1825, as it was not necessary, by the practice of the Ecclesiastical Courts, to prove the contents of the subsequent Will; and after referring to *Hall v. Dench* (1 Vern. 330) upon the doctrine of revocation, they submitted, that the authorities cited by the Appellant, which they examined and distinguished, related to real estate, and were not applicable to Wills of personalty.

The Queen's Advocate [Sir John Harding], in reply, cited Voet, "*Comm. ad Pand.*," lib. xxviii. tit. iii. ss. 2, 3, 4, 5, 6, 7, as to the rule of the civil law, where there are two Wills of the same, or nearly the same, effect; but was stopped.

The Right Hon. Dr. Lushington (July 7, 1854).—The Testator in this cause is Abraham Cutto, who died July the 16th, 1853. Upon his death a Will was found, bearing date the 11th of August, 1825; of that Will his widow, Ann Cutto, prayed probate; the probate was opposed by Elizabeth Gilbert, the only sister of the deceased, who alleged that the Will of 1825 was revoked by a subsequent Will; the learned Judge, in the Court below, was of opinion, that such revocation had taken place, and pronounced accord-[140]-ingly. The Will bearing date the 11th of August, 1825, had from the period of its execution remained in the custody of Ann Cutto, the widow. About two years before the death of the deceased, he had stated, in answer to an inquiry from Ann Cutto, whether any confirmation or re-execution of the Will was necessary, that it was perfectly valid, and did not require any confirmation.

Upon the death of the deceased, no other Will was found. Both parties are silent as to the search which may have been made; but as to the fact that no Will was found, they are agreed.

In this state of things, as mere length of time does not operate as a revocation, probate of the Will of 1825 would, if there were no other facts, have passed in common form.

Mrs. Gilbert, however, the only next of kin of the deceased, has pleaded a revocation by the execution of a subsequent Will, not forthcoming.

We agree in the position laid down at the Bar, that the *onus probandi* lies upon her: she must prove the execution of the subsequent Will, and establish her position of law that it is a revocation, with reference to all the facts connected with such subsequent Will.

The fact first to be proved, is the execution of some subsequent testamentary paper; and we here think it right to observe, that we are of opinion, that where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will not<sup>a</sup> appearing, and where there is no draft or instructions in writing, when such fact is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory; for we concur in the opinion which has been expressed by very learned persons, that to revoke an existing Will by parol evidence alone that another Will has been executed, is, though the law may admit of it, a course of proceeding not unattended with danger, and consequently, that such oral evidence ought to be stringent and conclusive.

Mrs. Gilbert has pleaded, that in the month of August, 1852, the Testator executed his last Will and Testament in writing; that he thereby revoked his Will of the 11th of August, 1825, and that he intended to make a provision for her and her daughters; and she has further alleged, that after the execution of such Will the Testator declared that he had executed his Will. The evidence to establish these facts is to be found in the testimony of three witnesses, Watkins, Floyd, and White. Mr. White was a solicitor, and a friend of the deceased. The two other witnesses were his clerks. The deceased himself had been a solicitor.

With respect to Watkins, the result of his evidence is, that the deceased executed some paper in his presence, and that he apprehended that it was his Will: more than that the witness cannot say. Floyd has a better recollection of the facts; and he deposes to the Testator having said, "I wish you to witness my Will." Watkins can say nothing as to the contents of the Will; but Floyd says he thinks, but cannot be positive, that the paper commenced, "This is the last Will and Testament of,"



or some similar words, denoting the paper to be the last Will and Testament of Mr. Cutto. He says, "We knew the paper to be Mr. Cutto's Will, and my impression is, and I have no doubt that I saw and read so much of it as showed it to be so; though, on that point, I am not able to speak with positive recollection."

Mr. White's evidence is to the following effect:—[142] The Testator told him that "he had just looked in to ask me to see him execute his Will; but, as I was not within, he had got two of my clerks to do so. My impression is, that he said, 'it is very short—just a few lines, like your poor father's.' I rather think his expression was, 'Just a few lines upon a sheet of foolscap paper.' I cannot be positive he used the word 'Will,' though I think it very probable he may have done so."

Now, what is the result of this evidence, taken in the most favourable light for the Respondent? It is this, that the deceased executed a paper, the only contents of which proved, or what can be argued to be proved, is, that it commenced with the words, "This is the last Will and Testament."

It would be impossible to contend that the mere execution of a testamentary paper, subsequent to the Will of 1825, would be a revocation, for it might be a codicil only, it might be confirmatory; and as the *onus probandi* is upon the Respondent to show that it was revocatory, such revocation could never be established by proving the execution of a testamentary paper only; and in effect the question comes to this, whether the evidence of Floyd, stating that the paper commenced with these words, "This is the last Will and Testament," and the remark to White that he had executed his Will, works a revocation in law, such Will being not forthcoming, and the other contents of the Will being totally unknown.

In order to disencumber this case of some of the authorities which have been cited, we will observe that it is simply a case of revocation or non-revocation at the time of the execution of this paper of 1852. Some of the cases are mixed up with arguments as to revival, but under the Statute of Wills, [143] 1 Vict., c. xxvi., sec. 22, there can be no revival of a Will revoked by the execution of another Will, except by re-execution, or by a codicil duly executed.

The Will of 1852 remained in the custody of the deceased, and the presumption of law, as it was not forthcoming, is, that he destroyed it *animo revocandi*, but the so doing cannot, since the Statute of Wills, operate as a revival of the former Will.

The simple question, therefore, is, whether by the execution of a paper commencing, "This is the last Will and Testament," a revocation of a former Will has been effected, the paper so commencing, "This is the last Will," etc., being destroyed by the Testator himself.

It is difficult to discuss this question upon reasoning as to what would be the best and the most advisable rule to govern such cases, because it is manifest that the state of circumstances create wide differences; for instance, to lay down a rule that the destruction *animo revocandi* by a Testator of a subsequent Will, will necessarily leave in force a Will made thirty years before, under totally different circumstances, and, perhaps, wholly forgotten, might have the effect of giving force and efficacy to an instrument which would be wholly contrary to the intention of the Testator. On the other hand, to say that a Will destroyed by the Testator, *animo cancellandi*, should always revoke a prior instrument, might in very many cases leave a Testator intestate, whose only object in the cancellation of his Will was, that his former Will might take effect.

Leaving therefore, the discussion of such difficulties as these, which would be incidental to any general rule, let us consider what is the legal authority upon this question.

[144] And first, with respect to common law authority as to devises. Upon that, we apprehend, there can be no dispute, that in order to revoke a devise of real estate by a subsequent Will not forthcoming, it must be proved that the contents were different. But assuming, for the purpose of the argument, that a distinction may be drawn as to devises of real estate, and bequests of personal property, we will not ground our judgment upon such cases; but this, however, we must observe, that with respect to the construction to be placed upon the words, "This is my last Will and Testament," it is difficult to suppose that such words could receive one interpretation at Common Law, and a different construction in the Ecclesiastical Courts.

We will proceed then to consider what are the authorities bearing upon this question, with respect to Wills of personal property. First, there are authorities from the Civil law, and there, no doubt, it is laid down that a prior Will is revoked by the execution of a subsequent one. Whether that proposition was universally true, even by the Civil law, in the case of two Wills having the same contents, it may not be necessary to inquire, for the true question is, how far this doctrine of the Civil law has been incorporated into the Testamentary law, as administered in the Courts exercising jurisdiction over Wills of personal estate. Now, the first case that we have reported at length upon this subject, is the case of *Helyar v. Helyar* (1 Lee, 511), and there Sir George Lee expresses his opinion in the following terms:—"I was of opinion that the executing of a second Will of a different import was by law a revocation of the first, though the second does not now appear." These words deserve great consideration, for, upon that occasion, all the authorities from the Civil law, as to [145] the revocation of a Will by the execution of a subsequent one, were cited, and yet Sir George Lee qualified the proposition by the insertion of the words "of a different purport." Many prior cases of such a revocation were cited, *Whitehead v. Jennings*, for instance, referred to in 1 Phillimore, 412. There it was proved, that the second Will appointed a different executor. Such was also the case of *Burt v. Burt*, also referred to in 1 Phillimore, 412, and there is not a single case brought forward in which a Will was held revoked by the execution of a subsequent one, the contents of which were wholly unknown.

Why, in the cases of *Whitehead v. Jennings*, and *Burt v. Burt*, the former Wills were held to be clearly revoked by the appointment of a different executor, might, perhaps, be explained by reference to the Civil law, and the effect by that law of appointing an executor; and the fact that these circumstances wrought the revocation is *prima facie* proof that such or similar circumstances were indispensable to a revocation; and that without them the mere execution of a subsequent Will would not revoke. We need not further advert to the case of *Helyar v. Helyar* [1 Lee 511], because it was decided upon the ground that the contents of the subsequent Will were wholly different, and the evidence to that effect was supported by the probabilities of the case.

The case of *Moore v. Moore* (1 Phill. 375) is so very complicated in its circumstances, that no safe conclusion can be drawn from that case as to the question of law now in debate; and it is not quite correct, as stated in the marginal note, that the two Wills were nearly of similar import. In the one case the property was given to the two sons; and by the [146] second Will, to one son only. But there is a case appended in a note to *Moore v. Moore* [1 Phill. 375], namely, the case of *Passey v. Hemming* (1 Phill. 439), in which we have the high authority of Sir William Wynne, to the following effect:—"Now, I think, that in all the cases in which it has been held that the former Will was revoked by the cancellation of the latter, it appears that the intention of the deceased was varied; consequently, it was proof that he departed from the intention of the first paper."

We will next advert to the case of *Henfrey v. Henfrey* [2 Curt. 468; on appeal 4 Moo. P.C. 29]. This was simply a case of construction, whether the two papers should be taken together, or whether the latter was a revocation of the former. We see no reason to doubt the correctness of that judgment, nor can we see how that case applies to the present. There the second paper disposed of the whole property of the Testator, and was necessarily a revocation of the former. One more case decided in the Ecclesiastical Courts remains to be noticed, upon which the learned Judge in the Court below seems mainly to have founded his judgment, the case of *Plenty v. West* (1 Robert. 264). Upon this case we will first observe, that the two Wills were essentially different; that no executors were appointed by the first; that executors were appointed by the second; and that the only ground of argument for uniting the papers was, that the whole of the personal estate was not disposed of by the second Will. It is true, that Sir Herbert Jenner Fust, in his judgment, relies upon the fact, that the Testator called the Will of 1838 his last Will, but that is only one circumstance in conjunction with others, on which he founded his decision.

Now, let us consider how these authorities bear [147] upon the present case. There is not one authority which lays down the proposition that the execution of



a subsequent will destroyed *animo revocandi* by the Testator, the contents of which are not known, revokes a prior Will. On the contrary, in all the cases where revocation has been held to be effected, there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the Court below, in the case now under consideration; but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words, "This is my last Will and Testament." We are of opinion, that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument. We think that the interpretation put upon these words by Lord Truro, in his judgment in the case of *Stoddart v. Grant* (1 Macq. Sc. Ap. Cas., 171), is the true meaning to be attributed to them. With regard to any auxiliary circumstances in this case, we think that the evidence wholly fails to render any assistance to the case of the Respondent.

Considering, therefore, that the Respondent, upon whom the *onus probandi* lies, has failed to prove what the law requires, the execution of a subsequent Will expressly revoking the former, or of different contents, we must reverse the judgment of the Court below, and pronounce for the Will propounded by Mrs. Cutto. Each party to pay their own costs in this Court.

Their Lordships reported to Her Majesty in favour [148] of the appeal, that the sentence of the Judge of the Prerogative Court of Canterbury ought to be reversed, save in so far as regarded the expenses incurred in that Court on both sides, which was to be paid out of the estate of the deceased; that the principal cause ought to be retained, and that probate of the Will, dated the 11th of August, 1825, ought to be granted to the Appellant, the sole executrix named therein. This report was confirmed by Her Majesty, on the 11th of August, 1854, and on the 23rd of that month, probate of the Will was granted to the Appellant, under the seal of the Judicial Committee of the Privy Council, and the costs decreed to be paid out of the estate of the deceased were paid, and the suit concluded.

On the 7th of October, 1854, the Appellant, on moving some clothes in a drawer of a chest of drawers in her bed-room, found a Will duly executed by the deceased, bearing date the 25th of March, 1851. By this Will the Appellant was also appointed sole executrix and universal legatee. The drawer in which this Will was found, was one in which the Appellant kept clothes only, and to which she was not aware that the deceased ever had access. The Will was not lying flat in the drawer, but was placed on edge against the side of it, and it was by accident only that it was discovered.

This Will was brought into the registry of this Court, annexed to an affidavit of the Appellant, and on the 27th of November, 1854,\* the Queen's Advocate (Sir John Harding) moved the Judicial Com-[149]-mittee to revoke the probate of the Will of the 11th of August, 1825, heretofore granted to the Appellant, and to direct that the Will of the deceased, dated the 25th of March, 1851, brought into the registry for the purpose of that motion, might be delivered out to the Appellant, in order that she might take probate in common form in the Prerogative Court of Canterbury.

The Right Hon. Dr. Lushington.—It appears to us that the suit having been concluded, we have no jurisdiction in the matter, and that you must almost of necessity petition Her Majesty to refer the case specially to us.

A Petition was accordingly presented to Her Majesty to that effect, who referred the same and the matters therein contained to the Judicial Committee, and it was now moved (Jan. 10. 1855 †) that the Committee would recommend to Her Majesty to revoke the Probate of the Will of Abraham Cutto, dated the 11th of August, 1825, heretofore granted to the Appellant, and to direct that the Will of

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.

† Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson.

the deceased, dated the 25th of March, 1851, brought into the registry of the Court, for the purpose of the present motion, might be delivered out to the Appellant, in order that she might take probate thereof in common form, in the Prerogative Court of Canterbury.

There being no opposition, the motion was granted accordingly.

[Mews' Dig. tit. WILL; V. REVOCATION; a. *Principles as to*, b. *Methods of*, 2. *By Other Wills, etc.* a. VII. PROBATE AND LETTERS OF ADMINISTRATION, a. *Jurisdiction of Court*. See *Lemage v. Goodban*, 1865, 1 P. and D. 61; *Berthon v. Berthon*, 1868, 18 L.T. 302; *Homerton v. Hewett*, 1872, 25 L.T. 855; *Silver v. Silver*, 1872, 27 L.T. 766; *In the Goods of De la Saussaye*, 1873, 3 P. and D. 44; *In the Goods of Howden*, 1874, 43 L. J. P. and M. 29; *Dempsey v. Lawson*, 1877, 2 P.D. 106; *Hellier v. Hellier*, 1884, 9 P.D. 239; see also *In re Nawab of Surat*, 1854, 9 Moo. P.C. 88.]

[150] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF  
ENGLAND.

THEODOR HEINRICH GUSTAF SCHACHT,—*Appellant*; HENRY CHARLES OTTER and FRANCIS HART DYKE,—*Respondents* \* [Feb. 19 and 23, 1855].

THE "OSTSEE."

Restitution of a ship seized as a prize may be attended, according to the circumstances of the case, with any one of the following consequences [9 Moo. 156, 157]:

First. The claimants may be ordered to pay to the captors their costs and expenses.

Second. The restitution may be simple restitution, without costs, or expenses, or damages, to either party, or

Third. The captors may be ordered to pay costs and damages to the claimant. General principles applicable to condemnation of captors in costs and damages [9 Moo. P.C. 157].

Costs and damages, when decreed against the captors, are not inflicted as a punishment on the captors, but as affording compensation to the injured party [9 Moo. P.C. 163].

In order to exempt captors from costs and damages in case of restitution, there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize [9 Moo. P.C. 162].

What amounts to such a probable cause as to justify a capture incapable of definition, and is to be regulated by the peculiar circumstances of each case [9 Moo. P.C. 162].

It is not necessary to prove vexatious conduct on the part of the captors to subject them to condemnation in costs and damages [9 Moo. P.C. 163].

Neither will honest mistake, though occasioned by an act of Government, relieve the captors from liability to compensate a neutral for damage which the captors by their conduct have caused the neutral to sustain [9 Moo. P.C. 163, 164, 168].

A neutral ship was captured in the Gulf of Finland by one of Her Majesty's ships of war, for breach of the blockade of Cronstadt, when no such blockade existed, and sent to England for adjudication as a prize: Held (reversing the sentence of the Admiralty Court), that the owners of such ship and cargo were entitled to restitution, with costs and damages, as the seizure was made without probable or reasonable cause.

\* Present: The Lord President of the Council (Earl Granville), the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.



The question raised by this appeal was, whether the owners of the *Ostsee* and cargo on board, [151] were entitled, upon the sentence of the High Court of Admiralty decreeing restitution of the ship and cargo captured as a prize, for a breach of the blockade of Cronstadt, by Her Majesty's ship *Alban*, to costs and damages from the captors. The seizure and detention being admitted to be without sufficient grounds for condemnation, the captor consented to the restitution of the ship and cargo. The sentence of the Admiralty Court was founded upon that consent.

The facts of the case were these:—

The *Ostsee*, under Mecklenburg colours, took on board at Cronstadt, in the month of May, 1854, a cargo of wheat, and sailed therefrom on the 28th of the same month, bound to Elsinore for orders, and, in the prosecution of such voyage, was captured on the 1st of June, in the Gulf of Finland, about twenty-four miles from Dagerort, by Her Majesty's ship *Alban*, Henry Charles Otter, Commander, as for a breach of the blockade of Cronstadt, and sent to England for adjudication as a prize.

Proceedings were instituted in July, 1854, against the ship and cargo, in the High Court of Admiralty, when a claim was put in by the Appellant on behalf of the owners of the ship and cargo. It appeared, however, that the blockade was not imposed upon Cronstadt until after the capture; and, consequently, the Queen's Proctor, on the 2nd of August, offered to consent to the restitution of the ship and cargo, on payment of the captor's expenses. No answer was given to this [152] offer, until the 10th of August, when the claimant rejected it.

The cause came on for hearing in the Admiralty Court on the 19th of August, when the claimant prayed the restitution of the ship and cargo, and that the captors might be condemned in costs and damages. The captors consented to restitution of the ship and cargo, but submitted that it ought to be without costs and damages. The Judge of the Admiralty Court (the Right Hon. Dr. Lushington) admitted the claim for the ship and cargo, and decreed the same to be restored to the claimant for the use of the owners, but without costs and damages. In giving judgment, the learned Judge observed, that "During the seventeen years that Lord Stowell presided in this Court, and administered the law of nations with regard to war, I believe that out of the many thousand ships and cargoes brought before him, he condemned the captors in costs and damages in only about ten or a dozen cases,—not one in a thousand, and Lord Stowell also, as I right well remember, laid it down, that he would not condemn the captors in costs and damages, upon evidence given before him, without giving them the opportunity of justifying their conduct, and stating, if they thought fit, the grounds on which they made the capture. In my own recollection there are only three cases of restitution with costs and damages. I am well aware that where a seizure has been made without ostensible cause or reason, justice requires that the persons making the seizure should make good to the party the loss that may have been occasioned by the capture; at the same time, I am of opinion, that this is the extremity of the law of nations, which ought not to be adopted except in cases which imperatively re-[153]-quire the Court so to do. Without venturing any opinion as to what may be the duty of the Court in cases that may come before it, looking at the confusion that has arisen respecting this blockade, and the difficulty Commanders of Her Majesty's vessels have in forming their own opinion, and seeing that consent has been given for the restitution of this ship and her cargo, I think I should be going too far in condemning the captors in costs and damages, and I decline so to do."

From so much of this sentence as refused costs and damages to the claimant, the present appeal was brought, and the Appellant prayed that that portion of the sentence appealed from might be reversed, the principal cause retained, and that the damages and costs sustained by the owners of the *Ostsee*, and her cargo, by reason of her capture and detention, be pronounced for, and that the Respondent, Otter, the captor of the ship and cargo, might be condemned in the damages and costs, and also in the costs incurred by the Appellant, as well in the Appellate Court as in the Court below, by reason, that the seizure and detention of the *Ostsee*, for the presumed breach of a blockade, which was not imposed until nearly a month

after, were unjustifiable; and that the same were not occasioned by, and was not imputable to, any misconduct of any description on the part of the *Ostsee*.

The appeal was argued by Dr. Addams and Dr. Twiss for the Appellant, and The Queen's Advocate (Sir John Harding) and Dr. Bayford for the Respondents.

[154] For the Appellant it was contended, that the general principle recognised in Prize Courts, was to grant compensation to claimants upon restoration of the ship and cargo when wrong had been done; whether the original seizure was justifiable or not, if the captors were guilty of malfeasance or non-feasance, and they submitted, that as the seizure in this case was without probable cause, as it was not in dispute that the *Ostsee* was captured for a breach of a blockade, which had no existence until nearly a month after the seizure, the Appellant was entitled, *ex debito justitiæ*, not only to simple restitution, but to restitution with costs and damages. The following authorities were referred to by them, as instances where costs and damages had been allowed on restitution. Story "On Prize Courts," pp. 35, 39, 112 (Pratt's Edition), *The William* (6 Rob. 316), *The Washington* (6 Rob. 275), *The Acteon* (2 Dod. 48), *The Hendrick and Jacob* (cited in *The Betsey*, 1 Rob. 97), *The Triton* (4 Rob. 78), *The Nemesis* (Edwards, 50), *The Wilhelmsberg* (5 Rob. 144), *The Cornei Maritino* (1 Rob. 287), *The Driver* (5 Rob. 145), *The Anna* (5 Rob. 373), *The Neustra Senora de Los Dolores* (Edwards, 60), *The Saint Juan Baptista* (5 Rob. 33, 41), *The Elise* (1 Spinks, Adm. Pr. Cas. 88), *Lindo v. Rodney* (note to *Le Caux v. Eden*, 1 Doug. 612), *Le Caux v. Eden* (1 Doug. 594), and they further submitted, that even if the captors had acted *bona fide* and been guilty of no misconduct, and the neutral had been wronged, he was still to be compensated by [155] the captors; the payment of which was a question resting between the Government and the captors, *The San Juan Nepomuceno* (1 Hagg. 265), *The Zacheman* (5 Rob. 152): and that the fact of the Captain Otter, having acted under orders of his superior in command did not exonerate him from responsibility, *The Mentor* (1 Rob. 183), *The Eleanor* (2 Wheat. Amr. Rep. 346).

The Respondent's counsel distinguished the cases cited by the Appellant, where costs and damages had been allowed, from the *Ostsee*, submitting that they were either cases of capture by privateers, or of improper conduct on the part of King's ships, and they referred to *The Betsey* (1 Rob. 93), *The Luna* (Edwards, 191), *The Felicity* (2 Dod. 381), *The Christine Margaretha* (6 Rob. 62), *The John* (2 Dod. 336), *The Le Louis* (2 Dod. 264), *The San Juan Nepomuceno* (1 Hagg. 265), *The Lively* (1 Gallis, Amr. Rep. 315), *The Marianna Flora* (11 Wheat. Amr. Rep. 1), *The Two Susannah's* (2 Rob. 132), as authorities that restitution had been decreed without costs and damages. They further contended, that the seizure of the *Ostsee* by the *Alban* was upon probable grounds, as there was an absence of necessary ship papers; that by international law it was the absolute duty of neutrals in time of war not to sail the seas without a complete set of ship papers, Bynkershoek, "*Quæst. Juris Publici*," lib. i. c. xiv., Story "On Prize Courts," pp. 4, 36 (Pratt's Edition), 1 Kent's Comm. p. 161, Chitty's Law of Nations, p. 196 (Edit. 1812), Abbott, on Shipping, 288 (9th Edit., by Shee), [156] Hubner. "*De la Saisie des Bâtiments neutres*," c. 3, sec. 2, that the sea register was wanting, and they submitted that it was not too late to urge such objection, as it was the privilege of the captor to rely upon any point at the hearing, as he might capture on one ground, and obtain a condemnation on another. Story "On Prize Courts," p. 49, *The Adeline* (9 Cranch, 244), *The Fortuna* (1 Dod. 83).

Dr. Twiss, in reply.

The consideration of the appeal was reserved. Judgment was now delivered by

The Right Hon. T. Pemberton Leigh (March 29, 1855).—On the 1st of June, 1854, the ship *Ostsee* sailing under the Mecklenburg flag, on her voyage from Cronstadt to Elsinore, was seized by Her Majesty's ship *Alban*, under the command of Captain Otter, and sent to London for adjudication as prize.

Upon the ship's papers and the examination of the master, the mate, and another of the crew, on the usual interrogatories, there appeared to be no ground for condemnation: and with the consent of the captors, on the 19th of August, 1854, an interlocutory decree was pronounced, by which the ship and cargo were restored to the claimants, but without costs and damages.



From so much of the decree as refuses costs and damages to the claimants, the present appeal is brought.

It is agreed on all hands, that the restitution of a ship and cargo may be attended, according to the circumstances of the case, with any one of the following consequences:—

[157] First. The claimants may be ordered to pay to the captors their costs and expenses; or,

Second. The restitution may be, as in this case, simple restitution, without costs or expenses, or damages to either party; or,

Third. The captors may be ordered to pay costs and damages to the claimants.

These provisions seem well adapted to meet the various circumstances, not ultimately affording ground of condemnation, under which captures may take place.

A ship may, by her own misconduct, have occasioned her capture, and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned.

Or, she may be involved, with little or no fault on her part, in such suspicion as to make it the right, or even the duty, of a belligerent to seize her. There may be no fault either in the captor or the captured or both may be in fault; and in such cases there may be *damnum absque injuria*, and no ground for anything but simple restitution.

Or there may be a third case, where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at his peril, and take the chance of something appearing on investigation to justify the capture; but, if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned.

The Appellants insist that the circumstances of this case bring it within the last of these rules.

The general principles applicable to this point are stated with great clearness in a document of the very [158] highest authority, the Report made to King Geo. II., in 1753, by the then Judge of the Admiralty Court (Sir J. Lee) and the law officers of the Crown, one of whom was Mr. Murray (afterwards Lord Mansfield), and they are laid down in these terms (Pratt's Story, p. 4):—"The law of nations allows, according to the different degrees of misbehaviour, or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages."

This passage (with others) is cited by Lord Stowell (then Sir William Scott), and Sir John Nicholl, in their letter to the American minister, in 1794, as containing an accurate statement of the law of maritime capture.

These rules have been recognised and acted upon by all the chief maritime powers.

In France a very early *Ordonnance* provides that when a seizure is made "*sans cause raisonnable, nostre dit Amiral sera deurement restituer le dommage*" (Pratt's Story, 35).

The same rule is laid down by M. Pourtalis, in two cases which came before the French *Conseil des Prises*, in 1799. In one, *The Pigou*, where a neutral ship (an American) had been captured by two French frigates, the rule was stated and applied, it may be thought with some severity to the particular case.

An English translation of a rather imperfect report of the judgment is to be found in the notes in the case of *The Charming Betsy* (2 Cranch, 98), but the [159] judgment is set out at length in a French work, published during the present year, with which Mr. Rothery (the Registrar) has been good enough to furnish us, entitled, "*Traité des Prises Maritimes*," vol. ii. p. 54.

After stating that in general a man is bound, as well by natural as by civil law, to make good the damage which he has occasioned, and that error on his part cannot relieve him from this reparation, the Judge (a) proceeds in these terms:—

(a) It appears that this was not strictly a judgment of the *Conseil des Prises*, as

*“En matière de prises, l'imprudence des capturés, leur négligence dans l'observation de certaines formes, des procédés équivoques peuvent souvent compromettre leur sûreté et faire suspecter leur bonne foi. Il peut arriver alors qu'en examinant l'ensemble des faits on reconnaisse qu'une prise est invalide. Mais on peut reconnaître aussi que les capturés, par leur conduite, ont donné lieu à la méprise des capteurs. Dans ce cas, il serait injuste de rendre ceux-ci responsables d'une erreur que l'on ne peut raisonnablement regarder comme leur ouvrage.*

*“Mais quand l'injustice des capteurs ne peut être excusée, les capturés ont incontestablement droit à une adjudication de dommages-intérêts.”*

In that case there would appear to have been some colour for the capture, for the Tribunal of the First Instance had decreed restitution; that order had been reversed by a superior Court at Morbihan, which decreed condemnation of the ship and cargo, and this [160] sentence was again reversed by the *Conseil des Prises*, which decreed restitution with costs and damages.

The same doctrine is laid down by the same eminent authority, about the same period, in the case of *The Statira* (2 Cranch, 99).

The cases in the American Courts fully bear out the statement of the law by Mr. Justice Story, in the Treatise already referred to (p. 35), which is in these terms:—“Every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof, be good prize, they are completely justified, and although the whole property may, upon a hearing, be restored, yet, if there was *probable* cause of capture, they are not responsible in damages.”

It may be observed, that there is a misprint in this passage in Pratt's edition of Story, p. 35, where the words “possible cause” are substituted for “probable cause.” On referring to the Appendix to 2 Wheat. Rep. 8, from which this part of the treatise is copied, the mistake appears, and, indeed, it is obvious from the context.

Mr. Justice Story then proceeds to enumerate a great variety of circumstances which have been held to constitute probable cause, but all of a character to throw suspicion on the ship or cargo, and all attributable, in a greater or less degree, to some act or omission on the part of the owners. At p. 39, he lays it down generally:—“If the capture is made without probable cause, the captors are liable for damages, costs, and expenses to the claimants.”

[161] In the case of *The Maria Shroeder*, in 1800, reported 3 Rob. 152, Lord Stowell says, “It is not necessary that the captor should have assigned any cause at the time of the capture; he takes at his own peril, and on his own responsibility, to answer in costs and damages for any wrongful exercise of the rights of capture.”

In the case of *The Triton*, in 1801 (4 Rob. 79), the same learned Judge expresses himself thus:—“It being the case of a voyage from Saint Thomas to Altona, both neutral ports, without any doubt on the destination, and without any sufficient ground of seizure, I think the claimants are entitled to costs and damages.”

In the case of *The William* (6 Rob. 316), the same learned Judge states:—“When a capture is not justifiable, the captor is answerable for every damage.” And the same law is laid down in the case of *The Actæon* (2 Dods. 51), which we shall presently have occasion to state more fully.

In the case of *The Elizabeth*, before the Lords of Appeal, in 1809 (1 Acton, 10). Sir William Grant, an authority upon such subjects second only, if second, to Lord Stowell, is reported to say (p. 13),—“We order the vessel to be restored, and, as we are of opinion there appears scarcely any ground for justifying the detention of the vessel, condemn the captors in costs.”

There appears in that case to have been, in the opinion of the Court, some, though but little, ground for the seizure, and the decree is for restitution without

Monsieur Pourtalès, although afterwards President of the *Cour de Cassation*, was at that time only *Commissaire du Gouvernement*, or public prosecutor, and the passage is taken from the “conclusions,” or arguments, delivered in by him to the Court. They are, however, important as being the deliberate opinion of so eminent a lawyer.



damages; but the captor, who had obtained a decree in the Court below, is condemned in the costs [162] of the appeal. We have referred to the original Order in the Minute Book, the case being loosely stated in the report.

The result of these authorities is, that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo affording reasonable ground for belief that one or both, or some part of the cargo, might prove, upon further inquiry, to be lawful prize.

What shall amount to probable cause, so as to justify a capture, cannot be defined by any exact terms. The question was discussed before Mr. Justice Story, in the case of *The George* (1 Mason, 24), when it was contended that, in order to exempt captors from costs and damages, the case against the ship at the time of seizure must be such as *prima facie* to warrant condemnation, or at all events, that a restoration by a Court of Prize, without further proof, is conclusive evidence of a defect of probable cause. Mr. Justice Story expresses his dissent from these propositions, in which we agree with him; and he then expresses himself in these terms (p. 26):—"If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct, of the parties, it is proper to submit the cause for adjudication before the proper Prize Tribunal; and the captors will be justified, although the Court should acquit without the formality of ordering further proof." In this case there was abundant ground of suspicion, and the demand of damages was rejected.

[163] Neither in the texts, nor in the decided cases to which we have thus referred, do we find it stated that, in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause, after she has been searched), or that honest mistake, though occasioned by the act of the Government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral (and with this case alone we are dealing) the damage which, by their conduct, he has sustained.

Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest.

If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight, but the principle on which they are awarded, is that of affording compensation to a party who has been injured. Vexatious conduct on the part of the captors has, in some cases, been alluded to as removing all reluctance on the part of the Judge to award costs and damages, as in *The Nemesis* (Edwards' Rep. 50); or as forming a ground for what are termed vindictive damages; or for subjecting the captors to costs and damages; or depriving them of their expenses, when, but for such conduct, they might have been entitled to their expenses against the claimants, as in the cases of *The Speculation* (2 Rob. 293), *The Washington* (6 Rob. 275), and several others; but no case was cited to us at the Bar, nor have we been able to find any, in which wilful misconduct on the part of the captors has been stated to be a necessary ingredient in an ordinary condemnation in costs and damages.

[164] So as to error occasioned by the proceedings of their own Government. The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize Courts afford the remedy as between the individuals, which otherwise must be sought by the Government of the claimants against the Government of the captors; but the mode of proceeding cannot affect the right to redress, and, if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so.

The law of nations upon these points appears to us to be settled by decisions both in the American and European Court. In the case of *The Charming Betsy*, in 1804 (2 Cranch. 64), the captain of an American ship of war had seized in America a vessel which was held upon the evidence to have become Danish property. The Court was of opinion that the orders issued by the American Government were such as might well have misled the captor; but it was decided (the judgment being de-

livered by a most eminent lawyer, Chief Justice Marshall) that the claimants were entitled to costs and damages against the captors (though not vindictive damages which had been awarded in the Court below), and that the officer, if he had acted in obedience to orders, or had been misled by his Government, must be indemnified by the State. Precisely the same doctrine, though without reference to this decision, was laid down some years afterwards by Lord Stowell, in the case of *The Actæon*" (2 Dod. 51).

There an American ship, sailing under a British licence, had been captured by one of His Majesty's [165] frigates, under the command of Captain Capel, who, being unable to spare men to take charge of her, had destroyed the vessel and cargo. It was a case, therefore, in which all possible suspicion of selfish or improper motives for the capture was out of the question, yet Lord Stowell decreed restitution, with costs and damages, and laid down the principles of his decision in these terms:— "This question arises on the act of destruction of a valuable ship and cargo by one of His Majesty's cruisers. On the part of the claimants restitution has been demanded, and there can be no doubt they are entitled to receive it; indeed, I understand that it is not now opposed by the captor himself, but it remains to be settled what is to be the measure of restitution,—how far is it to be carried. The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule upon the subject, but like all other general rules, it must be subject to modification. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution.

"This is the general rule of law applicable to cases of this description, and the modification to which it is subject. Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been [166] guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not, by any conduct of his own, contributed to the loss."

His Lordship then, after observing that the act of Captain Capel in destroying the vessel might have been a very meritorious act as regarded his own Government, and that he was not chargeable with any corrupt or malicious motives, but acted, in all probability, in obedience to orders, concludes his judgment in these words:—"But this will not affect the right of the American claimant, whom I must pronounce to be entitled to restitution, with costs and damages, and I beg it may be understood that I do so without meaning in the slightest degree to throw any imputation on the conduct and character of Captain Capel, but merely for the purpose of giving a due measure of restitution to the claimant."

This judgment was pronounced by Sir William Scott, in the month of May, 1815, almost at the very close of the war, and it is in perfect conformity with the rules laid down at its commencement, in the paper already referred to, in the year 1794 [9 Moo. P.C. 158].

The same decision, on the same grounds, was pronounced by the same learned Judge immediately afterwards, in the case of *The Rufus* (2 Dod. 55).

It is needless to refer to all the other cases which were cited at the bar, but there is one large class which so strongly illustrates the principle, that it may be proper to advert to it. We allude to what are called the Cape Nicola Mole cases.

In the early part of the last war a number of French [167] and Dutch vessels and cargoes were captured by British ships, and sent in for adjudication to the Court of Admiralty of St. Domingo. Several of the ships and cargoes were condemned, and the proceeds of the captures distributed in the years 1797 and 1798.

It was afterwards discovered that although the Court of St. Domingo was properly constituted as a civil Court of Admiralty, and His Majesty's instructions had been addressed to it as a Prize Court, yet, by mistake, no warrant had been issued to give it a prize jurisdiction against France or Holland, although there had been a prize warrant against Spain.

Some time afterwards some of the owners of the captured property, having discovered this error, the effect of which was that the Court had no jurisdiction,



instituted proceedings in the High Court of Admiralty, calling upon the captors to proceed to adjudication. These proceedings were instituted nearly two years after the sentence, when the property had been distributed, the crews dispersed, the papers probably lost or destroyed, and when it was scarcely possible that the truth of the cases could be made to appear on the part of the captors. In one of these cases, *The Huddah* (3 Rob. 235), Lord Stowell, in 1801, overruled the protest of the captors against the proceedings; and in 1804, in determining a question upon the Registrar's Report (*The Driver*, 5 Rob. 145), he speaks of it as "one of that unfortunate class of cases in which this Court has felt itself under the necessity of decreeing restitution, with costs and damages."

In all these cases where restitution was ordered, we believe that, on reference to the Registrar's books, it [168] will be found that the captors were condemned in the costs of the proceedings in the Court at Cape Nicola Mole.

Surely, if the absence of misconduct on the part of the captors; if honest error, occasioned by the blunders of the Government, or the consideration of hardship upon individual officers acting in discharge of their duties, could in any case afford a protection against the claims of a neutral, such protection would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public.

To apply, then, these rules to the facts of this case.

It appears that the ship was captured on the ground of some supposed breach of blockade. The mate, on his examination, says,—“I did not hear of any port or place being blockaded until the 1st of June, 1854, when we were taken. When they came on board they told us there was a blockade, and asked us if we did not know it.”

The master says,—“I did not know of any blockade whatever; I did not hear of any blockade. It is true I heard from Sir Charles Napier, after the capture, that I had broken the blockade, but I did not knowingly enter or leave any blockaded port, place, river, or coast. I did not hear of it except from Sir C. Napier, on the morning following the day of capture. He sent a boat for me, and I was taken on board the Admiral's ship, and he told me of it.”

This is all that appears upon the evidence with respect to the grounds of seizure, but the papers on board the ship distinctly showed the port from which [169] she had sailed, and that to which she was addressed; and it may not be immaterial to observe, that, although some of these documents were in languages of which English seamen might well be supposed ignorant, yet the material facts are stated in an English certificate, signed by the British Vice-Consul at Rostock. From these papers it appeared that she had sailed from Cronstadt, and was bound for Elsinore for orders. We take it for granted, therefore, that it was for a supposed breach of blockade in sailing from Cronstadt that she was seized, and this is the only ground upon which the case was rested on the argument before us. Now, in order to justify a condemnation for breach of blockade, three things must be proved: 1st, the existence of an actual blockade; 2ndly, the knowledge of the party; 3rdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade, *The Betsy* (1 Rob. 93).

The instructions to Her Majesty's commanders upon this subject for the present war are, that if any vessel shall be found coming out of any blockaded port, which she shall have previously entered in breach of such blockade, or if she shall have any goods on board laden after knowledge of the blockade, such ship and goods shall be seized, and sent in for adjudication (Article X.).

Now, when this ship was seized, was there any reasonable ground for suspicion that she was liable to seizure under these instructions?

It appeared distinctly upon her papers, as the facts upon inquiry turn out to be, that on the 25th of March, 1854, before the declaration of war against [170] Russia, this ship was on her voyage from Leith to Cronstadt; that she was on that day chartered for a voyage with a cargo of wheat, from Cronstadt to England, or countries in alliance or amity with England, according to orders which she might receive at Elsinore; that on the 10th of May, the shipment of her cargo had been completed; and that by the 16th she had complied with all the formalities required to enable her to leave Cronstadt: and that when she was taken she was on her direct course from that port to Elsinore.

Cronstadt was not blockaded at the time when she entered that port, nor at the time when she took her cargo on board, nor at the time when she left Cronstadt, nor even at the time when she was captured, nor for more than three weeks afterwards, and no blockade of Cronstadt had been proclaimed, either by the British Government or by the Admiral.

It is said that the Admiral had, on the 16th of April, in Kioge Bay, proclaimed an intention of blockading all Russian ports, and that certain ports in the Gulf of Finland were actually blockaded on the 28th of May, and perhaps, at an earlier period, but there was not the slightest ground for suspecting that this ship had left any other port than Cronstadt, or had any intention of entering any other Russian port.

What colour of reason, then, could there be for seizing, under such circumstances, this vessel, which did not fall under any one of the conditions which are required by the instructions to concur in order to justify sending in the ship for adjudication?

It is said that there was a confusion with respect to the blockades in the Baltic, and the several gulfs of [171] Finland, Riga, and Bothnia. But, in the first place, with respect to the port of Cronstadt, we find no trace in the evidence of any confusion or doubt as to the period when the blockade commenced, and if there had been, it was a confusion created only by the acts and in the minds of Her Majesty's officers, and could not, therefore, according to the principles which we have collected from the authorities, have afforded any answer to a neutral perfectly innocent of all fault, and not by any act or neglect of his, voluntary or involuntary, exposed to any suspicion.

But it is said, that although there might be no ground for suspecting this ship of breach of blockade, yet a captor is not confined to the case upon which the seizure was made, and that a vessel sent in for adjudication upon one ground may, if the facts warrant it, be subjected to condemnation on another.

Of this rule there is no doubt. Whether, when a ship is sent in for adjudication as a neutral, and there appears to be no reasonable cause for having sent her in as such, a captor can excuse himself from costs and damages by alleging irregularities in her papers, which might have led, but did not in fact lead, him to doubt her neutrality, is a question which it will be time enough to consider when it arises. This question, as regards non-commissioned captors, is discussed, and in our opinion most properly decided, by the learned Judge of the Admiralty, in the case of the sloop, *Elize otherwise Wilhelmine* (1 Spinks, 88).

In this case it is not open to doubt upon the evidence, that *The Ostsee* was in truth a neutral ship, and nothing suspicious is found on board her. But it is said that she ought to have had on board a sea [172] pass from the Mecklenburgh Government, describing and identifying her, and that no such pass is amongst the documents produced. It is very true that no such document is found there, but, unfortunately, in this as well as in other respects, there has been some irregularity on the part of the captors. By the Act 17 and 18 Vict., c. 18, it is enacted, and by Her Majesty's instructions, in conformity with the Act, it is ordered (Art. II.), that the captor shall bring into Court all books, papers, passes, sea-briefs, and other documents and writings whatsoever, as shall be delivered up or found on board any captured vessels, and the captor, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up or otherwise on board at the time of the capture, shall make oath that the said papers and writings are brought in as they were received and taken, without any fraud, addition, subduction, alteration, or embezzlement whatsoever, or otherwise shall account for the same upon oath to the satisfaction of the Court.

It is obvious, that unless the papers are verified in the manner pointed out by these instructions, that is, by the oath of some person who saw them taken, there can be no security that the papers brought in are all the papers on board the ship.

Now, in this case, neither the captor, nor any person present at the capture, nor any person who can have any personal knowledge whatever on the subject, has made the affidavit. It appears that a gentleman named Huxham, one of the officers on board of the *Duke of Wellington*, the flag-ship, was sent home in charge of this vessel, and he brings in cer-[173]-tain papers, which he swears were all that were delivered to him by Captain Otter, with certain exceptions, which he specifies and accounts for.



On the other hand, the Master, Voss, in his answer to the seventh interrogatory, states that the ship had a sea pass on board from the Mecklenburgh Government, and in his answer to the 28th interrogatory, he says it was on board when he took the command of the ship, and previously thereto. Now, when it is remembered that from the nature of the case, Mr. Huxham's affidavit offers no contradiction to this statement, and that the supposed absence of this paper appears to have excited no remark at the time of the capture, and to have occasioned no doubt as to the ship's neutrality, it is impossible to attribute any weight to this circumstance.

We will now advert to the principal cases cited for the Respondents, by which it was argued that the rules which we have above stated were modified, or exceptions engrafted upon them, which are sufficient to protect the captors: but in doing so we must premise, that unless the rule itself be qualified, its stringency is not affected by the circumstance that it may not always have been applied by the Judge who lays it down, to cases in which those who are bound by its authority may consider that it was applicable. The application, of course, must depend upon the opinion of the Judge in each particular case.

The first case relied on was *The Betsy* (1 Rob. 93).

There an American ship was found in the harbour of Guadaloupe, at the time when the island was captured by the British forces; there were circum-[174]-stances which, in the opinion of Lord Stowell, threw great doubt upon the point, whether she was neutral or enemies' property, and made a seizure justifiable, for the purpose of further inquiry. The learned Judge, it is true, remarks, that the question whether there was or not a blockade in existence when the ship entered the port, was one of nicety, which had only been recently decided by the Lords of Appeal, and required more legal discrimination than could be required from military persons, but he does not appear to have rested his judgment upon that ground.

The next case relied on was *The Luna* (Edwards Rep. 190), which is, no doubt, a strong decision; for, in the case of a capture made from a neutral, under a mistaken construction by the captors of a British Order in Council, the learned Judge not only relieved the captors from costs and damages, but gave them their expenses out of the captured property.

It must be admitted that the mistake of the captors was not an unnatural one: they thought that an Order in Council of April 26, 1809, which declared a strict blockade "of all ports and places under the Government of France, together with the colonies, plantations, and settlements in the possession of that Government" extended to St Sebastian in Spain, which was then, and had been for two years, in the possession of the French.

The facts of the case are not stated in the report so fully as to enable us to form an accurate judgment of the degree of suspicion which might really attach to the ship. The question of expenses does not seem to have been argued, and Lord Stowell probably felt [175] that he was going to the very verge of the law, for he declares that he will not allow the same indulgence in future cases.

This judgment was pronounced in the year 1810, during the conflict between the French, Berlin, and Milan Decrees on the one hand, and the retaliatory British Orders in Council on the other. Whatever may be thought of the particular decision, the general rule with its modifications is laid down five years afterwards, in the case of *The Actæon* [2 Dod. 48, 51], by the same learned Judge, in the terms which we have stated.

If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the Respondents here, where no questions of law of any kind appear to have existed.

The other authorities mainly relied on by the Respondents do not relate to disputes between belligerents and neutrals. They are either cases in which the rights of belligerents only were involved, as where captures had been made by one belligerent from another, in ignorance that peace had been restored, or where no belligerent rights at all were involved, as in the capture of ships engaged in the slave trade.

The rules laid down in these cases may have an indirect, but only an indirect, application to questions between belligerents and neutrals.

The case of *The John* (2 Dod. 336) was one of the former class.

[176] There, a capture of an American vessel had been made by a British cruiser, in ignorance that war between Great Britain and America had ceased, and the prize having been lost by unavoidable accident, the captor was called upon for restitution.

The case was one which, as the learned Judge intimates, might be provided for by the Treaty of Peace between the two nations, and on which, as between them, there might or might not be a claim against the British Government according to its terms, and according as the British Government had or had not taken due means for giving notice of the peace to its officer, and he lays it down that the officer being under invincible ignorance, and being in possession *bona fide*, was not responsible for the loss which had occurred.

In another case of the same kind, *The Mentor* (1 Rob. 179), Lord Stowell seems to have thought that when an act of mischief was done by the King's officers, though through ignorance, it would not necessarily follow that they would be protected from civil responsibility, but that the party injured might resort to a Court of Prize, and that the officer must look to his own government for reimbursement. Whether all the doctrines laid down in these two cases are quite consistent with each other, may, perhaps, admit of some doubt; but they belong, as we have already observed, to a different class of cases from that which we have to decide, and if all the doctrines found in *The John* [2 Dod. 336] were applied to a case between neutrals and belligerents, they would afford no protection to the captors here, where there was no invincible ignorance, where everything depended on [177] the Admiral's own acts, whether he had or had not established a blockade of Cronstadt.

It was then urged that the captors having acted *bona fide* ought to be indemnified by Her Majesty's Government, and that there are cases in which the Court of Admiralty has either made an order against the Government, or has refused to make an order against the captor unless the Government would undertake to indemnify him.

The cases relied on for this purpose are *The Zacheman* (5 Rob. 152), and *The San Juan Nepomuceno* (1 Hagg. 265).

In the former, the Crown having by treaty the right of pre-emption of certain goods seized as contraband, had improperly delayed to exercise such right. In the latter, the slaves, the value of which was sought to be recovered, had been liberated by the Crown.

In both these cases the Crown either had taken, or had the right to take, the property, the value of which was demanded from the captors. In neither was any order made against the Government, nor is it easy to see how any could have been made.

But it is sufficient to say, that in the case before us no blame of any kind appears to be imputable to the Government. They had contributed by no act or default of theirs to the capture. They had not, at the time when it took place, proclaimed any blockade of Cronstadt, nor done anything to mislead the naval officers in that respect.

Whether, in any case, where Her Majesty's naval officers may have acted wrongfully as regards neutrals, but are liable to no imputation of wilful misconduct, it may, or may not, be expedient, with a view to the [178] efficiency of the navy and the interest of the public service, to indemnify such officers at the public expense against the legal consequences of their acts, must be left to the consideration of those who are entrusted with the executive authority of the Crown. Sitting here judicially, we can only administer the law as we find it between the claimants and the captors.

It is then said, that in this case the sending in the ship must be treated as the act of the Admiral, and not of Captain Otter. When a subordinate officer does an act under the immediate order of his superior, it may well be that the superior officer should be responsible for it. The principles applicable to this subject are discussed and explained in *The Mentor* [1 Rob. C. 179], already referred to, and *The Eleanor*, before the American Courts, in 1817, reported 2 Wheat. 357. But here we are dealing with the actual captor, who demands adjudication of the ship and cargo, and who, for all purposes of this suit, must be treated as the party responsible



to the claimant. With any rights or liabilities as between Captain Otter and Sir Charles Napier, we have here nothing to do.

It is then said, that if the captors had been admitted to prove the circumstances of the capture, the case might have worn a different aspect. But the principle of the Prize Court is, that the case is, in the first instance, to be tried on evidence coming from the captured; and if upon such evidence no doubt arises, the property is to be restored instantly—to use the expression of Lord Mansfield, in *Linda v. Rodney* (2 Doug. 614), “*velis levatis*.” The liberty to enter into proof on the part of the captors is rarely granted, [179] and is attended with great inconvenience, as is well explained by Lord Stowell in the case of *The Haabet* (6 Rob. 54). No doubt the circumstance that the case is decided exclusively upon evidence proceeding from the claimants is deserving of great attention, when it is sought to condemn captors in costs and damages, and makes it fit that the Court should look with great jealousy at the evidence, with a view to see whether there might not be reasonable ground of seizure, before it pronounces such a decree. But we can see, in the case before us, nothing to excite any suspicion, or to induce us to think that if an application for liberty to give evidence on the part of the captors had been made in proper time, it ought to have been complied with, or, if complied with, would have altered the complexion of the case. However that may be, we do not mean, in any degree, to affect the rules of law upon this point as they now exist. In the present case, the captor was aware, before the cause came on, of the question which alone was to be discussed: if he thought his case could be bettered by further proof, and that he was entitled to give it, he should have applied for such liberty before the case was heard, and he cannot reasonably make such an application after the hearing.

It is then said, that there is a distinction to be made in these cases between officers of Her Majesty's navy and privateers; that the Court has a large discretion in such subjects, and ought not to press with severity upon men who are acting in the discharge of a difficult and important duty.

That, for many purposes, there is a clear distinction to be made between public and private ships of war, [180] and that there are the strongest reasons for making such distinction, can admit of no doubt; but, as regards the particular rule in question, that a capture without probable or reasonable cause exposes the captors to condemnation in costs and damages, we find it laid down, in the text books and the decided cases, both foreign and domestic, as applicable to captors generally, to public and private ships indifferently.

In the case of *The Lively* (1 Gallis, 327), Mr. Justice Story states distinctly, “Public and private ships must be governed by the same principle.”

Again, as to the discretion to be exercised by the Court. When the application of a rule depends on the absence or existence of misconduct in both or either of the litigants, the greater or less degree of that misconduct, the existence or absence of suspicion attaching to a particular ship or cargo, the greater or less degree of it, and the causes to which it is, in whole or in part, to be attributed, it is obvious that there must necessarily be a very large discretion left to the Judge, for scarcely any two cases can in all such respects be precisely the same. But when once, in the opinion of the Judge with whom the decision rests, a particular case is brought clearly within a particular rule, it should seem that his discretion is at an end. It is not a question merely of costs of suit, but of reparation for a wrong, which, when an accidental loss has afterwards occurred, may extend to the whole value of the ship and cargo.

Nor, if we were at liberty to relax settled rules upon our own notions of justice and policy, are we quite prepared to say that we should do so in this instance! The law which we are to lay down cannot [181] be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all of her principles of prize law from the decisions of English Courts; and whatever may have been the case in former times, no authorities are now cited in English Courts, in cases to which they are applicable, with greater respect than of those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy will be

held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nation.

By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say, that where no ground of suspicion can be shown, and all that the captor can allege is, that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured, "True, nothing suspicious appeared in your case at the time of seizure, but, upon further inquiry, something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience. Go about your business, and be thankful for your escape?"

We cannot think that this would be deemed a satis-[182]-factory answer to a British neutral seized by a foreign belligerent.

Upon the whole, therefore, after the most anxious consideration, having sought in vain for any circumstances which could afford in this case a probable cause for capture, we cannot hold the captors exempted from all responsibility, though the damage will, in all probability, prove to be but small. The amount must be referred to the Registrar in the usual way; but we shall advert to some circumstances which ought to be attended to in making the computation.

No complaint is made of any vexatious conduct on the part of the captors, or of any undue delay in sending home the vessel. London appears to have been one of the ports to which the charter party provided that she might be sent. For any delay which may be attributable to the claimants themselves, the captors, of course, cannot be held responsible.

The exact time of the ship's arrival in London does not appear. It was stated at the bar to have been on the 26th of June.

On the 3rd of July, a monition was taken out, and the ship's papers were brought in; on the 6th, the monition was posted up at the Royal Exchange; and on the 7th of July, the examination of the witnesses, *in praeparatorio*, was completed.

It seems probable that as the ship had previously traded with this country, and one of her contemplated destinations was the east coast of England, the owners, or, at all events, Brockelman, the part owner of the ship and sole owner of the cargo, had agents in this country.

On the 10th of July, at all events, the present [183] claimant came forward and gave bail; but his claim was not consistent with the fact, for he alleged Brockelman to be the sole owner both of the ship and cargo, omitting the other part owners of the ship, and no affidavit accompanied the claim: an amended claim and affidavit were afterwards brought in, but not till the 31st of July.

On the 2nd of August, an offer was made by the captors to restore, on payment of their expenses, and no answer was returned to this till the 10th, when the claimants rejected it, expressing their hope of obtaining £2000 for damages.

On the 19th of August the case was heard, and restitution took place.

We think that three weeks, at least, of the delay in this case must be imputed to the claimants, and that in respect of this period no damage or demurrage must be allowed of the ship or cargo.

We shall recommend that the claimants have their costs in the Court below, but that no costs should be given of this appeal.

We have thought it fit to enter so fully into the grounds of our decision, not only on account of the great importance of the general principles which have been brought into discussion, but out of the deference which we must always feel for any opinion of the learned Judge from whom we are compelled to differ, and to whose deliberate judgment, if it were consistent with our duty to do so, we should willingly surrender our own. But this case seems to have passed without much discussion in the Court below; certainly without that full examination of the principles and the authorities, both in this and foreign [184] countries, for which we are indebted to the able arguments addressed to us from the bar. The cases in which, during the late war, restitution was attended with costs and damages, turn out on inquiry to be more numerous than was supposed.

We have been guided to the conclusion at which we have arrived by what we consider to be established principles. They appear to us to be founded both in



justice and convenience, reconciling, as far as possible (what it is very difficult to reconcile), the conflicting rights of belligerents and neutrals. We have adopted them, however, not upon any views of our own, but because we consider them to have been recognised and acted upon by the general consent of nations (*a*).

[See Phillimore, *Inter. Law*, vol. 3, 2nd ed. pp. 478, 649, 720, 757; and Prize Rules, Oct. 20, 1898 (Stat. R. and O. 1898, p. 905, No. 1063), and July 18, 1899 (*ib.* pp. 1124-1268, No. 570); and tit. Prize in Pulling's *Index to Stat. R. and O.*, 3rd ed. 1899. On point as to damages and costs on restitution, followed in *The Aline v. Fanny*, 1856, 10 Moo. P.C. 491.]

# [185] IN THE MATTER OF THE STATES OF JERSEY \*

[Nov. 30, and Dec. 1, 2, and 3, 1853].

Three Orders of the Queen in Council, addressed to the Lieutenant-Governor of the Island of Jersey, and directed by the Secretary of State for the Home Department to be registered in the Island, to give them the force of law; upon petitions of the States of Jersey, and by numerous inhabitants of the Island, recalled; and certain Acts passed by the States of Jersey, and proposed to be substituted for the Orders in Council, by the advice of a Committee of Her Majesty's Privy Council, confirmed [9 Moo. P.C. 262-263].

Whether the Crown, by force of the prerogative, can, by Orders in Council, without the concurrence of the States of Jersey, originate laws for Jersey, or, whether an exclusive right of originating all laws for that Island resides alone in the States. *Quære?* [9 Moo. P.C. 262].

This was a case regarding the prerogative right of the Crown to originate, and of its own accord promulgate, Orders having the force and effect of laws for the Island of Jersey, without the concurrence of [186] the States, the legally-constituted legislature of the Island (*a*).

The question being one as well of policy as law, and involving the constitutional rights of the States and the inhabitants of the Island of Jersey, was referred by Her Majesty to a mixed Committee of Her Privy Council, comprising members of Her Majesty's Government as well as of the Judicial Committee; and who were attended also by the Law-Officers of the Crown, the Attorney and Solicitor-General, as Assessors to the Committee.

The case arose under the following circumstances:—

In May, 1851, a deputation of a New Police Committee, which had been appointed at a public meeting of the inhabitants of the Island, lodged a petition with the Home Secretary, addressed to Her Majesty in Council, praying for the establishment of a sitting Magistrate, a paid police, and a Court of Requests for the recovery of small debts.

Her Majesty having taken the prayer of the petition into consideration, by the advice of Her Privy Council issued, of Her own accord and without communicating with the States, three Orders in Council, dated the 11th of February, 1852, for the purpose of carrying out these objects.

\* Present: The Lord Chancellor (Lord Cranworth), the Right Hon. Viscount Palmerston (Home Secretary), the Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Lord Justice Knight Bruce, the Right Hon. Lord Justice Turner, and the Right Hon. Sir John Patteson. Assessors.—The Attorney-General (Sir Alexander Cockburn), and the Solicitor-General (Sir Richard Bethell).

(*a*) The claimants laid their damages at £1961 15s. 6d., which, upon a reference to the Registrar and Merchants, was reduced to £1223 19s. 6d., with interest at 4 per cent. per annum, from the 19th August, 1854, until paid. The amount was subsequently paid by Her Majesty's Government.

(*a*) No authentic account of these proceedings having, as was contemplated, been published by the authorities in Jersey, the Editor has thought it right to give a report of the petitions and cases referred to the Privy Council, with the ultimate Order of Her Majesty thereon, the extreme length of which have precluded more than an outline of the arguments of Counsel, with an enumeration of the authorities cited and relied on by them.

These Orders, on being transmitted to the Island in the usual way for registration, were objected to by the [187] States as contrary to the constitutional privileges of that body as well as of the inhabitants of the Island; and the Royal Court having taken upon itself to suspend provisionally the registration of the Orders, the States presented the following petition and representation to Her Majesty in Council, wherein they stated:—

“That it was with feelings of the deepest regret that the States of the Island of Jersey considered themselves called upon to lay before Her Majesty in Council their humble petition and representation, touching the issuing of three several Orders of Her Majesty in Council, bearing date the 11th day of February, 1852, whereby the inhabitants of the Island would be taxed, not only without their concurrence, but without even their knowledge or participation; and which Orders, moreover, were calculated, in fact, to deprive that Assembly, the legitimate representatives of the people of Jersey, of the right they had hitherto enjoyed, in the initiation and enactment of such laws as they might deem necessary to promote the happiness and welfare of the people.

“That on the 5th day of May, 1852, Sir Thomas Le Breton, Bailiff and President of the States, had laid before that Assembly three Orders of Her Majesty in Council, bearing date respectively the 11th day of February, 1852, viz.:—

1. An Order for establishing a Court for taking preliminary proceedings in Criminal cases, and of summary jurisdiction;
2. An Order for establishing a Civil Court for summary jurisdiction for the more easy recovery of small debts; and
3. An Order for the establishment, in the town [188] of St. Helier and its vicinity, of a New Police, in lieu of the present establishment;

which Orders were accompanied by a letter from the Lieutenant-Governor, Major-General Love, transmitting the same, together with a letter from Lieutenant-General Sir James H. Reynett, and another from the Under Secretary of State for the Home Department, directing the registration of the Orders.

“That previously to the Orders of Her Majesty in Council being submitted to the States, they had been communicated to the Royal Court, which, by an Act, dated the 3rd of May, 1852, (considering that the Orders would effect very important changes in the institutions of the country, and that they had been issued without the concurrence or participation of the States, to whom they were also addressed,) resolved to suspend provisionally the registration of the said Orders, and to refer them to the States.

“That up to the 5th of May, when the above-mentioned Orders were thus officially laid before the States, no communication whatever had been made to that Assembly by any member of Her Majesty's Government that it was intended to adopt such measures, nor had the States at any time been consulted thereupon. It moreover appeared from the statement of their President, that, prior to the emanation of the Orders, he was not made aware of their being in contemplation, nor had he been called upon to give any opinion either as to the necessity there existed for the proposed changes, or upon the mode by which it was intended to effect them.

“That the States could not disguise from Her Majesty in Council that they were painfully affected by the information given to them, and felt that it would [189] be a great dereliction of the duty they owed to Her Majesty, and to the inhabitants of Her Majesty's Island of Jersey, if they did not lay before Her Most Excellent Majesty in Council their humble petition and representation, and respectfully point out to Her Majesty what they deemed to be the undoubted constitutional rights and privileges of the States of the Island. That with that object, the States, on the 5th of May, passed an Act directing the Orders to be lodged *au Greffe*, but suspending the registration of them until the States had had an opportunity of bringing this important matter under the consideration of Her Majesty in Council, and of praying Her Majesty's further Order thereupon.

“That before adverting to the changes proposed to be effected by the several Orders, the States humbly craved leave to submit to Her Majesty in Council the following brief statement of the constitutional rights and privileges which belong to them.

“The States of Jersey have, from time immemorial, existed as a legislative body, and have been recognised as such by innumerable Charters and Orders of Her



Majesty's royal predecessors. The legislative powers of the States of Jersey have, moreover, been regarded as of the most ample description, in so far as concerns laws which were to take effect in the Island, the right to initiate which has been left to the States, as the body most likely to be conversant with the wants and customs of the people of Jersey. The power of self-government, under the superior control of the Sovereign in Council, has not only constantly been recognised, but the confidence thus reposed in them has ever been met by the inhabitants of Jersey with feelings of gratitude and unflinching loyalty.

[190] "That the States would further observe, that, while one of the most important privileges of the Island is that of not being subject to be taxed by the Imperial Parliament, in which it is unrepresented, no tax can be imposed upon the people of Jersey, except with the consent of the States, by whom they are represented. That in the 'History of Jersey,' published by the Rev. Philip Falle, in the year 1694, speaking of the States, he says:—'The business of these meetings is the raising of money to supply public occasions. For, as in England, money cannot be raised upon the subject but by consent of Parliament, so here it is a received maxim that no taxes can be made upon the inhabitants unless agreed to by their representatives assembled in common council.' That so constantly has this doctrine been kept in view, that the States can fearlessly assert that there is upon record no instance, as regards Jersey, of a contrary practice, where the inhabitants have been taxed, unless with the previous consent of the States.

"That in reference to this question it is not unimportant to show in what manner the States are constituted. This Assembly is composed of the twelve Jurats of the Royal Court, elected by the whole body of ratepayers throughout the Island; of the twelve Rectors of the twelve parishes into which the Island is divided (the Rectors being appointed by the Governor representing the Crown); and of the twelve Constables, elected for three years by the ratepayers of the twelve parishes, of which they are respectively the representatives. That as regards the number of electors by whom the Jurats and Constables are chosen, the States begged to say, that every person possessed of property within the Island of the [191] value of forty pounds may be assessed: consequently, the number of persons entitled to vote is, as may be supposed, very considerable; and bears, probably, a much larger proportion to the number of inhabitants than would be the case in any town in England of the same numerical population.

"That whatever doubt might at any time previously have existed as to the power of the States, thus constituted, to originate and discuss all laws intended to be made for the government of the Island before receiving the Royal sanction, the States conceived that such power is clearly and expressly recognised and confirmed by the Order of the King in Council of the 28th of March, 1771, whereby, after reciting that 'Upon considering the annexed collection or Code of laws, agreed upon by the States of the Island of Jersey, and transmitted for His Majesty's royal approbation, His Majesty taking the same into consideration, is hereby pleased, with the advice of His Privy Council, to approve of, ratify and confirm the said collection of laws, and to order the same, together with this Order, to be entered upon the register of the said Island, and observed accordingly. And His Majesty doth hereby order that no laws or Ordinances which may be made provisionally, or in view of being afterwards assented to by His Majesty in Council, shall be passed but by the whole Assembly of the States of the said Island, and with respect to such provisional laws and Ordinances so passed by them, that none shall be put or remain in force for any longer time than three years, but that the same, upon its being represented by the States to His Majesty, that they are found by experience to be useful and expedient to be continued, shall, [192] having first obtained His Majesty's royal sanction, and not till then, be inserted and become part of the code of the political laws of the said Island. And His Majesty doth further order, that when anything is proposed to the Assembly of the States it shall be wrote down in the form in which it is meant to be passed, and there shall be debated, after which it shall be lodged *au Greffe* for fourteen days at least before it is determined, in order that every individual of the States may have full time to consider thereof, and the Constables to consult their constituents, if they think necessary,' etc., etc. That so entirely has this right of the States to originate laws that are to operate within the Island been recognised, that on frequent occasions, when it has been

thought by Her Majesty's Government to be expedient that the provisions of an Act of Parliament wherein the Island has not been expressly named, should be extended to the Island, Her Majesty in Council, so far from insisting upon the registration of such Act, by a compulsory Order, has invited the States to legislate upon the basis of the Act of Parliament, and if the States have seen occasion to vary the terms of such Act in order to render the provisions in unison with the laws and institutions of the country, no objection has ever been raised to their doing so.

"That as a further evidence of the free action which has ever been left to them, the States also begged to refer to the fact, that, on various occasions upon which they have adopted laws, and transmitted them for the Royal sanction, and some objections to their provisions have occurred to the Right Honourable the Lords of Her Majesty's Privy Council, Her Majesty in Council has not thought fit to amend such [193] laws, without a reference to the States, but they have invariably been sent back to be reconsidered, with such suggestions as in their Lordships' wisdom have been deemed meet; and instances are not wanting where, eventually, the modifications adopted by the States, though not in conformity with the recommendations of their Lordships, have received the sanction of Her Majesty in Council. That the States would, moreover, remark that they are not aware of the existence of any law of a purely local nature at present in force, which has not at first received the sanction of the States, and bearing in mind the principles they have laid down in the preceding observations, namely, that the power of originating laws to be executed within the Island, and especially that of taxing the inhabitants (subject to the control of the Sovereign in Council), is vested in them, they could not but entertain the impression that Her Majesty in Council had been induced to give Her Royal sanction to the Orders of the 11th of February, 1852, under the supposition that the provisions of those Orders had previously been discussed and approved of by the States, and that they would tend to the happiness and welfare of the inhabitants of Jersey.

"That the States having thus, as they trusted, satisfied Her Majesty in Council, that in the enactment of the three Orders of Her Majesty in Council, of the 11th February, 1852, the usual and constitutional course of proceeding had not been adopted, and that the rights and privileges of Her Majesty's subjects have inadvertently been infringed by the mode in which those Orders have emanated, conceive that they should not fulfil the duty which is required of them, if they did not also point out to Her Majesty in Council, [194] that some of the changes intended to be effected by the Orders in question were not only unsolicited by the inhabitants of the Island, but were the more repugnant to their feelings, as being subversive of their political and municipal institutions, and as tending to create an expenditure, which would be the more grievous from the circumstance, that up to the present time the people have been free from taxation, except so far as may have been necessary for the maintenance of the poor, the construction of works of utility, and for the defence of the Island, whilst the extensive powers which were proposed to be exercised by the Court of summary jurisdiction in Criminal cases could not be viewed by them but with anxiety and alarm. That the States of Jersey believe they may respectfully affirm that the Orders have not been framed with that regard to the existing laws and institutions of Jersey which was required, with the view of rendering them of easy application within the Island, and that they also contain enactments of a nature calculated to awaken in the minds of the people feelings of alarm and distrust, at the same time that they introduce systems of procedure at once novel, and opposed to the habits and customs of the country. That the States did not propose to enter minutely into the details of the several Orders, but they nevertheless ventured to advert to some of the provisions of them, which they think will establish the position they have advanced in the preceding paragraph.

"That first, as to the Order for the establishment of a Court for taking preliminaries in Criminal cases and of summary jurisdiction, it was by the first clause thereof enacted, that Her Majesty should appoint a fit person to be Judge of a Court to be established in [195] St. Helier; and by the third section, that the person so appointed Judge, should receive an annual salary of four hundred pounds. By the fifth clause it was provided, that a Greffier shall be appointed to act as clerk for the said Court, such officer to be appointed by the Lieutenant-Governor of Jersey for the time being, and who, by the sixth section, it was declared should receive an annual salary of one hundred and fifty pounds. That the Order then proceeded



to prescribe a mode of procedure in Criminal cases, which, in the forms to be observed, prior and subsequent to the arrest of a person charged with a crime, until he is put on his trial, were totally distinct from those at present in use, whilst no attempt was made to amalgamate, so to speak, the two systems, so that, in putting this Order into execution, great doubt and confusion must necessarily arise. That to illustrate this; according to the existing practice, an accused person is brought before the Court upon the written report of the Constable of the parish where the crime has been committed, and the act of accusation or indictment is framed by an express reference to that report; whereas the Order in Council, at the same time that it introduces a new form of proceeding in the preliminary examination and committal of the offender, neither provides a new form of indictment to put the prisoner on his trial, nor does it abolish the practice now pursued before the Royal Court. That by the tenth clause of the Order it was enacted, that it should be lawful for the Bailly, Lieutenant-Bailly, or Judge of the Court for preliminary proceedings, to issue a warrant for the apprehension of any person charged with a crime, but it was not said to whom such warrant was to be directed; and considering that the practice of [196] issuing a warrant for the apprehension of a person charged with a crime was, for the first time, to be rendered necessary, it was conceived that the omission was an important one. That by the twelfth clause, a party charged and in custody of a police officer is to be detained in custody in a station-house only until the said party could be brought before the Judge for preliminary proceedings. The police officer was at the same time to produce the witnesses, whom the Court were to hear in the presence of the prisoner, but no provision was made in this or any other of the sections of the Order respecting the compulsory attendance of witnesses, regulating by whom the process of the Court was to be executed.

“That the preliminary examination being over, and the party charged committed for trial, it was not provided by the Order in Council in what manner the case was to be brought before the *Grande Enquête*, or other jury, whether the *Enditement*, or first jury, before which an offender now goes, was to be retained, and if not (the form of the act of accusation or indictment having been determined), what was to be the form of the oath of the *Grande Enquête*, or other jury, nor whether the witnesses to be heard upon the trial were to depose *viva voce*, or if, on the contrary, their depositions are to be reduced into writing and read to the jury, as was the present custom.

“That as respects the proceedings to be taken before the Court of summary jurisdiction:—By the twenty-second clause, the Judge was to hear and determine all Criminal matters heretofore heard and determined in the Royal Court by summary proceedings, on the report of the Constable, and in which the intervention of the *Grande Enquête*, or other jury, was not [197] required. At present, however, those cases are not clearly defined, and instances might be cited where very serious offences are disposed of without the intervention of a Jury. That the Order, moreover, did not limit the *maximum* of punishment which the Judge should have power to award, which, in most cases, would be left to his discretion. Nor was there any appeal provided, or any control given, over a Judge who might exceed his jurisdiction, either in the cases properly coming within his cognizance, or to the amount of fine or other punishment he might inflict. That the twenty-fourth clause, which prescribes the mode of proceeding before the Judge of summary jurisdiction, was deemed to be objectionable, inasmuch as it enabled the Judge to proceed in the absence of the Defendant, and that it did not provide by whom the process of the Court was to be served or otherwise executed,—an objection which applied equally to the twenty-eighth section. That by the twenty-seventh clause, provision was made that a party accused might be assisted by Counsel or attorney, but it was not stated at whose expense. That it was proper to observe, that by their oath of office, and in conformity with the practice of the Royal Court which has existed for ages, the Advocates of that Court were bound to give their services, gratuitously, to every person charged with crime, who had not the means of remunerating an Advocate; so that, in the Island, there never was a time when an accused party was left undefended.

“That by the Order in Council, no provision was made for affording to an accused person the gratuitous assistance of an Advocate, though, in a country of so

mixed a population, where the English and French languages are spoken, and must both necessarily be [198] understood by the members of the Bar, it might be of the utmost importance to the accused to be assisted by some person who may interpret to him the evidence produced against him. That the Order also made an important omission in not pointing out to what place of confinement the Judge was to send a person convicted summarily before him, and in not giving authority to any officer or gaoler to detain such offender in prison, by virtue of any sentence of the Judge of the proposed Court.

“That by the thirty-second clause, power was given to Her Majesty’s law-officer to prosecute in this Court, whenever he should deem that the ends of justice render it necessary; but it was not provided how or by whom prosecutions were to be carried on, in which that officer did not see fit to interfere. That by the law of the Island, all criminal prosecutions are to be conducted by, and in the name of, the law-officer of the Crown, and for the due performance of this duty the “*Procureur*” and “*Avocat-Général*” are remunerated by salaries derived from the revenues of the Crown, collected in the Island, so that, at present, there is no expense to the country in the carrying on of criminal prosecutions; whereas, under this Order, it was left doubtful whether a great charge might not devolve on the Island in this respect.

“That as to the second of the before-mentioned Orders, by which a Civil Court of Summary Jurisdiction for the more easy recovery of small debts was to be established, it was, by the eleventh section of that Order, provided, that all pleas in personal actions, where the debt or damage claimed was not more than £15 (with the exceptions therein mentioned), might be holden in this Court, and be heard and determined [199] in a summary way; and by the thirty-first section it was declared that every Order or Judgment pronounced by the said Court should be final and conclusive. So that this anomaly would be presented,—that whereas in all actions where the debt or damages recovered before the Royal Court (which was still to continue the superior tribunal) should not exceed £5, the parties would be entitled to appeal from the Bailiff and two Jurats to the full number of the Royal Court, in the Civil Court of Summary Jurisdiction; the decision of a single Judge was to be final and conclusive, in all cases not exceeding £15; and no exception was made when this sum arose upon the balance of an account, so that a single Judge might have to decide upon questions involving thousands of pounds. That as respects the Judge himself:—By the Common Law of Jersey, a Judge is recusable for the interest of himself, or as being related, within certain degrees, to one of the parties interested in the suit. That in the Order no provision was made for supplying the place of the Judge in the event of his being so recused, and though it might be said the Royal Court would have a concurrent jurisdiction, it would be at the risk of any increased expense to which the party might be put who might be compelled to have recourse to it. That by the twelfth and thirteenth sections, it was provided, that actions commenced in this Court should be by plaint, upon which a summons was to be issued; and by the twenty-third section, process at any stage of a suit might be proceeded in, when the party to be summoned should have had service of summons six clear days before that appointed for the holding of the Court at which the party summoned was to appear.

“That the States would here observe, that, by the [200] existing law, a debtor, not being possessed of real property within the Island, is liable to be arrested for debt on mesne process; and from the position of Jersey, and the facility of escaping from its jurisdiction, this privilege of arrest has been considered by the trades-people of the Island as an important one. That unless, therefore, the power of attaching the person, in the first instance, be given to the Small Debts Court, the States have much doubt whether the Royal Court will not in these cases continue to be appealed to, though, in the case of persons endeavouring to evade process, it would evidently be unjust to oblige the Plaintiff to pay the extra costs if any should be incurred by that proceeding.

“That, by the law of Jersey, persons who are possessed of real property can be sued in term time only (there being two terms in a year, viz., one beginning in the middle of April, and ending on the 5th of July, and the other commencing in the middle of September, and concluding on the 5th of December). But the Order in Council makes no provision as to whether this freedom from process out of term



time, in the case of owners of real property, was to continue before the Small Debts Court.

“ That connected with this question, whether a person possessing real property in the Island might be sued before the Civil Court of Summary Jurisdiction, out of term, was another of very considerable importance. By the thirty-third section of the Order, it was enacted, that a party suing in that Court should have the same power to cause the proceedings to be registered against the estate of the debtor as if such proceedings had been taken before the Royal Court, and that the registry of an Act of the Court of Summary [201] Jurisdiction should, to all intents and purposes, confer the same powers and privileges, and have the same effect, and be subjected to the same rules, as the registration of an Act of the Royal Court. And by the thirty-fourth section, after directing the mode in which the amount of the judgment was to be levied on the goods of a debtor, it was provided as follows:— ‘ Provided always, that whenever a party shall have obtained a judgment in this Court against a person possessing real estate (corporeal or incorporeal) in the Island, and that such party is desirous to take proceedings so as to bring such real estate *en décret*, it shall be lawful for such party, by virtue of such judgment, to take proceedings thereon, before the Royal Court, as if such judgment had been rendered by the Royal Court, and all proceedings and rules relative thereto, as by law now required, shall be observed and applicable in such case, and shall be available to such party, to all intents and purposes, as in the case of a judgment obtained before the Royal Court.’ Without staying to inquire whether the effect of the thirty-third and thirty-fourth sections would not be to induce a different practice in regard to the imprisonment of a debtor, in the case of a person who is and who is not possessed of real property in Jersey, it was evident from them, that if a person who is so possessed of real property might be sued before the Civil Court of Summary Jurisdiction out of term, creditors for small sums would be able to obtain a preference over those for larger amounts suing before the Royal Court, and thus property might be frequently forced, *en décret*, against the interests of the largest creditors.

“ That by the twenty-seventh section of this Order, [202] a very important change was introduced into the law of evidence, which the States ought not to fail to signalise. It was thereby enacted, that on the hearing or trial by action, or any other proceeding in this Court (of Summary Jurisdiction), the parties thereto, and all other persons, except the wives of the parties, might be examined, either on behalf of the Plaintiff or Defendant, upon oath or solemn affirmation. That the States were quite aware that in England, and some other countries, the rule as to the competency of witnesses has been of late years greatly relaxed, but in none of those countries had the rule of evidence, previously to the changes, been so strict as in Jersey. That by the Common Law of the Island, founded on the custom of Normandy, neither the parties, not their relations within the degree of nephew inclusive, can be heard as witnesses, and the States would hesitate to adopt any law to the extent of the Order in Council, except after the experience of more moderate changes.

“ That the States would, in this place, mention but one or two other objections to this Order. By the law as at present, the Plaintiff or other person putting his debtor into prison, is bound to pay the expense of maintaining him there; but although a power of imprisonment was, in certain cases, given to the Judge of the Civil Court of Summary Jurisdiction, no provision was made as to the maintenance of the prisoner while in gaol. The States would also remark with reference to the table of fees. Her Majesty in Council was doubtless under the impression that the costs of proceedings before the Royal Court of Jersey bore some proportion to those of a suit before the Superior Courts at Westminster, whereas, in ordi-[203]nary cases, they were of small amount; so much so, that the expense of proceeding before the Civil Court of Summary Jurisdiction would, in some instances, be greater than the costs recoverable before the Royal Court could be.

“ That the third of the Orders of the 11th of February, 1852, according to the preamble of the Order, has for its object ‘ to substitute a more efficient system of Police in the town of St. Helier and its vicinity, in lieu of the present establishment,’ and also to establish a night watch.

“ That as respects this Order, the States observed, that it appears to be only one of the three Orders which has been issued in consequence of a representation made to Her Majesty in Council. The States did not propose in this place to make any

remarks on this point, though they intended before closing this, their humble representation, to offer some observations in connection therewith, as they believed they should be able to show that the Orders went much further than the petition which they imagine had given rise to them.

"That by the first section of the Order in Council now under review, power was given to one of Her Majesty's principal Secretaries of State to give orders for the establishment of a Police force in the town of St. Helier and its vicinity; such force to consist of a Superintendent, to be appointed by the Lieutenant-Governor of the Island of Jersey, and of two Sergeants and twenty men, to be from time to time named and appointed by the Superintendent of Police, with the approbation of the Lieutenant-Governor; and the said Superintendent, Sergeants, and twenty men, so to be appointed, are to be sworn [204] in as by the said Order directed, and the men so sworn should, within the limits thereafter mentioned, have all such powers, authorities, privileges, and advantages, and be liable to such duties, responsibilities, pains, and penalties, in respect of the preservation of the peace, prevention and detection of crime, and apprehension of offenders, as any Constable, *Centenier*, or Constable's officer, duly appointed, then had, or thereafter might have, within their parish, by virtue of the common or customary law of the Island, of any Order of Her Majesty in Council, of any local provisional regulation, or of any Statutes made or to be made, and should obey all such lawful commands as they from time to time should receive from the Lieutenant-Governor, for conducting themselves in the execution of their office. That with reference to this section, and the preamble by which it was preceded, considerable doubt might arise, whether the existing Police of St. Helier would not be deprived of all authority, either as a Police or municipal body, so that it might happen that the town of St. Helier, a moiety of the population of the Island, would be unrepresented in the States. That another serious question also suggested itself to the States in regard to the powers proposed to be conferred upon the intended Police force by this section of the Order.

"That Her Majesty in Council might not have been made aware of the extensive duties which, by the law of the Island, devolved on a Constable, or *Centenier*, an office of considerable importance in Jersey, and usually held by one of the most influential persons of the parish in which he resided. That the office of Constable in Jersey might, in fact, in some respects, be compared with that of a Mayor in England, for, besides the ap-[205]-prehension of a party accused, he is authorised to inquire into the facts connected with the charge, and to exercise a judgment, as to whether the case is one in which the accused should be detained. That if, upon inquiry, he should not deem the statements brought under his notice to warrant his bringing the party charged before the Court, he may set him at liberty; but if, on the other hand, he sees sufficient reason for a prosecution, he then obtains a committal from the Chief Magistrate, to whom he previously makes known the particulars of the offence committed, who, again, may exercise his discretion in the matter. That the Constable subsequently brings the accused party before the Court on a written report, which is presented by the Attorney-General, who founds an accusation or indictment upon it. That in order to justify the apprehension of a party charged with having committed an offence, no warrant is at present necessary, and, owing to the existing powers given to the Constable for the purpose of inquiry, as also from his position in the parish, no mischief or inconvenience has ever been known to result from the existing practice.

"That the States undoubtedly considered that such unlimited powers cannot safely be confided to a paid Police force, and they, therefore, deemed it imperative upon them to make this statement of the present powers of a Constable to Her Majesty in Council.

"That by the second clause of this Order, the district over which the Police force so to be established was to extend, was defined; and power was given to follow, into any adjoining parish, any person charged with the commission of a breach of the peace, robbery, or other felony within the town district. That by the [206] third clause of the same Order, authority was given to the Lieutenant-Governor to make and frame, from time to time, subject to the approbation of one of Her Majesty's principal Secretaries of State, such orders and regulations as he should deem expedient for the general government of the men of the said Police force, etc., and the said Lieutenant-Governor was also empowered, at any time, to suspend or dis-



miss from his employment any man belonging to the force. That after making other provisions, it was, by the tenth section of the Order in Council, enacted, that one of Her Majesty's principal Secretaries of State should, from time to time, regulate and order the amount of salary to be paid to the several members of the said Police force, not exceeding the following rates: namely, for the Superintendent, the yearly sum of £150; to each of the Sergeants, 4s. per diem; to each of the other Constables, 3s. per diem. The salaries and other incidental expenses of the Superintendent, of the Sergeants, and of fifteen other Constables, to be defrayed by a rate as thereinafter mentioned, and the salaries and other incidental expenses of five of the said Constables to be defrayed by the States, out of the revenue of the harbour of St. Helier's. That by the eleventh clause, it was directed, that the treasurer of the States should, out of the revenue collected by that body, pay to the several members of the Police force such salaries as aforesaid, and should also provide and pay for, out of the said revenue, such arms, accoutrements, equipments, clothing, and other necessities for the said Police force as the Lieutenant-Governor should order, and should provide one or more station-house or station-houses, coals, candles, stationery, books, and other requisite articles [207] for the said Police force. And the States of the Island are by the said Order required, yearly, to make an Ordinance for raising and levying a rate on the owners and occupiers of houses and other property, situate within the Town Police district, in such manner as the States should judge expedient, and of a sufficient amount to defray the sum expended by the treasurer, for and on account of the said Police, as before mentioned. That by the fourteenth clause, power was given to the States, on the recommendation of the Lieutenant-Governor, in certain cases, to grant superannuation allowances; and by the eleventh clause, to make allowances for wounds, etc., had in the service.

"That against each and every of the above enactments the States begged leave, respectfully, but solemnly, to protest, as an encroachment upon the constitutional privileges, and an invasion of the rights of the people of Jersey, as granted and secured to them by Her Majesty's royal predecessors.

"That before entering upon an examination of that question, which the States hoped they might, with all due respect, be permitted to do, they first begged permission to refer to some other of the clauses of the Order in Council. That by the eighteenth clause, the Superintendent was to distribute the members of the Police force as he should think expedient; and by the nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, and twenty-eighth clauses, various powers were given to the Police, to which the States made no other objection than that they were introduced without any regard to existing local regulations on the same subject, and were such as the [208] States might reasonably, it was respectfully submitted, be left to frame, if they should be deemed expedient. That by the thirtieth, thirty-first, and thirty-second clauses, power was given to a Constable, in certain cases, to admit to bail, with or without securities: a mode of proceeding novel in this Island, where hitherto, from its insular position and the facility of escape from it, the bail of persons possessed of real property within the Island had been required.

"That the States had affirmed, in a former part of that their humble petition and representation, that the changes proposed by the above-recited Orders were unsolicited by the people of Jersey, and they would refer to a memorial adopted at a public meeting, held in the Island, which was presented to the States, and which that Assembly had been led to believe was the representation alluded to in the preamble to the third of the above-mentioned Orders. That the memorial, after setting forth the alleged increase of crime and the desecration of the Sabbath by men and boys, was, in the concluding paragraph or prayer, couched in these terms:—Your memorialists would respectfully recommend a paid night Police, additional inspectors for the markets, who shall be armed with a sufficient power to check and control abuses, and also a central station. Your memorialists would also further recommend the expediency of appointing a Police Magistrate for the summary punishment of all delinquents who may legally come within his judicial province.' That it was impossible, upon comparing the demands of the memorialists with the enactments of the several Orders in Council, not to be struck with the disparity between them; and whilst the States had been ready to entertain the former, because they [209] believed what was required might be

moulded to the existing institutions, they could not, without the sacrifice of those same institutions, which are dear to all Jerseymen, except of the latter. That as respects the signatures to the memorial presented to the States, it might not be irrelevant to state that it contained 435 signatures, of which 291 were those of casual residents (British and French), and 144 natives of the Island.

“That the States having, as they apprehended, in their foregoing observations, proved satisfactorily that the several Orders in Council, in their present shape, were both unsolicited by the people of Jersey, and inapplicable to the circumstances of the Island, begged leave to show that they were not only a direct infraction of the constitutional privileges of the States as an independent legislative body, but that the Orders were an invasion of some of the dearest rights of the people of Jersey,—of rights which had, on frequent occasions, and at distant periods, been conferred upon them as a reward for their fidelity to their Sovereigns, and for services performed in the hour of trial and danger; and which the States could unhesitatingly aver had never been forfeited by any failure in the duty and fealty they owed, and were proud to render, to Her Majesty. That the States humbly, yet earnestly, expressed their opinion, that in the event of any offices, such as those contemplated by the several Orders in Council, becoming necessary, the appointments to them ought to be vested in the States, or the municipal authorities of the Island. That the States were the more impressed with this part of the subject, as, in common with the inhabitants [210] of Jersey, they considered that the investing a Lieutenant-Governor of the Island with the power of nominating to any of the offices in question would be a violation of the principle which had hitherto kept the military quite distinct from the civil authority of the Island.

“That by the Ordinances of King Henry the Seventh, dated the 10th of February, 1497, the military and civil government of Jersey were separated from each other; and it was then ordered ‘that the Constables of each parish should be fairly elected and chosen by the majority of the said parish, without any recommendation from the Captain or Jurats.’ And, by subsequent Ordinances of the 27th of February, 1616, it was expressly declared that ‘the charge of the military force be wholly in the Governor, and the care of justice and civil affairs in the Bailiff.’ And, as if to mark the jealousy with which the two powers were to be kept separate, and, at the same time, the more clearly and emphatically to indicate that the civil liberties and franchises awarded to the people were not to be interfered with by any Governor; by an Order in Council of the 14th of June, 1619, it was ordered that ‘the Bailiff shall, in the *Cohue* and seat of Justice, and likewise in the Assembly of the States, take the seat of precedence as formerly.’ That the foregoing Orders were made after frequent contests between the civil and military authorities of the Island; and though, at different times since, in the history of Jersey, disputes had arisen as to the extent of the powers of the respective Governors and Bailiffs of the Island, the same distinction which, in 1616 and 1619, was established, still subsisted, and [211] the inhabitants of Jersey, in the present day, were not less tenacious than their ancestors were in their adherence to that line of separation.

“That the States had not yet adverted to the expense which would be entailed upon the inhabitants of Jersey, by an adoption of the changes contemplated by the Orders in Council; but it was a very important question, which ought not to be overlooked. That it had hitherto been the boast, as it has been the happiness and privilege of the people of Jersey, to be free from an undue pressure of taxation; and this had arisen, in a great measure, from their readiness to perform, without remuneration, those services which, in other countries, have been a burthen to the State. Thus, with the exception of the Bailiff, the *Procureur-Général*, the *Viscomte*, and the *Avocat-Général*, who are appointed by patent from the Sovereign, and whose fixed salaries are derived from the revenues of the Crown, the duties which devolve upon the *Jurats* of the Royal Court, and the municipal and Police authorities, are executed gratuitously.

“That this system of self-government and self-reliance had not been unattended with benefits, the States thought they might triumphantly appeal to the happiness and prosperity of the people of Jersey, as evidence of the advantages which had accrued from it, and, when regard was had to the position of the Island, the States might safely point to the records of crime committed within the Island, and compare them with other places of an equal extent, in answer to all the cavillings and assertions respecting that want of security to the person and property which, it had



been alleged, the existing institutions failed to afford; whilst the States knew of no instance where any criminal [212] had evaded justice from not having been captured and brought to trial. That the States were willing to admit that some reforms might be necessary, such as the rendering the present Police force more effective, establishing a night watch in the town of St. Helier, the supplying a more summary mode of dealing with persons charged with petty offences, and a greater facility in the mode of recovering small debts, all which subjects had, for some time past, engaged the serious attention of the States, and for effecting some of which objects, several bills were before that Assembly. The States, however, respectfully begged leave to contend that these changes and modifications might be effected by them without the removal of any of the great constitutional privileges which were so dearly prized by the great bulk of the people of Jersey, and without letting in that flood of taxation which would inevitably follow, if the expensive changes proposed to be introduced by the Orders in Council were insisted upon.

That the States thought it would not be irrelevant to this question that they should advert to the geographical position of the Island of Jersey, the elements of which its present population is composed, and the arduous duties, which, at all times, devolve upon the native inhabitants; but especially in time of war. That situated within view of the French coast, and at a distance from the mother country, the Island of Jersey was particularly exposed to danger from its contiguity to a warlike neighbour. That since the peace, the Island has increased in wealth and population. That in the event of a war being declared, it was not too much to say that at least one-third of the population would quit the Island for some country offering [213] greater security from invasion; and thus a population, which then numbered nearly 60,000 souls, would at once be reduced to less than 40,000. That the States had already alluded to the freedom of the people of Jersey from taxation; but if they made not large pecuniary contributions for the maintenance of their privileges, and for the defence of their native shores, they made great and severe sacrifices in their persons for the support of both. That even during peace, an unpaid permanent militia was kept up, and much time was necessarily spent by the inhabitants in the exercise of drill and other duties. But in the case of a war, the service became both constant and arduous, and the interruption which war naturally occasions to their commerce, deprived the inhabitants of those means of acquiring wealth, which would enable them to maintain an expensive judicial and police establishment. That on this ground alone, the States confidently relied that Her Majesty in Council would not force upon the people of Jersey, measures which would be so grievously burthensome to them. That the States were prepared to have it urged against the Assembly, that it had been dilatory in the adoption of the reforms which have been suggested to it; but they could reply, that within the last few years more important changes had been effected by them in the laws of Jersey than had been made for centuries previously. That it might again be asserted, that in the modifications they had introduced, or were prepared to introduce, into the institutions of the country, they did not keep pace with the rapid advance of civilisation; but they could reply, that whilst they were unwilling to abolish a constitution which had made the people free and prosperous, they might point to many of their exist-[214]-ing laws and institutions as not unworthy models for the improvement of those of other countries.

That on reviewing the preceding remarks, the States were conscious how imperfectly they had brought under the notice of Her Majesty the great and important interests of the people of Jersey, whom they had now the honour immediately to represent; they, however, confidently hoped that they had stated sufficient to induce Her Majesty in Council to reconsider the three several Orders of the 11th of February, 1852, and to direct that the same might be recalled, and that that Assembly and the inhabitants of Jersey might be maintained in the exercise of their ancient and undoubted rights and privileges. The States of the Island of Jersey, therefore, most humbly and earnestly prayed that, for the foregoing among other reasons, Her Majesty in Council would be graciously pleased to direct that the before-mentioned Orders in Council of the 11th day of February, 1852, might be recalled, so that the States might be at liberty to adopt such legislative measures as might be necessary and in harmony with existing institutions

of the Island, for rendering the present Police force more effective, establishing a night watch in the town of St. Helier, the providing a more summary mode of dealing with persons charged with petty offences, and giving greater facility for the recovery of small debts; and that, if requisite, the States might be permitted to be heard by Counsel in support of that their humble petition and representation, and in vindication of the rights and privileges of their Assembly, and the people of Jersey; or that Her Majesty would be pleased to grant to the States and the inhabitants of Her Majesty's Island of Jersey, such [215] other relief in the premises, as in Her Majesty's royal wisdom should seem meet."

This petition having been presented, a deputation of the States obtained an interview with the Lord President of the Council and the Home Secretary, and obtained their consent to suspend for a time the Orders in Council of the 11th of February, 1852, the States undertaking to pass forthwith legislative enactments for the approval of Her Majesty in Council, in the spirit and in lieu of these three Orders in Council.

Accordingly, after many sittings, the States passed six Acts as substitutes for the above Orders, which were transmitted for Her Majesty's approbation, and were now submitted with the Orders of the 11th of February, 1852, for the advice and consideration of the before-mentioned Committee of Her Privy Council. These Acts were respectively entitled:—

First. An Act relating to the number and powers of the *Centeniers* and other Officers of St. Helier and other parishes.

Second. An Act for the appointment of a paid Police.

Third. An Act to amend the practice in taking down the evidence in Criminal Cases.

Fourth. An Act for the establishment of a Court for the recovery of debts not exceeding Ten Pounds.

Fifth. An Act to amend the practice of the Royal Court in certain cases.

Sixth. An Act to establish a Court for minor criminal offences.

In the meantime, and pending Her Majesty's determination on the subject of the petition of the [216] States and the Acts passed by them, the following petition in favour of the three Orders and against the Acts passed by the States was preferred by certain Merchants, Bankers, Tradesmen, and other inhabitants of St. Helier, in the Island of Jersey.

The petition stated that several petitions having been presented to Her Majesty and the various departments of Government during the last ten years, praying for certain reforms in the civil, criminal, and municipal laws of the Island, and the mode in which they were administered, and especially for a better and more efficient system of Police in that parish, and a Court for the trial of petty offences, and one for the recovery of small debts, the Petitioners hailed with inexpressible joy and delight the intelligence that Her Majesty had been graciously pleased to take their petitions into Her royal consideration, and had issued three Orders in Council, bearing date the 11th February, 1852, to redress their grievances.

"That the Orders in Council having been transmitted through the Lieutenant-Governor to the Bailiff, to be laid before the Royal Court of the Island, in order to be registered and published, the Petitioners had learned with astonishment and regret, that the said Court, on the 3rd May last, took on themselves, without any lawful right, the power to suspend the registration and publication of the Orders, on the ground that they interfered with their privileges; and referred them to the States, under the erroneous impression that by so doing Her Majesty's Orders had not, and could not have, force of law in the Island.

"That the States, on the 7th of May, approved of the course pursued by the Court: and conceiving that they had an exclusive right to originate all laws [217] and taxes for the Island, passed four Acts to supplant Her Majesty's Orders in Council, adopted a petition to Her Majesty, and appointed a deputation at the public charge to proceed to London to take measures to get them withdrawn, and thus to deprive the Petitioners of the great boons which Her Majesty had most graciously bestowed upon them.

"That the deputation obtained an interview with the Lord President of Her Majesty's Council, and the Secretary of State for the Home Department, on



the 8th of June, by whom the Petitioners learned that the States attempted, as they had already done in their petition to Her Majesty, to justify the conduct of the Court in suspending Her Majesty's Orders in Council on an Order dated the 21st of May, 1679, and the claim of the States to the exclusive right of originating all laws and taxes; to the fact, that being a legislative body, it was inherent in them; and, therefore, that Her Majesty's Orders of the 11th of February last were illegal.

"That the Petitioners could not refrain from expressing how deeply they were penetrated with sorrow and indignation, to find that the Royal Court and the States should have studied the laws of their country to so little advantage, either for Her Majesty's service or the public welfare, as to put forth so monstrous a pretension, which was inconsistent with the nature of their institutions—was not founded on any grant—was repugnant to the charter of Henry VII., and was contrary to several Orders in Council made in that behalf.

"That as to the conduct of the Court, the Petitioners begged to inform Her Majesty, that the Orders of the 21st of May, 1679, on which they claimed a right to suspend the registration, publication, and even [218] the execution of Her Majesty's Orders in Council, was found to be prejudicial to the Royal Authority, and, therefore, repealed on the 17th of December, 1679, in the following words: 'In obedience to your Majesty's Order in Council, of the 31st October last, referring unto us the consideration of the differences between Sir John Lainer, Knt., Governor of your Majesty's Island of Jersey, and the Bailiff and Jurats of that Island, touching certain privileges granted unto them, by an Order of your Majesty in Council, of the 21st May last, we have spent several days in hearing all parties concerned, as likewise the Commissioners of your Majesty's Customs, and do find that the Order was obtained at this Board without consulting either the Governor of the said Island, or the officers of your Majesty's Customs, and that several parts thereof (if put in execution) would be prejudicial both to your Majesty's authority there, and to the revenue of your Customs and the trade of this Kingdom, so that it is our humble opinion that the said Order be recalled, and instead thereof, that your Majesty would be pleased to command that all Orders, Warrants, or Letters relating to the public justice of the Island, either coming from your Majesty or this Board (which are to be a standing rule for their proceedings), be registered in the Royal Court of that Island, before they be put in execution, and that there be a clause in every such Order, Warrant, or Letter, requiring the registry thereof accordingly. Nevertheless, as to such other Warrants, Letters, or Orders, as your Majesty or this Board shall send and judge fit to be executed without registry, no registry shall be thereof, without special direction in that behalf; and as to Acts of Parliament, wherein that [219] Island is named, or any words contained, that your Majesty will be pleased to direct that such Acts of Parliament, so soon as they are printed, be transmitted to that Island, with an Order of your Privy Council annexed, directing the registering and publication thereof.' \* \* \* \* 'His Majesty was pleased to approve thereof, and did order that the same be effectually put in execution in all the several parts.'

"That with respect to the claim of the States, the Petitioners begged to observe, that they were not a legislative body, but only a Common Council, having never been incorporated by Royal Charter, and, therefore, did not possess any inherent right to originate laws and impose taxes, or to exercise any legislative functions whatever, save and except when Her Majesty might be pleased from time to time to grant them permission to enact a law, on a special application made to Her Majesty for that purpose, defining beforehand the purport of the law or tax they might wish to enact. That as to the initiation of laws, this had been decided by the Committee of Council in the following words:—'If the States should think it expedient to make the offence of burglary a capital offence, as it is by the law of England, they may, if they be so advised, propose a new law for your Majesty's consideration, to be enacted and confirmed by your Royal sanction, after your Majesty shall have signified your allowance to have such a law enacted.'—Order, 23rd June, 1790. And that as to the claim of the States to the right of initiating taxes, it had been declared as follows:—'His Majesty, taking the said Report into consideration, was pleased, with the advice of His Privy Council, to approve thereof, and accordingly to declare that [220] the States of the said Island of Jersey have no authority to

pass any Act, or Law, imposing the several duties and taxes mentioned in the said Acts, for laying on rum and gin imported into the said Island, without application having been made to His Majesty for that purpose, and His Majesty's consent and approbation being first had and obtained. And His Majesty is hereby pleased to declare the said Acts imposing the several duties and laws therein mentioned, upon rum and gin imported into the said Island of Jersey, to be null and void in themselves, and to order that the Bailiff and Jurats of the Royal Court of the Island of Jersey do cause the said Acts to be erased out of the records of the said Island.—Order, 20th April, 1774.

“ That the Petitioners humbly conceived that the whole legislative authority, both initiative and final, on all matters and things left unprovided for by Act of Parliament, was vested in Her Majesty, in right of Her Majesty's sovereignty, and the reservations made in the several Charters granted to the Island, and also of the numerous decisions of Her Majesty's Royal predecessors in Council; and that, as the law then stood, the Royal Court had no right to suspend the registration and publication of Her Majesty's Orders in Council, and that the States had not and never had the power to originate laws or impose taxes without the previous permission and command of the Crown, although of late years they had usurped it, contrary to the Charter of Henry VII., through the non-interference of the Lieutenant-Governor, who was bound ‘ to give notice from time to time unto your Majesty and the Privy Council ’ of the contraventions attempted in prejudice of the same.—Letters Patent of James I., and Order, 23rd May, 1816.

[221] “ That Her Majesty having been graciously pleased, in the exercise of Her Royal authority, to issue the three Orders in Council of the 11th February last, the Petitioners humbly considered that it was desirable that they should be registered and published, for the sake of preserving the evidence of their existence (notwithstanding they contained no direction to that effect, and notwithstanding it could not add one jot or tittle to their authority, or the omission of it subtract therefrom), because several Ordinances of Royal Commissioners, authorised to make laws for the Island, especially those of Queen Elizabeth in 1591, having been fraudulently omitted to be enrolled by the Greffier, when the public register was made in 1608, are now held to have no force; and because the Royal Court has repeatedly withheld the registration and publication of Orders in Council for the purpose, as they conceived, of rendering them of no effect; and, therefore, the Petitioners humbly prayed that Her Majesty would be graciously pleased to issue a peremptory and standing Order to prevent such scandalous frauds in future.

“ That considering that the Royal Court and the States had confederated together to deprive the Petitioners of the inestimable benefit of Her Majesty's Orders in Council of the 11th February last, and get access to the public funds to pay their deputies and employ counsel learned in the law, for that purpose, without any lawful right, instead of levying a rate on the inhabitants to reimburse themselves, after their costs and charges should have been examined and approved conformably to law (Order, 2nd June, 1786), by which the Court and States obtained an unjust advantage over the Petitioners;—and considering [222] also that the States had improperly taken on themselves to frame Laws to supplant Her Majesty's Orders in Council, without first carrying them into execution, and giving them a fair trial to discover any defects in them, and without having obtained Her Majesty's express permission and command to do so:—all which the Petitioners considered to be a grave contempt of Her Majesty's Royal authority, and ought to be visited with Her Majesty's displeasure. Wherefore the Petitioners humbly prayed, that Her Majesty would be graciously pleased to dismiss the Petition of the States of Jersey, and all other petitions having for their object to impeach the validity and obstruct the force of Her Majesty's Orders in Council of the 11th February last, and that Her Majesty would be pleased to order the Royal Court to register them forthwith: and also that Her Majesty would be pleased to disallow the Acts of the States already passed to supplant the Orders, and to prohibit the States from passing any further Acts for the like purpose, until the Orders should have been carried into execution, and have had a fair trial, and some defects should be discovered in them; and not then, until Her Majesty's express permission and authority had been first had and obtained; and also that Her Majesty would be further pleased to issue a



peremptory Order to the States to promulgate Her Majesty's three Orders in Council of the 11th February last, as was done on the 7th March, 1785, and to carry them into operation without the least delay, as on the 25th March, 1697, under such pains and penalties towards all disobedient and refractory persons as Her Majesty in Her superior wisdom should think fit; and finally, that Her Majesty would be pleased to interdict the [223] States from applying any portion of the public money to defray the costs and charges of their deputation; and, if already applied, that Her Majesty would order them to make restitution thereof."

A petition was also presented, signed by forty-nine memorialists, against the confirmation of the Acts recently passed by the States, and in favour of the original Orders in Council of the 11th February, 1852.

A further petition was presented, having four thousand four hundred and twenty-seven signatures, against two of the Laws passed by the States, namely, the Act for the Recovery of Small Debts, and the Act for the appointment of a paid Police.

These petitions were also referred to the Committee for their advice and consideration.

The States put in a printed case, in support of their petition, in which they submitted, in addition to the facts and circumstances already stated by them, that, according to the constitution of Jersey, Her Majesty in Council was not empowered to pass any Laws, or impose any taxes upon the inhabitants of Jersey, without the concurrence of the States, the legally constituted legislature of the Island. That they did not claim for themselves the power to enact permanent laws, or to impose taxes (except upon extraordinary emergencies, as for the defence of the Island), without the sanction of the Crown: but affirmed that, as in Great Britain the people could only be taxed, and laws could only be made, with their own consent, ex-[224]pressed through their representatives, the Commons House of Parliament, so in Jersey the inhabitants could not be taxed, nor could laws be enacted, without their concurrence, given by their representatives, the States of the Island; that, as a general principle, the exclusive legislative authority, competent to fix or change the municipal law of the Island, resided in the States, representing, by their three orders of Jurats, Clergy, and Constables, the whole community, as the propounding power, and in Her Majesty in Council as the Supreme governor and controller over them. And they submitted the following statement of their constitutional rights and privileges:—

"The States of Jersey have, from time immemorial, existed as a legislative body, and have been recognised as such by innumerable Charters and Orders in Council. It would not, indeed, be difficult to prove that, prior to the Conquest, the Dukes of Normandy neither possessed, nor claimed, the right to impose taxes upon the people, except through the Acts of the States, as appears by the following passage from the Commentaries on the *Coutume de Normandie*, by Godefroy, p. 278, Edit. 1626:—'*Forme Ancienne de lever les Impôts. Anciennement toutes levées de deniers fors le revenu du domaine ne se faisoient, que du consentement de Estats, dequoy les vestiges se remarquent encore en ceste Province (antiquae libertatis monumenta). Et à ceste cause s'appelloient aides, octrois, subventions, subsides, et non tailles, impôts, tributs, qui sont noms plus durs et odieux, dont l'Histoire de France fournit assez d'exemples.*' The same principles are to be found in the '*Chartre aux Normans*,' in the Commentaries upon the same *Coutume*, by Rouillé, fo. 25. But conceiving such an inquiry to be unnecessary, the state-[225]-ment is confined to what has been the constitution of Jersey in comparatively later ages, and especially to the existing powers of the different branches of the Island legislature: from the fact that the records of the Island, from destruction and other causes, only commence in the year 1520, and that a public registry was not established till 1601, it is impossible to trace the origin of the States as at present constituted; but it is clear that it is of very great antiquity. In a Royal Letter of the 6th of April, 1551, King Edward the Sixth addresses the States thus:—'*A nos bien aimez, le Bailiff, et Jurés, et autres les Estats de l'Isle de Jersey.*' And in the report made on the 3rd April, 1591, in the reign of Queen Elizabeth, by the Royal Commissioners, Pyne and Napper, it is said:—'*Que de tout temps dont il y a memoire du contraire, le Bailly et Jurets de la dite Isle ont eu Jurisdiction sur et concernant*

*toutes matières en justice, dans icelle ile, et pareillement ont manié les affaires de grande importance avec l'assistance du Commun Conseil nommé communément les Etats;*' and, by the Order in Council of the 2nd July, 1619, which resulted from the Report of the Royal Commissioners, Conway and Bird, the powers of the Assembly of the States, almost in their present extent, were distinctly recognised.

"It appears, moreover, from documents of the same period, that the States were then composed of the twelve Jurats, the twelve Ministers, or Rectors, and the twelve Constables; and they are at present constituted in like manner; the Jurats being elected by the whole body of ratepayers throughout the Island; the Rectors being appointed by the Governor, representing the Crown; and the twelve Constables elected [226] for three years, by the ratepayers of the twelve parishes, of which they are respectively the representatives. As regards the number of electors by whom the Jurats and Constables are chosen, every person possessed of property within the Island of the value of £40 may be assessed, consequently the number of persons entitled to vote is, as may be supposed, very considerable; and bears, probably, a much larger proportion to the number of inhabitants than would be the case in any town in England of the same numerical population.

"In the early periods of the history of Jersey, and prior to the Order of the 28th of March, 1771, hereinafter mentioned, the Royal Court, consisting of the Bailiff and twelve Jurats, sometimes even without the concurrence of the other constituent parts of the States, exercised to a certain extent a legislative power in the adoption of local political Ordinances and Regulations; but in all matters of great weight, and particularly whenever the Governor, Bailiff, and Jurats found it necessary to raise money, they were obliged to obtain the consent of the people on whom such money was to be raised, and then the Royal Court was assisted by the twelve Ministers and twelve Constables; but now the legislative power is exclusively vested in the whole Assembly of the States.

"By the Order in Council of the 28th of March, 1771 (already set forth in the petition of the States) (*ante* [9 Moo. P.C.], p. 191), which deprived the Royal Court of all authority to enact political or other Ordinances, the legislative powers of the States to originate and discuss all Laws for the government of the Island, were [227] clearly and finally defined and declared; and placed as it is at the head of the Code of Laws of 1771 then collected and agreed upon by the States and confirmed by His then Majesty, which Order had always been justly viewed by the inhabitants of Jersey as the bulwark of their ancient liberties. And it is observable that the Order in Council, and the Code confirmed by it, only purport to be declaratory of what the ancient privileges of the States had been from time immemorial, and of what the laws of the Island then consisted.

"Under this Order, provisional laws for three years have ever since (subject to the negative voice of the Governor, and the power of dissent of the Bailiff, hereinafter mentioned) been made by the States, such laws taking immediate effect, and not requiring either the previous or subsequent sanction of the Crown, but being only of a local and municipal character, and not concerning the interest or prerogative of the Crown, or touching the constitution, or any of the laws already in force in the Island.

"With regard to these provisional laws, if the Lieutenant-Governor shall consider any act as prejudicial to Her Majesty's service, or, if the Bailiff, the President of the States, shall conceive a proposition to concern Her Majesty's interest or prerogative, or the constitution, or laws of the country, the one has power to negative (5th Ordinance of the Royal Commissioners, of the 3rd of April, 1591, and the Order in Council, 2nd of July, 1619), and the other to place his dissent upon (Order of the 2nd of June, 1786) any such act or proposition. No permanent laws intended to be passed by the States have any immediate effect, until the Royal assent has been [228] first obtained; and to carry out this object, every permanent Act invariably contains some clause of a conditional nature, *e.g.*: '*Moyennant la sanction de Sa très Excellente Majesté en Conseil*,' or words to the like effect. That with regard to permanent laws, the negative voice or dissent is not exercised or required, as such laws are, in their very terms, not effectual until the sanction of the Crown itself is given thereto. Thus it appears, that the power of the States to originate and enact laws, is surrounded by every possible safeguard.



By a provision also in the Code annexed to the Order of 1771, no Orders in Council can be executed in Jersey before they have been presented to the Royal Court for registration and publication, which Court has thereby the power to suspend the registration of such Order, Warrant, etc., emanating from the Sovereign, as they may deem to be contrary to the Charters and privileges of, or burdensome upon, the Island, until the case has been represented to Her Majesty, and Her Majesty's pleasure known thereon. Again, all Acts of the Imperial Parliament, by which the Island of Jersey is named, must be in like manner registered and published in the Island. By these means a system of mutual checks is established; upon the States, by the negative voice of the Lieutenant-Governor, and the power of dissent in the Bailiff; and upon the Crown, by the power of the Royal Court to suspend the registration of any measures deemed prejudicial to the constitutional rights of the people. So entirely has this right of the States to originate laws, that are to operate within the Island, been recognised, that, on frequent occasions, when it has been thought by Her Majesty's Govern-[229]-ment to be expedient that the provisions of an Act of Parliament, wherein the Island has not been expressly named, should be extended to the Island, Her Majesty in Council, so far from insisting upon the registration of such an Act by a compulsory Order, or passing imperative Orders in Council, embodying its provisions, has invited and recommended to the States to legislate upon the basis of the Act of Parliament, and, if the States have seen occasion to vary the terms of such Act, in order to render the provisions in unison with the laws and institutions of the Island, no objection has ever been raised to their doing so. And, where objections have occurred to Her Majesty's Privy Council to laws so adopted by the States, and transmitted for the Royal sanction, Her Majesty in Council has not thought fit to amend such laws, or by an Order in Council to re-enact them, without a reference to the States; but the laws have invariably been sent back, with suggestions from Her Majesty's Privy Council, to be reconsidered by the States, and thus the free legislative action of the States has been preserved unimpaired. Instances are not wanting where, eventually, modifications adopted by the States, though not in conformity with the recommendations of their Lordships, have received the sanction of Her Majesty in Council.

Although the States consider that the sole right of legislation in the States has been finally settled by the Order of the 28th of March, 1771, yet, as the right of the Crown to tax the inhabitants of Jersey, without their concurrence, has been broadly asserted in a petition hereafter to be alluded to, the States deem it proper to make some observations in respect to local taxation in the earlier periods of the history of [230] the Island. The States would observe that while one of the most important privileges of this Island is, that of not being subject to be taxed by the Imperial Parliament, in which it is unrepresented, it has always been understood that no tax can be imposed upon the people of Jersey, except with the consent of the States, by whom they are represented. This is sufficiently shown by the passage from the 'History of Jersey,' published by the Rev. Philip Falle, in the year 1694, already cited (*ante*, [9 Moo. P.C.], p. 190). That after a diligent search of the Records of the Island, it would seem, that at different periods previous to the year 1771, the States passed numerous Acts, raising money for public purposes, upon the people, even without the sanction of the Sovereign in Council. Of this nature are laws and Ordinances for the immediate defence of the Island, for the usual and ordinary exigencies which the maintenance of the poor, and the particular interests of the Island, may have rendered absolutely necessary. And even after the year 1771, the States, under an erroneous construction of the Order of the 28th of March in that year, endeavoured to levy taxes and duties, and pass other laws, without the sanction of the Crown; but such Acts were directed by the Privy Council to be erased from the Records, as by the Orders in Council of the 20th of April, 1774, and the 2nd of June, 1786, appear. But it is evident, from the same Records, that the Crown never assumed the right to tax the inhabitants of Jersey without their concurrence. It would not, indeed, be matter of wonder if, during the centuries which have elapsed since the conquest of England [231] and the many disturbed passages in our history, instances could be quoted of Orders in Council appearing to emanate directly from the Sovereign, without the concurrence of the States. But that in truth the States can fearlessly assert, that there is upon record no instance, as regards Jersey, where the inhabitants have been taxed, unless with the previous

consent of the States; nor are they aware of the existence of any one law, of a purely local nature, which has not first received their sanction.

"In the petitions presented in favour of the Orders in Council of the 11th of February, 1852, or against the recent Acts of the State, there are certain Orders, letters, and documents, which, it is alleged, establish that right to the Crown. In the first place, it is worthy of remark, that almost all those Orders, etc., were of a period anterior to the Order and Code of 1771. Some of them will, upon a careful examination, be found to relate to the practice of the Royal Court, especially in criminal matters, and to be rather declarations of the law by the Court of *Dernier ressort*, than Orders promulgating new laws; and, moreover, to have issued, in consequence of petitions to the Privy Council from the States of the Island. Others, as those of the 17th of April, 1597, and the 11th of July, 1599, are mere letters of recommendation to the States, at their discretion, to raise taxes through the exercise of their own legislative powers, for the erection and repair of forts and other buildings, and the like. Other Orders will be found to have been made upon the petition of the officers of the Court, for the regulation of their fees. Others, again, will be found to have issued from the Star Chamber. In regard to the Order of the 17th of [232] December, 1679, by which the exaction by a Governor of a duty of 5s. a ton on French vessels trading in Jersey, was supported, although it had been set aside, as being contrary to the privileges of the Island, by a previous Order in Council of the 21st of May, in the same year, the States observe that such levy was contrary to the ancient charters of all the Sovereigns from Richard II. to Queen Elizabeth, by which Charters all vessels, whether foreign or not, are exempted from customs dues; and also contrary to the Charter of James II., which was in the same terms as that of Queen Elizabeth, and was granted a few years after, in 1685 (Falle's Jersey, by Durell, p. 459); and to all subsequent Charters and usages; which were freely acknowledged in a report of a Select Committee of the House of Commons on the Channel Islands' Corn Trade, ordered to be printed on the 17th of June, 1835. There is, however, no trace to be found in the Records of the Island whether any such tonnage duties were ever in fact raised, and at all events it is believed that the levy of such duties continued but for a very short period. But that, even in the case of the Order of the 17th of December, 1679, the States, by an Act, bearing date the 31st of January, 1679, consented to the registry thereof only on the express ground that thereby the ancient privileges of the States were confirmed. And furthermore, the Order of the 21st of May, 1679, was expressly confirmed by the Code of Laws of 1771, and the 5s. tonnage duty was declared illegal (Falle's Jersey, p. 159 and 162). The letters patent in the Jersey Code of 1771, p. 96, have been also relied on, in support of the alleged right in the Crown; but these letters patent clearly, on their [233] face, appeared to have issued on the petition of the States themselves. An Order in Council, of the 28th of June, 1830, whereby a fine of £2 was to be inflicted on every member of the States for non-attendance, has also been set up as proving this right; but the States make the following remarks thereon. In accordance with an Act of the States of the 30th of July, 1830, that Assembly presented a petition to Her Majesty in Council, dated the 9th of October, 1830, praying the withdrawal of the Order of the 28th of June, 1830, as having been obtained without their knowledge or participation, and as being contrary to their privileges. In consequence of such petition, this Order in Council was never registered in the Island of Jersey, nor acted on, but was virtually withdrawn. Subsequently, upon a recommendation contained in a letter of the Under Secretary of State for the Home Department, dated the 25th of January, 1839, the States passed two Acts on the 13th of February and 14th of March of the same year, carrying out the objects of the Order in Council of the 28th of June, 1830; and this latter Act was confirmed by Her Majesty in Council, on the 2nd of May, 1839. That the Sovereign in Council could not, previously to 1771, make laws, without the concurrence of the States, receives additional confirmation from the mode of procedure usually adopted in the appointment of Royal Commissioners sent to inquire into the state of the laws. Sometimes those Commissions were issued merely to inquire and report, but occasionally the Commissioners had power also to concur in Acts of legislation: but, to show how entirely this was a delegation only of the authority of the Crown, and not intended to [234] supersede that of the States, the Commissioners were directed to have the advice



and assistance of the States, and accordingly, upon the arrival of the Royal Commissioners in the Island, the States have invariably been assembled, and the acts and proceedings of the Commissioners have been recorded in the books of that Assembly. Without producing other instances in support of this statement, the heading to the Report of the Commissioners Pyne and Napper, made in the reign of Queen Elizabeth, 3rd of April, 1591, before referred to, may be cited, which is in these words:—*Ordres, Loix, et Ordonnances concernant l'Île de Jersey, faites et établies pour l'avancement de l'honneur de Dieu, du service de Sa Majesté, et du bien et utilité publique, le troisième jour d'Avril, en l'an trente-troisième du règne de Notre Souveraine Dame Elizabeth, par Tertullian Pine, Docteur en Loix, et Robert Napper, Ecr., sur ce autorisez par Sa Majesté sous le Grande Sceau d'Angleterre, et aussi par le consentement d'Anthoyne Poulet, Ecr., Gouverneur de la dite Île de Jersey, et du Baillé, Jurez, et Etats d'icelle,* etc.

Bearing in mind these principles and privileges, which for so many centuries, by successive Sovereigns and their Privy Council, have been respected and confirmed, the States cannot but entertain the impression that Her Majesty in Council has been induced to give Her Royal sanction to the Orders of the 11th of February, 1852, under the supposition that the provisions of those Orders had previously been discussed and approved of by the States. And the States, therefore, respectfully urged the recal of the three Orders in Council of the 11th of February, 1852, by which the inhabitants of the Island would [235] be taxed, not only without their concurrence, but without even their knowledge or participation, and which are calculated to deprive the States, the legitimate representatives of the people of Jersey, of the right which they have hitherto exclusively enjoyed, to initiate and enact such laws as they may deem necessary to promote the happiness and welfare of the people.

That the first, and most numerously signed of the petitions, was from the rate-payers and householders of Jersey, and though concurring with the States in regarding the Orders in Council of the 11th of February, 1852, as unconstitutional, and tacitly assenting to the sufficiency of several of the measures of the States, prayed that the Royal sanction may be withheld from the two laws proposed by the States for establishing a Court for the recovery of Small Debts, and a Police Court. The States, however, firmly believing that the Acts which they have adopted will fully accomplish the objects professed to be desired by the Petitioners, without militating against the institutions of the Island, beg leave respectfully to urge the approval, by Her Majesty in Council, of all their Acts of the 10th, 16th, and 17th of August, 1852.

That the second of the petitions purports to come from persons styling themselves 'Your Memorialists,' without any other description; and though signed by persons who have likewise affixed their signatures to the first-mentioned Petition, seeks the registration of the three Orders in Council of the 11th of February, 1852, in order that they may become the law of Jersey, and prays the withholding of the Royal sanction from the Acts of the States.

[236] That without staying to notice the inconsistency of persons who pray in one petition the recal of the Orders as unconstitutional, and in another that the registration of the same Orders may be enforced, the States call attention to the fact, that, whilst the Petition soliciting the recal of the Orders has received several thousand signatures, that of the persons styling themselves 'Your Memorialists,' contains but forty-nine, of whom thirty-two are non-natives, who have little or no interest in the affairs of the Island; and of the seventeen natives, most of them live at a distance from St. Helier, and would not be called on to contribute at all, or very slightly, towards the expense of the changes proposed to be effected.

That the third of the petitions above referred to as having been presented to Her Majesty in Council, professes to come from persons styling themselves 'The undersigned merchants, bankers, tradesmen, and other inhabitants of St. Helier, in the Island of Jersey' (a misdescription of the Petitioners who signed it, as there is neither a merchant or banker among them). Although these Petitioners did not seek to be heard by Counsel in support of their representations, and the greater number of them have also signed the Petition objecting to the Orders as unconstitutional, the States deemed it incumbent on them to refer thereto."

The case of the States then proceeded to state that although they were willing

to rest their case on the unconstitutional nature of the three Orders in Council, yet they submitted that the Orders were not only unnecessary, but would, in their present state, be to a certain extent inoperative, create an unnecessary increase of expenditure, and were, moreover, not [237] sufficiently blended with the established institutions of the Island, and were rendered wholly unnecessary by the adoption of the six Acts passed, which they submitted had been carefully prepared with a view to supply adequate remedies at a much less costly rate than the Orders in Council, which introduced systems of procedure at once novel, and opposed to the habits and customs of the people. The case then entered into a minute comparison of the Acts with the Orders in Council, and in conclusion the States submitted, that the three Orders in Council ought to be recalled, and the six Acts of the States receive the Royal confirmation, for the following reasons:—

First. Because the Orders had been made without the consent of the States, and were contrary to the letter and spirit of the constitution of the Island.

Second. Because, if their legal validity could be maintained, they were of such a nature that it would be inconvenient and inexpedient to confirm and put them in force; and

Lastly. Because the States had by their Acts of the 10th, 16th, and 17th of August, 1852, made sufficient provision for the useful objects contemplated by the Orders, and those Acts were proper to be confirmed by Her Majesty in Council.

The States and the Petitioners also put in a joint Appendix, containing the Orders in Council complained of, and the Acts passed as substitutes by the States, and the following documents and authorities, illustrative of the Constitution and usages of the States of Jersey, which were referred to and relied on in the petitions and cases, and subsequently in the argument in support of them. These consisted of [238] Letter of Edw. III., 1351; articles 12, 15, 19, 20, and 24 of the Ordinances in the Charter of Hen. VII., of the 17th of June, 1495; extract from the Stat. 27 Hen. VIII., ch. 24; extracts from the Charter of Queen Elizabeth, of the 27th of June, 1561; from the Ordinances of Commissioners, dated 20th of October, 1562; from Orders and Laws of Sark, being articles 15 and 16, dated 24th of April, 1583; from the Rolls of the Royal Court of Jersey, the 22nd of January, 1587; from the Ordinances of the Commissioners Pyne and Napper, dated 3rd of April, 1591; also extracts of letters from the Council to the Bailiff and Jurats of the Isle of Jersey, dated respectively the 17th of April, 1597, and the 11th of July, 1599; also, extracts from an Order in Council, dated 27th of February, 1616; from the Patent of James I., dated 9th of August, 1616; from the Ordinance of James I., dated 14th of June, 1618; from Orders in Council, dated respectively, 15th of June, 1619; 2nd of July, 1619; 19th of July, 1619; 12th of June, 1635; 19th of May, 1671; 21st of May, 1679; and 17th of December, 1679; an Act of the States of Jersey for the registration of the last-named Order, dated the 31st of March, 1680; an Act of the States of Jersey for the levy of money for the expenses of a Commissioner, appointed by the States to act as their Deputy, made in pursuance of an Order in Council for that purpose, dated the 28th of August, 1690; an Order in Council, dated the 8th of April, 1731, removing the Lieut.-Governor, and reprimanding several members of the States; and an extract of a letter from the Royal Court of Jersey to the Lords of the Council, dated the 10th of January, 1737, which was to the following effect:—"My Lords, we never pre-[239]-tended to be vested with the power and authority of making laws; it is what neither we nor our predecessors before us ever assumed; but we beg leave to acquaint your Lordships that the Court hath always, as well by the nature of our Constitution as by virtue of sundry Charters from the Crown, and other express Orders in Council, deemed hereby authorised and empowered to make regulations, and such rules and regulations as were necessary for the enforcing and putting in due execution the laws of the Island." The Appendix also contained the Order in Council of the 28th of March, 1771, confirming the Jersey Code of laws of that date, and extract from that Code as set forth in the petition of the States and in the cases; an extract from an Order in Council, dated the 20th of April, 1774; an Act of the States of Jersey, of the 3rd of November, 1779, made in accordance with the last-mentioned Order, and the Order in Council of the 3rd of December, 1779, confirming such Act; extracts from the Orders in Council of the 2nd of June, 1786; 8th of August, 1787; and the 1st of October, 1790; from the Report in 1847 of Commissioners on the State of the



Criminal Law, p. 66; of the following protest of a minority of the States of Jersey, dated 1792, against an Act, because it "contravened the Constitution of the Island, requiring that the people should be deprived of one of their Jurats to fulfil the office of Lieutenant-Bailly, contrary to the Constitution of King John, which ordered that there must be a Bailly and twelve Jurats." Extracts from Orders in Council of the 23rd of May, 1816, and the 28th of June, 1830; from the minutes of the proceedings of the States of Jersey on the 30th of July, 1830; petition of the States of Jersey to the [240] Privy Council, dated the 9th of October, 1830; of the minutes of the proceedings of the States of Jersey of the 13th of February, and the 14th of March, 1839; and from the Report of a Committee of the House of Commons of the 17th of June, 1835; and of the Commissioners' second Report on the State of the Criminal Law in the Channel Islands (Guernsey).

In further support of their petition and case, and in addition to the documents contained in the Appendix, the States put in the following extracts from various Authors, with translations (the English translations relied on are printed here).

Merlin, vol. xviii. s. 1, p. 373:—"To whom belongs the power of making laws? The mode of exercising that power.

"Under the two first races of our Kings, the legislative power resided in a body which was presided over by the King, and composed of Prelates and Dukes, or Counts, since called Lords. This was a remnant of German usages.

"These usages were preserved among the Franks after the conquest of the Gauls. We see that since the time of Clovis, A.D. 481, the nobles of the Kingdom assembled every year in a field which was afterwards called the '*Champ de Mars*,' because these Diets were held in the month of March. These assemblies had several objects, etc.

"At the head of the laws of the Germans, we read that they were reduced to writing in the time of Clotaire, A.D. 558, by that King; 30 Bishops, 34 Dukes, 70 Counts, and the rest of the people.

"Childebert, A.D. 511, in a decree regulating justice and the general police of the Kingdom, said that he [241] had made these Constitutions with the nobles of the State, '*Una cum nostris optimatibus pertractavimus*,' and that these things had been regulated by him and the great vassals.

Clotaire II., in an edict A.D. 615, declared that that law had been deliberated upon and passed by him, the bishops, the nobles, the *principaux* lords of the nation, and the faithful or vassals of the Crown, etc.

"The King himself was, for his private actions, subject to the decisions of the Diet, etc.

"Under the second race of Kings, A.D. 751 to 986, the General Assemblies, which had been interrupted by the tyranny of some of the Mayors of the palace, were re-established. They began under Pepin le Bref, and were held in the month of May, and for this reason named the Assemblies of the month of May.

"Charlemagne, although so powerful, did not hesitate to continue them. It was there he made those celebrated Ordinances called Capitularies, because they had been made in these Assemblies or General Chapters of the nobles of the kingdom."

P. 375. "It was well conceived thereby that the King could not then order anything of himself in the territories of his vassals, only he held for them the General Assemblies or plenary Courts, where the peers or barons sat with him."

Loyseau. *Traité des Seigneuries*, ch. iii. s. 43:—"And in truth it is very certain that anciently in France taxes and other subsidies were not usual and perpetual as they are at present, but they were levied only with the consent of the people, and so long as the necessity continued. Therefore, the principal [242] cause for assembling the States was to have their consent to some new levy; and even then it was the people who elected those who were to levy these subsidies and aids (so they called them, because the people voluntarily aided and succoured the King in his necessity); and for this cause they still call 'Elected' those who make the levies in each province," etc.

D'Aguesseau, by Pardessus, vol. ii. p. 4:—"Without wishing to go back to the first race of our Kings, A.D. 751 to 986, whose forms and usages are not sufficiently known to us perfectly to instruct us upon this point, it is certain that, in the second, all the laws which remain to us appear to have been proposed, discussed, and adopted

in those solemn Assemblies, where the Bishops and the Nobles concurred with the King to form rules of public order or of ecclesiastical and secular duty, which were to be observed in the kingdom.

"These Assemblies held the place of Parliaments, or rather of General States of the kingdom; and there was not then a tribunal to which the ordinances and the statutes which were approved there could be addressed. We may regard these Assemblies as the Councils of the French nation, where the law was published in the presence of those very persons who had passed it, and where legislation and the promulgation of the laws were united.

"Each Bishop, Duke, or Count took away a copy which he apparently had published in his own territory, and whereof he enforced the execution, as also those called *missi dominici*, whose functions are now exercised, at least in part, by the Intendants.

[243] "It would, therefore, be very difficult, not to say impossible, to compare such a custom with what was adopted after the cessation of those General Assemblies, and since the establishment of the tribunals which have been called Parliaments, after the example of those which were formerly held in the *Champ de Mars*, although their authority was subject to it. The only general consequence that can be deduced from this form of legislation, which took place under our second race of Kings, is, that it has always been thought in this kingdom, that how great soever might be the authority of the King, the laws which interest the whole State could not so depend upon the will of one individual, that they should not be examined by those who have the greatest part or interest in their execution, and who are charged to watch over the maintenance of public order. The old Parliaments were like the General Council of the nation, whose advice the Kings almost always took and followed in whatever concerned legislation. Did they diminish thereby the authority of their laws, or did they strengthen them, on the contrary, by the concurrence of the suffrages of those who were to see them observed? This is a question which we will hereafter examine; but it is quite certain that our Kings took the latter course, that of consulting the Parliament before making any law. To admit them into the secret deliberations and the Privy Council of the Legislator was no doubt something more than permitting them to lodge complaints against the inconveniences of the law before its registry.

"The Kings of the third race, A.D. 987 to 1328, at first followed nearly the same form of government as those of the second, so far as concerns legislation.

[244] "We find several of their Ordinances which appear to have been made by the Council of their Barons or Peers, with the great officers of the Crown. And the Baillies and Senechals having succeeded in a great part to the functions of the ancient Dukes and Counts, it was the custom, during a long period, to address to them directly the laws that the Kings had made by the advice of the principal persons of their kingdom.

"We can scarcely doubt that when the Parliaments, which were then convoked once or twice a year, were assembled, the King did them the honour to consult them respecting the new laws which he thought it expedient to make. And we find proofs of this custom, not only in the time when each Parliament was specially convoked, but even since they were made permanent in the reign of Philip le Bel, and that of Philip de Valois."

*Le Grand Coustumier. Prologue premier.* "And, therefore, because the laws and ordinances which the Princes of Normandy established by their great wisdom, and with the advice of the prelates and nobles, and other wise men, which were not yet defined in regular Courts, but were defective through various readings, so that no memory was held of the ancient ones; but they were, as it were, forgotten; I shall endeavour, for the common good, to set them down, and, by the help of God, to explain them, and if I cannot do all, I shall do something," etc.

*Dictionnaire de Droit Norman, by Houard, Avocat en Parlement, etc.* Vol. ii. pp. 170, 1, 2:—"The estates under the Dukes have been general or par-[245]-ticular according to circumstances; that is to say, the Assemblies were composed of all the orders of England and of Normandy, or else of a single Province of the one of those two Sovereignties, as the matter might interest either the whole dominion



of the Dukes, who were at the same time Kings of Great Britain, or simply a portion of the Provinces under their dominion.

"The most ancient of their General Assemblies whereof any acts remain, is that which was held at Caen, in 1042, under William the Bastard; *la trêve de Dieu* led to it.

"Rollo, the first Duke of Normandy, wished to obviate this abuse, and not having been able to remedy it as promptly and efficaciously as he desired, the abuse subsisted until William the Bastard took the reins of government. He assembled the States, and the only remains of their deliberations is the law of the Clergy, which may be found in the collection of the Councils of Normandy by Dom Bessin, by which the Lords, as well as private persons, were forbidden to undertake any private war from the first day of Advent until the eighth of the Epiphany, during Lent, and in the interval of the Rogation days of Whitsuntide.

"In 1061, the same prince held the Estates at Caen, to repress the licence of the Abbots and other prelates, to regulate the hour at which every citizen was with his family to retire at night, and to prevent nocturnal robberies which were committed with impunity.

"The Estates were again assembled at Lillebonne, in 1066, and to the great men of the State, to the Bishops, Counts, and Barons, were added persons of [246] the laity distinguished by their prudence and sagacity. The question deliberated upon was the conquest of England. It was of this General Assembly that Orderic Vital speaks (Book IV. p. 527), and in which the Normans were exhorted by their Duke to live together in concord during his absence, and the Bishops to induce or bring back the faithful to the observance of the holy canons.

"In 1080, the General Assembly of the Estates of Normandy was convoked at the same place. It appears that it was principally engaged in preserving to the clergy the privileges of their churches.

"We find no further memorials of the Estates convoked in Normandy and in England before the year 1094, etc.

"The Bishops, the Abbots, and all the principal inhabitants of the kingdom, assisted at those Estates; *res ad episcoporum abbatum cunctorumque regni principum, id est, magni Concilii definitionem, commendatur.*

"The Estates were again assembled in 1101, to deliberate if the King should marry Matilda, daughter of Malcolm II., King of Scotland, who, during some time had worn the veil in a monastery; upon which question it was declared that the Princess, not having taken any vows, was at liberty to contract marriage. There is no mention but of the presence of the clergy and nobles in that General Assembly. But in the Acts of that of 1107, held on the subject of the dispute about investitures, upon which occasion the pastors of churches in Normandy and of those in England had been interdicted, we read that the Bishops, Abbots, Counts, Barons, *optimates et proceres*, assisted therein. These last names could not [247] certainly be applicable to any but to the most important persons of the various bodies of the State, over whom the Counts and Barons did not immediately preside. Now, there are no degrees inferior to those dignities except Centeniers, Deans, Aldermen, Sheriffs, Mayors, or notables of towns and freeholds, that is to say, the chiefs of the freemen; whence it is natural to infer that, under the expression *regni principes*, employed in the General Assembly of 1094, they were included, as also the Counts and the Barons, as being all, each in their respective orders, the principal subjects of the kingdom, *regni principes*.

"It was, he says, a custom among the French, that their Kings, on ascending the throne, should convoke an Assembly which they called a Parliament, in order that if there were anything to repeal, or to add to the ancient laws, that should not be done on their own authority without having taken advice.

"In the course of their reign, these Sovereigns held similar Assemblies in such place and at such time as he pleased to name. When they discussed any matters which interested both the nobles and the people, in order that every one might have the same liberty of speech, they were divided into two chambers, the King, the Bishops, and the Princes,—the Abbots sat in one, and the representatives of the people in the other; these latter elected a man of weight from among them called Speaker, who proposed the matters to be discussed, collected the opinions, and

reported to the order of the clergy and nobility what his own order had decided. But nothing could be considered as determined unless the majority of the two Chambers adopted it, and the King confirmed their deliberation. This custom, adds Vergile, was [248] that which was adopted in England when Henry I. quarrelled with Louis le Gros. This statement not being contradicted by any of the records or memorials which remain of the Parliaments or Estates held either in France, in the Duchy of Normandy, or in England, in the twelfth century; we must, therefore, consider as an incontestable point that from thenceforth the Third Estate, '*Tiers Etat*,' had the right of sitting and voting in the National Assemblies. Thus, also, when Henry II., in 1155, granted the Great Charter to his subjects, it was addressed not only to the Bishops, Abbots, Counts, and Barons, but likewise to all the faithful, *Fidèles*.

"Normandy having in 1204 come again under the domination of France, our Kings preserved the use of General Assemblies. Immediately after this reunion of our Province to the dominion of the Crown, Philip Augustus convoked the Bishops and the great Lords of Normandy with those of the other parts of France. But independently of the Estates of the kingdom to which he called them, he allowed them to assemble among themselves to deliberate upon the particular customs of the province.

"It was in one of those Assemblies that, in 1205, the Norman customs were recorded upon the oath of the Barons in this form," etc.

Godefroi, p. 284:—"Now, the States of the Duchy, fearing that the current money might be altered and weakened, had made an agreement with their first dukes that it should remain in its full value, and for that purpose they bound themselves to pay the Duke every three years one half-penny for every hearth, which the *costumier* calls *moneyage*, or hearth-money."

[249] The ratepayers and householders of the Island of Jersey also put in a case in support of their petition, which alleged that the inhabitants of Jersey had for a long time past experienced a very great necessity for a reform in the judicial institutions of that Island, calculated to ensure to them a less costly, and, above all, a more expeditious system for the administration of justice; which want had arisen in a great measure from the large increase of the population of the Island, which had nearly trebled itself within the last half century.

They set out a brief sketch of the constitution of the Royal Court, and of its mode of procedure, to demonstrate the inefficiency of that institution to meet the wants of the community, or effectually to deal with the large amount of business with which, from the variety and complexity of the interests arising out of the present state of the Island, it is necessarily burdened. The Petitioners affirmed that in their opposition to the registration of the three Orders in Council, the States had met with the sympathy and hearty concurrence of the great mass of the inhabitants of the Island, who, while aware of the benefit which would probably result from many of the provisions contained therein, were particularly averse to the mode in which those benefits were to be conferred; a mode which, they submitted, was subversive of one of the greatest and most cherished of the privileges with which the favour of successive sovereigns had rewarded their loyalty and fidelity, viz. the right of self-government. But that whilst unwilling to accept even a beneficial change at the expense of what they submitted was a constitutional right, the people of Jersey were equally solicitous [250] that the wants, for which they had sought a remedy in vain, should be supplied, and that the abuses from which they had so long suffered, and against which they had so often, though ineffectually, complained to the authorities of the Island, should be redressed. That the people of Jersey had looked to the States to award them this redress, hoping that that body, awakening to a sense of its duty, and of the necessity of satisfying the wants and wishes of the people, would grant those reforms, which it had hitherto so pertinaciously refused. That they had been most grievously disappointed in this expectation, and the modifications in the judicial and police system, as introduced by the six Acts already alluded to, combined with the ungracious and reluctant manner in which these slight concessions had been made, had failed to satisfy the people: and that this dissatisfaction was expressed at numerous meetings of the electors,



ratepayers, and householders of the whole Island, and was embodied in resolutions which were there set forth: and, in conclusion, they submitted, that the points to which they particularly desired humbly to direct their Lordships' attention were the following:—

First. The imperative necessity of establishing a small debts Court, and a tribunal for the repression of petty offences, in the Island of Jersey.

Second. The very general and decided wish of the inhabitants of the Island, that these Courts should be totally distinct from the Royal Court, and that the Judge or Judges and other functionaries employed therein should be remunerated by means of fixed salaries, and not by fees, as is the practice in the Royal Court, and recommended in the Acts of the States.

[251] Third. The aversion of the people of Jersey to the mode in which the three Orders in Council had been obtained and promulgated.—The dissatisfaction which the confirmation of these Orders would cause, with very few exceptions, among the natives particularly.—Their extreme attachment to the course which for a very long period had been uniformly followed, of allowing all legislative enactments, and particularly such as modify the constitution and particular laws and customs of the Island, to originate with the States.—The defective and incomplete provisions contained in these Orders, and particularly the objectionable nature of the tariff of the expenses, which appeared to be unreasonably high.

Fourth. The insufficiency of the Acts of the States to meet the wants and wishes of the people. The impropriety of making the new Courts created by two of these Acts, in some measure a dependency of the Royal Court, by selecting the Judge and Advocates from that tribunal. The disadvantage of paying the Judge and officers of the small debts Court by means of fees, a mode which would hereafter prove an obstacle to reform, and particularly to a reduction of the expenses, should such a measure be found necessary or advantageous.—The impolicy of making the Bailly, Lieutenant-Bailly, or one of the Jurats, fulfil the office and duties of Judge of the new Civil and Criminal Courts, such a course being calculated to impair the efficiency of the Royal Court, and, therefore, to nullify in a great measure the advantages which the creation of the other Courts was intended to produce; because, while the Bailly was administering justice in the inferior Courts, the Royal Court could not sit; and if a Jurat was appointed as Judge, the latter tribunal [252] would necessarily be deprived of one of the most able and experienced of its members, to the detriment of the suitors there: moreover, in many instances the full Court, or Court of appeal, would probably be prevented from acting, since even at the present time, with the full complement of Judges in office, it frequently happened that through the sickness, infirmities, or absence from the Island of several of them, a sufficient number of them could not be brought together for the purpose. The imperfect nature of many of the articles of the Acts, the absurdity and injustice of others, and their general inadequacy to attain the object in view. The extension of the jurisdiction of the Court for the recovery of small debts to all cases where the sum claimed did not exceed £15, including arrears of ground-rents when the rent itself is not in dispute, parish rates, tithes, bonds, dowers, and annuities.

Fifth. The anxious desire of the people of Jersey that Her Majesty in Council might be graciously pleased, while rejecting the above-mentioned Acts of the States, not to insist on the registration of the Orders adverted to, but to refer back the subject to the States for reconsideration, in conformity with the practice hitherto adopted by Her Majesty's predecessors, of permitting all legislative measures connected with the Island to proceed from the people themselves as represented by the States, but at the same time to issue Her Royal recommendation to that Assembly to prepare and send up without delay, for examination and approval, enactments consonant to the wishes of the inhabitants, establishing a Court or Courts for the recovery of small claims and demands, and for the repression of petty offences, and the preliminary exa-[253]mination of accused persons, the Judge or Judges, and other officers of such Courts, to be paid by fixed salaries, and not through the medium of fees.

The case put in by the forty-nine Petitioners, in support of their petition, affirmed that the States had acted in an illegal and unconstitutional course, in refusing to register the Orders in Council, so as to give them the force of law in the

Island; that they registered them only provisionally, which had the effect of suspending the operation of the Orders; and, then by treating them as inoperative, proceeded themselves to pass certain Acts, subject to the approval of the Queen in Council, relating generally to the same matters to which the Orders in Council applied.

And, in answer to the petition of the States, they alleged that although the States merely prayed for a recal of the Orders in Council, so that they might be at liberty to adopt certain legislative measures, they in effect denied the right of the Queen in Council to issue any such Orders, or any Orders in Council at all in the nature of laws for the government of the Island of Jersey, which had not first originated with the States, and been afterwards submitted to the Queen in Council for Her Royal sanction. That they thus sought to constitute themselves the sole judges of what legislative measures ought to be initiated, and to limit the authority of the Crown to a mere approval or disapproval of such measures as should from time to time be submitted by the States to its consideration, and the Petitioners submitted that this was not in accordance with the constitutional law of Jersey. They contended that the States had no legislative power or functions in the proper sense of the word; and al-[254]-though it might be admitted that the States had the power of originating certain provisional laws or Ordinances which possess permanent authority only when they have received the sanction of the Queen in Council, yet the Petitioners denied that the States had even in such matters more than a concurrent right with the Crown, and they contended that in all cases the Crown has the power, although in some it may not have the exclusive power, of originating legislative measures for the Island of Jersey. They further contended that when the Crown exercised the power or right, and issued an Order in Council, in the nature of a legislative enactment applicable to Jersey, it is the duty of the States to register such Order, and that they cannot lawfully refuse so to do. In support of their case, and to show the long course of precedent and usage on the subject, they referred to various documents; and quoted the following passage from the Report of the Commissioners appointed by Her Majesty to inquire into the Criminal laws in force in the Channel Islands, which Report was presented to both Houses of Parliament in the year 1847, and which was as follows:—"By the Norman law the Duke had supreme legislative power. The form which this authority now assumes, is that of the Orders of your Majesty in Privy Council; and this has been the course for several centuries. The Orders in Privy Council are registered by the Royal Court, and are not binding as law until such registration has taken place. This is so settled by an article in the Code of 1771. The Orders in Council always now contain a specific command that they shall be registered. It is however declared by the same Code that it is competent to the Royal Court, in any case where the Order ap-[255]-pears to be contrary to the charters and privileges of the Island, or burthensome (*onéreux*), to suspend the registration until the pleasure of the Crown be further taken; though if the Crown does not withdraw the Order it must be registered." That the Order by the King in Council of the 28th of March, 1771, quoted by the States in their case, which enacted, "That no Laws or Ordinances which may be made provisionally, or in view of being afterwards assented to by His Majesty in Council, shall be passed but by the whole Assembly of the States of the said Island, and with respect to such provisional Laws and Ordinances so passed by them, that none shall be put or remain in force for any longer time than three years, but that the same upon its being represented by the States to His Majesty, that they are found by experience to be useful and expedient to be continued, shall, having first obtained His Majesty's royal sanction, and not till then, be inserted and become part of the Code of the political laws of the said Island;" and contended by the States as expressly recognising and confirming their power "to originate and discuss all laws intended to be made for the government of the Island before receiving the Royal sanction;" the Petitioners submitted, admitted of no such inference. That assuming that some Laws or Ordinances of a provisional nature may originate with the States, it enacts that even these shall only have a temporary force for a period not exceeding three years, and must obtain the Royal sanction before they become part of the Code of the Island. That the right to make temporary regulations was very different from the right to make permanent laws. The former,



as they the petitioners contended, were within the province of the States, but not the latter, which [256] ought, according to immemorial usage, to emanate in the first instance from the Crown, in the shape of Orders in Council, and have a binding effect given to them by being registered by the States. That the true nature of so-called legislative power of the States was described in the work by Dr. Shebbeare, on the Laws and Constitution of Jersey, who lays it down that "The States may make occasional Ordinances and temporary Acts for the raising of small sums of money for their common utility, and they may enact orders for the suppression of immorality and irreligion; for prohibiting whatever may prove injurious to the Commonwealth in matters of inferior moment; for the support of the poor, the preservation and repair of the high roads, and other insular concerns of a similar kind. But they are not authorised to enact Ordinances which may touch the King's prerogative, nor the rights, privileges, and properties of their fellow subjects, or such as derogate or deviate from the Norman laws, as they are delivered and explained by Rouille and Terrien, nor the Orders of the Queen in Council transmitted to that Isle. Every act, therefore, which is repugnant to anything contained in those jurisprudential writers, to the Orders in Council, or to their ancient customs, unless it be confirmed by the authority of Her Majesty, is still-born, and, though it bear the form of a legislative institute, is void of animation and activity." And, that in Falle's account of the Island of Jersey, which is quoted as an authority by the States, that author, speaking of the Channel Islands, says:—"In short these Islands are properly a peculiar of the Crown of England; and as in England the Legislature is the Sovereign with his two Houses of Parliament, so here 'tis the same Sovereign with his [257] most honourable Privy Council." And immediately following the very passage of the same author, cited by the States in their favour, occurs the following:—"Nor have the States a power of themselves to create new subsidies or imposts, but only upon extraordinary emergencies, when the safety and defence of the Island requires it, or application must be made to the King by persons sent over at the public charges, to levy what they judge sufficient for these purposes, by fixed and equal proportions, according to the ancient rate."

The Petitioners then proceeded at considerable length to observe on the constitution granted by King John, by which the present Royal Court and the Jurats are created, and examined, the comparative merits of the Orders in Council, and the Acts passed by the States to supersede and in lieu of the Orders passed by Her Majesty in Council, and in conclusion they submitted that the Bills proposed by the States fell short in their provisions of the Orders they were intended to supplant, and would do little to supply the wants or remedy the abuses which occasioned the issuing of those Orders. That they were, moreover, framed with such vagueness of language, and inaccuracy of expression, as would inevitably lead to great uncertainty and confusion in practice, and that they would, from their incompleteness, in a great measure, fail to effect even those objects for which they professed to have been passed: that even supposing that the Acts of the States were, if passed into laws, likely to be as beneficial and remedial as the Orders in Council, the Petitioners submitted that the result of cancelling or recalling the latter would be, not to give the people of Jersey the supposed benefit of the Acts, but to deprive them altogether of the reforms [258] which both the Orders in Council and the Acts of the States professed to contemplate. For that the States had not the power which they claimed, of originating those measures, and, if the Orders were recalled, the result would not follow which they mentioned in the prayer of their petition, namely, that they would be "at liberty to adopt such legislative measures as might be necessary and in harmony with the existing institutions of the Island;" but that the inhabitants of Jersey must wait until it should please Her Majesty to issue fresh Orders in Council, when, judging from the past conduct of the States, there was every reason to believe that they would refuse to register such Orders, and thus the inhabitants of Jersey would be for an indefinite period deprived of the benefits of reform which it had been the gracious intention of Her Majesty in Council to secure to them: that, in short, from the conduct of the States in this matter, it was clear to them the Petitioners, that that body contested Her Majesty's prerogative to issue Orders in Council for the Government of the Island of Jersey, according to what the Petitioners maintained was the undoubted right of the Crown, and that

the States wished to make all legislative measures originate with, and depend upon, themselves. The Petitioners, therefore, hoped that the prayer of the petition of the States might be rejected, and that Her Majesty in Council would be graciously pleased to issue Her peremptory order to the States to register forthwith the Orders in Council, bearing date the 11th of February, 1852, for the following amongst other reasons:—

First. Because it was the undoubted prerogative of the Queen in Council to issue Orders for the Government of Jersey, and it was the bounden duty of the [259] States to register such Orders, in order that they might acquire the force of law in that Island.

Second. Because the States of Jersey had not the power to originate such legislative measures as are embodied in the Acts alluded to in their petition, and such Acts, therefore, even if unobjectionable in themselves, must remain inoperative.

Third. Because the Orders in Council, dated the 11th of February, 1852, were much better adapted to effect the reforms admitted to be necessary, than the Acts of the States, which were wholly inadequate for that purpose.

Fourth. Because the wish of a large body of the most influential and disinterested inhabitants of Jersey was in favour of adopting the Orders in Council, in preference to the Acts of the States, and they were anxious that the Orders should be registered, and obtain the force of law.

Two other petitions were presented to Her Majesty, one by the Bailiff and Chief Magistrate of the Island of Jersey, praying for compensation for the loss of fees, which he would sustain if some of the proposed Acts of the States should become law; and another petition from the Greffier of the Royal Court of Jersey, to the like purpose and effect.

These petitions were also referred by the Crown to the Committee.

Sir Frederick Thesiger, Q.C., Mr. R. Palmer, Q.C., and Mr. Mackeson, appeared for The States.

Mr. Dryden, for the forty-nine Petitioners; and Mr. Collier, for the other Petitioners, the ratepayers and householders of the Island.

[260] The question of the legality of these Orders was, in the first instance, directed to be argued.

Sir Frederick Thesiger, Q.C., and Mr. R. Palmer, Q.C., were thereupon heard on behalf of the States; and Mr. Dryden, on behalf of the forty-nine Petitioners.

The States contended, that by the constitution of the Island of Jersey they were a legislative body, and that the assumption of the Crown to make Orders in Council having the effect of law in the Island, without their concurrence, was an infringement of their privileges and subversive of their rights; as the Crown had no such absolute legislative power, and could only make laws or impose taxes with the consent of the inhabitants represented by the States in their Assembly, from whom such laws emanated in the first instance; and they argued, that as Jersey was never conquered nor colonized by England, Jersey being originally part of the Dukedom of Normandy, and annexed at the Conquest by William to England, the Sovereigns of this country, if they ever possessed the sole power of legislating for the Island, had parted with that power upon the grant of the constitution by King John. Falle's "*History of Jersey*," p. 222 (Durell's Edit.); and, that the Crown could not afterwards exercise any absolute power over that constitution. *Campbell v. Hall* (2 Cowp. 204).

The Petitioners, the ratepayers and householders, supported this argument of The States.

The argument of the forty-nine Petitioners was, [261] that the States had no such exclusive rights of legislating as they claimed, and they submitted that the Crown alone had full power by force of the prerogative to make such Orders. They contended, also, that registration by the Royal Court was not necessary to give validity to the Orders in Council, the only object of such registration being to preserve a record and to give public notice of the making of them, that the people of the Island might conform thereto. Upon this point, Orders in Council of 21st May, and 17th December, 1679; Jersey Code, 1771; and Order in Council, 24th February, 1802, were referred to.

The principal authorities referred to on both sides respecting the constitutional



rights of the Crown, and the States, were those already stated and contained in the petitions, cases, and appendices. They also referred to Sismondi, "*Hist. des Français*," vol. ii. pp. 278-9, *ib.*, vol. iii. p. 218; Guizot, "*Essais sur l'Histoire de France*," pp. 219, 242, 244; Guizot, "*Histoire des Origines du Gouvernement représentatif en Europe*," vol. i. pp. 284-5; Guizot, "*Civilization en Europe*," p. 280; Guizot, "*Civilization en France*," vol. ii. p. 240, vol. iv. p. 190; Hallam, "*Hist. of Europe in the Middle Ages*," vol. i. pp. 243-4, 253 note (6th Edit.), *ib.* Supp. notes 167, 179; Houïard, "*Traité sur les Coutumes, Anglo-Normands*," vol. i. pp. 378, 384; Houïard, "*Dictionnaire de la Coutume de Normandie*," vol. ii., Art. "*États*," p. 170; "*Dudon de St. Quinton*," "*Duchesne*," pp. 84-5-6, 506; "*Concilia Rotomagensis Provinciae*," by Dominus Guillelmus Bessin, pp. 39, 48, 49, 67, 79, 80, 90; "*Orderic. Vital*," lib. iii., v., xi., xii.; Du Moulin's "*Hist. of Normandy*," pp. 83, 129, 147, 307, 403, 404, 416, 440; "*Le Grand Coutumier*," caps. x. [262] fo. 20, xi., xv. fo. 24, 25, xxiv. fo. 35, gloss, lv. fo. 77; Martin's "*Histoire de France*," vol. iv. pp. 559, 560; "Letter of King Edward III., A.D. 1351;" "Ordinances of King Henry VII., A.D. 1495," Arts. 8, 15, 28; Terrien, B. II., cap. vii.; Falle's "*History of Jersey*," pp. 157, 162-3; "*Le Geyt*," vol. iv. pp. 348, 355, 373, 391, 385-6, 388.

No judgment was pronounced, but the report made by their Lordships to Her Majesty in Council, dated the 3rd of December, 1853, after stating the nature of the reference, and the Orders, Acts, and Petitions, was to the following effect:—Their Lordships, in obedience to your Majesty's said Order of reference, did, on the 30th of November last, and on the 1st and 2nd of this instant, and on this day, take the said Petitions and Acts into consideration, and heard Counsel at great length, in respect of the allegations set forth in the said petitions, and, with respect to the Orders in Council of the 11th of February, 1852, although they appear to their Lordships in their main provisions well calculated to improve the administration of justice in Jersey, yet, as serious doubts exist whether the establishment of such provisions by your Majesty's prerogative without the assent of the States of Jersey is consistent with the constitutional rights of the Island, their Lordships have agreed to report their opinion to your Majesty, that it may be expedient for your Majesty to revoke the said Orders.

That as regards the Acts of the States, although they do not in all respects carry the provisions of the said Orders in Council into full effect, and though, with respect to the appointment of the Judge of the new Courts, it might in the opinion of their Lordships be an improvement of the Acts of the States if the ap-[263]-pointment of the Judge were vested in your Majesty, and such appointment were not confined necessarily to members of the Royal Court, yet as such Acts do to a considerable extent carry into effect substantially the provisions of the said Orders in Council, and the benefit thereby conferred on the Island may by further Acts of the States, with your Majesty's sanction, be extended, their Lordships humbly report their opinion to your Majesty, that it may be proper to give your Majesty's assent to the said Acts.

The above report of the Committee was confirmed by an Order in Council, dated the 29th of December, 1853, as follows:—"Her Majesty having taken the said report into consideration, is pleased, by and with the advice of Her Privy Council, to approve of what is therein proposed, and to recall and revoke the three Orders in Council of the 11th of February, 1852, and they are hereby by Her Majesty recalled and made null accordingly; and Her Majesty is hereby further pleased to declare Her approbation of the six Acts passed by the States of the Island of Jersey on the 16th and 17th of August, 1852, and to confirm and ratify the same, and they are hereby finally confirmed, enacted, and ratified accordingly. And Her Majesty is further hereby pleased to direct that this Order, together with the said six Acts, be entered upon the Registry of the Island of Jersey, and observed accordingly; and the Lieutenant-Governor or Commander-in-Chief for the time being of Her Majesty's Island of Jersey, the States, the Bailiff, and Jurats of the Royal Court, and all others Her Majesty's subjects within the Island of Jersey, are to take notice of Her Majesty's pleasure herein signified, and govern themselves accordingly."

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 13. *Jersey and Guernsey*; b. *Constitution*. S.C. with full annotation, in 8 St. Tr. (N.S.) 285.]

## [264] ON APPEAL FROM THE COURT OF CHANCERY AT JAMAICA.

HENRY TURNER,—*Appellant*; ALEXANDER BARCLAY,—*Respondent* \*  
[July 12, 1854].

A., by Bond, in consideration and contemplation of marriage, bound himself in a certain sum, for the purposes of his intended marriage settlement, to mortgage certain estates "and properties and the lands thereto belonging, and their respective appurtenances" in the Island of Jamaica, of which he was seised in fee, and to raise a certain sum by way of settlement. By a mortgage by way of settlement, in pursuance of such Bond, A. mortgaged, *inter alia*, the said estates and pennis, and appurtenances, and "all and every the cattle, stock, and plantation implements."

Held (reversing the decree of the Court of Chancery in Jamaica), that cattle and stock upon the estate and pennis were not included in the Bond, and that though the mortgage deed, made in pursuance of such Bond, was by way of marriage settlement, yet it could not enlarge the provisions of the Bond [9 Moo. P.C. 285].

Cattle and stock upon a plantation or penn in Jamaica, are, by the law of the Island, personal estate, and not affixed to the freehold [9 Moo. P.C. 285].

The cases of *Lushington v. Sewell* (1 Sim. 435), and *Stewart v. Garnett* (3 Sim. 398), observed upon, and distinguished as relating to devises by Will [9 Moo. P.C. 275, 276, 284].

This was an appeal from a judgment of the Vice-Chancellor of Jamaica, made on a cause petition, in the nature of an original Bill (under the Jamaica Act, 15th Vict., c. 16), presented by the Respondent, by which it was held, that the cattle and stock upon certain plantations and pennis of Thomas McNeel, in that Island, called New Galloway, Caledonia, and Petersville, were primarily charged with the sum of £5000 and interest, under a Bond to the [265] Respondent and the other trustees of the marriage settlement of McNeel, in preference to a mortgage of the Appellant, who claimed thereunder a prior charge upon the cattle and stock.

In the year 1842, a marriage was agreed upon, and afterwards solemnized, between McNeel and Bathia Barclay. At the time of the agreement for the marriage, McNeel was seised in fee simple of a plantation, or sugar estate, in the parish of Westmorland, in the Island, called New Galloway, subject to the residue unexpired of two several terms of 1000 years and 1500 years, then vested in William Kemble, in trust for McNeel and his heirs, and to attend the inheritance,—also of two pennis in the same parish, respectively called Caledonia and Petersville. Previously to, and in contemplation and consideration of, the intended marriage, McNeel, by his Bond, dated the 25th of January, 1842, became bound to the Respondent and William James Harvey, James Lawson, and John Ranken, therein described, in the sum of £10,000 sterling, to be paid to them, their executors, administrators, and assigns, in default of the condition thereafter written; and the Bond after reciting that upon the treaty for the intended marriage, McNeel, as a provision for his intended wife and the issue, if any, of the marriage, and in lieu and satisfaction of all dower to which his wife might otherwise become entitled out of his real estate, had agreed within a convenient time for such purpose, and in the manner thereafter provided, to secure the sum of £5000 sterling, with interest at 6 per centum, from the date of the celebration of the marriage, to be paid to the Respondent and to the other trustees upon such trusts, for the benefit of the intended wife and children of McNeel, as therein [266] particularly recited; it was further agreed by McNeel, "That the said principal sum and interest thereof, and all accumulations of interest thereof in his hands as aforesaid, shall be settled and further secured to the said trustees thereof, by a good and sufficient conveyance by way of mortgage, in fee-simple, free from incumbrances of certain estates and

\* Present: The Right Hon. Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. Lord Justice Turner, and the Right Hon. Sir John Patteson.



properties, in the parish of Westmorland aforesaid, whereof the said Thomas McNeel is now seised and possessed, that is to say: New Galloway estate, Caledonia penn, and Petersville penn, with all and every the lands thereunto respectively belonging, and their respective appurtenances, as the same are now held and possessed by the said Thomas McNeel, except only a portion of outlying lands (which the said Thomas McNeel is desirous of disposing of), consisting of 1000 acres, or thereabouts, of uncultivated land belonging to Petersville, and whereon no part of the works or buildings of the said plantation or penn are erected." And it was further agreed that such mortgage deed should contain all usual and proper covenants on the part of the said McNeel, his heirs, executors, and administrators, for a good title to and right to convey in mortgage the said premises, free from incumbrances, and for further assurance thereof, and for payment of the monies and interest intended to be thereby secured, and should contain all usual and proper powers and provisions for recovering and enforcing payment of the same, and also provisions for the appointment, in case of necessity, of new trustees, from time to time, in room of the present trustees, or any of them, and for exonerating the trustees from liability for each other, except for their respective wilful and negligent default, and all other proper and usual covenants, [267] powers, provisoes, and stipulations for giving full effect to the purposes thereof, according to the true intent and meaning, spirit and effect, of the Bond. And the condition of the Bond was, that it should be void if the intended marriage should not take effect, or, if the intended marriage should take effect, and McNeel, his heirs, executors, and administrators, should within six months from the date of the celebration of the said intended marriage or thereafter, when he should be thereunto duly required, execute and deliver unto the trustees, a good and sufficient deed of settlement by way of mortgage, to the effect thereinbefore contained, and to be settled and approved of in case of disagreement in the manner therein provided.

At the time of the execution of this Bond, M'Neel was absolutely possessed of about 14 head of cattle then upon the New Galloway plantation, of about 50 head of cattle upon the Caledonia penn, and of about 450 head of cattle also then upon the Petersville penn.

By an indenture, dated the 1st of July, 1846, made between M'Neel and Bathia his wife, of the first part, William Kemble, of the second part, the Appellant, of the third part, and George Symons Airey, therein described, of the fourth part, after reciting the seisin and possession of M'Neel to the above-named plantations and others, and further reciting that M'Neel was absolutely possessed of the cattle, plantation, utensils, and other live and dead stock, upon or belonging to the several plantations, penns, and hereditaments; and reciting also the Bond of M'Neel, and that he was indebted unto the Appellant in the sum of £2538 1s. 2d., and in order to secure [268] to him the payment thereof, and of all such further and other sums of money as thereafter mentioned (subject to the limitation thereafter contained), together with interest, he, M'Neel, had agreed to execute such mortgage of the plantations, penns, tenements, and hereditaments, thereafter described (subject and without prejudice as to the plantation or estate called Dean's Valley Dry Works, otherwise New Galloway), and the plantations or penns called respectively Caledonia and Petersville, to the sum of £5000 and interest charged or secured, or agreed to be charged or secured, under or by virtue of the recited Bond or obligation of M'Neel, so far as the same was intended for the benefit of Bathia M'Neel, and the children of them, M'Neel and Bathia his wife; it was witnessed that M'Neel and wife, in pursuance of the agreement, and in consideration of the debt of £2538 1s. 2d. thereby granted, bargained, sold, aliened, released, conveyed, and confirmed unto the Appellant, his heirs, executors, administrators, and assigns (according to the nature and legal quality of the same premises respectively); firstly, the plantation and sugar work, or estate, theretofore called Dean's Valley Dry Works, but then better known by the name of New Galloway, by the description therein contained, and all and singular the lands and hereditaments whatsoever then belonging to the plantation, or estate, or cultivated therewith, or considered as part thereof (subject and without prejudice to the sum of £5000, and interest secured, or agreed to be secured, as aforesaid, so far as such charge was for the benefit of Bathia M'Neel, and the children of her

marriage with M'Neel); secondly, the plantation, or estate, called Petersville, by the description therein contained (except the portions [269] of outlying lands, consisting of 1000 acres, or thereabouts, in and by the thereinbefore in part recited Bond or obligation reserved and excepted); and also the plantation called Caledonia, by the description therein contained, and all and singular the lands and hereditaments whatsoever belonging to the plantations or estates called Petersville and Caledonia (except the portion of outlying lands, parcel of Petersville, and thereinbefore excepted), or cultivated with, or considered as part of, the plantations, or either of them (subject and without prejudice, nevertheless, to the sum of £5000 and interest charged, or agreed to be charged thereon by such Bond or obligation of M'Neel, so far as the said sum was for the benefit of Bathia M'Neel, and the children of her marriage with M'Neel); thirdly, the other plantations, sugar work, and penns of M'Neel, therein particularly described, but not subject to the Bond or obligation, together with all houses and buildings whatsoever on the plantations, lands, and premises, or any of them. And also all ways and appurtenances whatsoever to the plantations, lands, hereditaments, and premises, or any of them, belonging, and all land and the cattle, stock, and plantation implements upon or belonging to or thereafter, during the subsistence of that security, to be placed upon the plantations and lands respectively, and subject to a proviso therein contained for redemption of the premises, on payment by M'Neel, his heirs, executors, or administrators, to the Appellant, his executors, administrators, or assigns, in manner and at the times therein mentioned, of the sum of £2538 1s. 2d. sterling, with interest at £5 per cent., and of all such other sum and sums as should thereafter become due from M'Neel, his [270] heirs, executors, or administrators, to the Appellant, his executors, administrators, or assigns (not exceeding in the whole, together with the sum of £2538 1s. 2d. already due, the sum of £15,000), with interest at the rate aforesaid on such further advances. And, by the same indenture, William Kemble, for the consideration and by the direction therein expressed, assigned to Airey the plantation or estate called New Galloway, for the residue of the terms of 1000 and 1500 years therein, but in trust for the Appellant, his executors, administrators, and assigns, and to attend the inheritance thereof. There was also contained a power of sale, which provided that in case of default in payment of the monies thereby secured to the Appellant, after twelve months' notice, or of the sum of £5000, and interest secured by the Bond to the Respondent, and the other trustees thereof after demand, it should be lawful for the Appellant to sell and dispose of the plantations and penns, lands, tenements, hereditaments, stock, effects, and premises thereby granted, assigned, and conveyed in the manner therein mentioned. And it was declared that the Appellant should stand possessed of the monies to arise from any sale or sales, and from any rents and profits of the mortgaged premises, to be received by him or them in the meantime, in trust, first, for reimbursement to the Appellant of the expenses incurred by him; secondly, to pay and satisfy thereout to the Respondent, and the trustees for the time being of the Bond, the sum of £5000, thereby secured and charged, or agreed to be charged, on the plantations and hereditaments, firstly and secondly thereinbefore described, and the interest due, and to grow due thereon, or so much of the same principal and interest monies [271] as should be then due and unpaid, together with all costs and expenses (if any) attending the non-payment thereof, with the following proviso:—"yet so that the same last-mentioned plantations and hereditaments shall not be rendered further or more extensively liable thereto than the same were immediately before the execution of these presents, and the principal sum of £5000, and interest, shall be discharged, as aforesaid, only in case the plantations and hereditaments, on which the same stand, or by the Bond are agreed to be secured, shall be actually sold under the aforesaid trust for sale, and so far only as the monies arising from such sale shall actually extend to discharge the same, and so that nothing herein contained shall preclude Turner, his heirs, executors, administrators, or assigns, if he or they shall think fit, from disposing of the last-mentioned plantations and hereditaments, subject to the said sum of £5000 and interest." And in the next place, in payment to the Appellant, his executors, administrators, or assigns, of the principal monies and interest intended to be by the mortgage secured to him and them, and any surplus to be accounted for, and paid over to M'Neel, his heirs, executors,



administrators, or assigns. The deed also contained covenants on the part of M'Neel for title.

In the month of April, 1848, the Appellant, under the above mortgage, entered upon, and took possession of, the plantations and pennis, and the cattle and stock upon the same respectively, and had since continued in such possession, and in the receipt and perception of the rents and profits, crops and produce, of the premises respectively. The Respondent, in September, 1852, caused a written notice to be served upon the [272] Appellant, either to pay to the Respondent, upon the trusts, and for the purposes of the Bond, the principal money and interest due and owing thereunder, or to account for, and pay over to the Respondent as the acting and only surviving trustee in Jamaica of the Bond, the clear proceeds, after reimbursement to him, the Appellant, of such expenses as he might have fairly expended, and be entitled to retain out of the same, of the rents and profits of the premises, subject to the Bond, and to execute or join and concur in executing such proper deed of mortgage, or other proper deed or deeds, as might be considered necessary or advisable, for legally and sufficiently securing the principal money and interest, which after the application thereto of the monies received and to be paid over by him as aforesaid, should remain due and owing, in respect of the same, by conveyance, by way of mortgage in fee-simple, free from incumbrances, of the plantation, lands, and hereditaments mentioned in the Bond, with the cattle and stock, or the survivors and increase of the cattle and stock upon and belonging to the premises respectively, and upon the execution by him (the Appellant) of such mortgage, to deliver up the possession pursuant thereto of the premises to be comprised therein.

The Appellant accordingly accounted with the Respondent for the rents and profits, crops and produce of the premises received by him during his possession as aforesaid: and such accounts were approved by the Respondent, and the Appellant undertook to pay over the balances or sums, which, after making all due allowances to him on such accounting, should be found to be in his hands, unto the Respondent, in payment, so far as the same might extend, of the [273] monies and interest due under the Bond. The Appellant, however, although admitting the priority of the charge of the Bond upon the plantations and lands subject thereto, refused to give up the cattle and stock upon the plantations and pennis, insisted that the cattle and stock were not contemplated by the Bond, nor intended to form part of, or to be included in the conveyance by way of mortgage thereby agreed to be executed to the Respondent and the other trustees, and refused to concur in a mortgage or conveyance of the cattle and stock, or any part thereof, to the Respondent and the other trustees; claiming to be entitled to hold and dispose of the same as a security for the monies due to him under his mortgage security, preferably to any other right, or lien, or charge thereon.

Subsequently to the date of the Appellant's mortgage, several judgments were recovered in the Supreme Court, in the Island, against M'Neel, one by The Planter's Bank, and another by the Appellant, for the sum of £5670 5s. 10d. damages, and by several other parties, all which judgments were unsatisfied, and were registered as liens on the real estate of M'Neel.

The Respondent, on the 7th of February, 1853, filed a cause petition against the Appellant, The Planter's Bank and others, and against M'Neel and Bathia his wife, and Adolphe Philipson, setting forth in substance the facts above stated, and praying that in default of payment of the principal sum of £5000, and interest due under the Bond, possession might be delivered to the Respondent of the plantations and pennis, with the cattle and stock upon and belonging thereto respectively, and that the Appellant, and the [274] several other parties to the petition, might be foreclosed of all equity of redemption upon the plantations, pennis, cattle and stock, or for a sale of the premises under the direction of the Court. The Appellant filed an affidavit in answer to this petition, claiming the prior and preferable lien charged on the cattle and stock, under the mortgage of the 1st of July, 1846, and setting forth certain receipts of the Respondent, and Bathia M'Neel, for sums amounting together to £1500, on account of the interest due under the Bond.

When the cause petition came on to be heard, the Respondent and Appellant alone appeared. The Vice-Chancellor (The Hon. Edward Panton) pronounced

judgment on the 10th of June, 1853. After setting forth the facts above stated, the judgment proceeded as follows:—"Stress was laid upon the proviso as indicating a desire that the stock on the three plantations should not be held liable to the Bond; but, in the first place, the obligees of the Bond are no parties to the mortgage of 1846, and, further, considering that the power of sale expressly mentions the stock, and that other properties besides these which were affected by the Bond were included in this mortgage, I think the fair construction is, that the words 'further or more extensively liable' have reference rather to the other estates which the proviso stipulated should not be considered in any way liable to the obligation of the Bond. Barclay has given the notice required, and Turner does not refuse to execute the power of sale, but denies that he is bound to apply the proceeds arising from the sale of the stock on the three properties in payment of the Bond, inasmuch as M'Neel by it only bound himself [275] to execute a mortgage upon the land of the plantations without the stock. This, then, is the question at issue between the parties, whether the mortgage by way of settlement would, if executed, have properly included the stock? It was contended for the Defendant that the Bond, being an instrument, *inter vivos*, must be construed strictly, and that nothing could be included in the settlement which the obligor had not agreed to include. This Bond, however, must, I think, be viewed as articles entered into before marriage for the purpose of making a settlement, in which case the Court of Chancery considers that marriage articles are in their nature executory, and ought to be construed according to the intention of the parties. (4 Cruise, Dig. 482). Now, in this case, what was that intention? The agreement was 'for a good and sufficient settlement by way of mortgage;' and would the land of a Jamaica plantation by itself, divested of the stock, be deemed a sufficient security? I apprehend not. Both the obligor and obligees were fully cognizant of the nature of property in this Island, and that a security on the land alone of a sugar estate or penn, without the implements and stock, may indeed be no security at all. The words used are, 'that the estates and properties and the lands thereunto belonging, and their respective appurtenances, as the same were then held and possessed by Thomas M'Neel,' were to be mortgaged to secure the £5000. In *Lushington v. Sewell* (1 Sim. 435), a devise of a plantation in Jamaica, sugar works, pennis, etc., with their members and appurtenances, was held to pass the stock; and a similar principle was recognised in *Stewart v. Garnett* (3 Sim. 398). It is true these were Wills; but the ground upon which Sir [276] Anthony Hart put his decision in *Sewell v. Lushington* is, I think, equally applicable whether the instrument be a deed or a Will. He says, 'that the gift of a plantation as a plantation, denuded of these accompaniments, which would make it productive, is rather a burthen than a benefit.' What, then, might Barclay have insisted upon had he required the settlement to be executed six months after the marriage? I think he might have required a mortgage covering the same extent of property, and in the usual form in which those instruments are drawn when affecting plantations in Jamaica. He might have insisted upon having something more than the mere land; he might have claimed to have the estate and pennis as then held and possessed by M'Neel, that is, as a sugar estate and pennis, in the same condition as they were when the Bond was executed, with the stock upon them, as a sufficient security for the wife and the issue of the marriage, whose interest he was by the Bond authorised and bound to protect. The prayer of the petition must, therefore, be granted; and if it is found necessary to resort to that portion of it which prays for a sale, then the monies arising from the sale of New Galloway, Caledonia, and Petersville, and stock, must be applied first in payment of the costs of the sale and the costs of the parties to this petition, and then in liquidation of whatever may be due for principal and interest upon the Bond of 1842."

By a decree made thereon, it was ordered and decreed in the terms of the prayer of the petition, that the Appellant and the other Respondents named in the petition, should, on or before the 10th of October then next, pay to the Respondent as acting and only surviving resident trustee under the Bond, the principal [277] sum of £5000 due thereunder, with interest thereon from the 25th of January, 1842, up to the day of payment thereof, deducting therefrom only the sum to be paid over to the Respondent by the Appellant, as the balance, upon his accounting with



the Respondent, in respect of his possession and management of the plantations and pennis, subject to the Bond, and in default of such payment to the Respondent, that possession should be delivered unto the Respondent of the plantations and pennis, in the petition called respectively New Galloway, Caledonia, and Petersville, with the cattle and stock upon and belonging thereto respectively; and that the Appellant and the other parties named Respondents in the petition should be foreclosed of all equity of redemption in the plantations, pennis, cattle, stock, hereditaments, and premises, or in case any of the parties named Respondents therein should desire the same, that the said premises should be sold in manner therein directed.

From this decree the present appeal was brought, and now came on for hearing.

Mr. R. Palmer, Q.C., and Mr. Mackeson, for the Appellant.—The sole point is, whether the stock and cattle upon the plantations and pennis in question are subject to the Bond of McNeel for securing the sum of £5000. We submit that it cannot be extended upon more than the real estate. In the first place, the Appellant has a prior charge on the cattle and stock under the mortgage deed of July, 1846, and is entitled to hold and dispose of them as a security for the money due to him under such mortgage, in preference to any other charge; and, secondly, no men-[278]-tion is made in the Bond of the cattle and stock upon any of the plantations and pennis; in fact, all reference thereto seems to have been studiously avoided. The cattle and stock were clearly not intended to be included in the mortgage. The Bond only mentions real estates; namely, "New Galloway estate, Caledonia Penn, and Petersville Penn, with all and every the lands thereunto respectively belonging, and their respective appurtenances." Now, cattle and stock upon a plantation or penn in the Island of Jamaica are personal property, and are not by law or usage of the Island affixed to the freehold, and when it is contemplated that cattle and stock should be included in a Bond or mortgage deed, the practice is, that such cattle and stock should be specially mentioned, described, and assigned in the instrument. The cases of *Lushington v. Sewell* (1 Sim. 435), and *Stewart v. Garnett* (3 Sim. 398), relied upon by the Court below, do not at all apply to this case; they were decisions upon Wills, where the Court gives a more liberal construction than upon a Bond, which we insist must be construed strictly. But, in any circumstances, the decree cannot stand in its present form; as it ought, at all events, to have allowed the Appellant, by way of deduction for interest already paid upon the Bond, the sums mentioned in the Appellant's affidavit and schedules thereto.

Mr. Rolt, Q.C., and Mr. W. R. Rennalls, for the Respondent.—The grounds set forth in the Vice-Chancellor's judgment are conclusive, and fully support the decree. The Bond having been executed in consideration of [279] the intended marriage, the wife and the issue of the marriage must be considered as purchasers for a valuable consideration of everything that was intended for them by the condition, *Prebble v. Boghurst* (1 Swanst. 309, 325). The object was to make a provision for both, and the sum proposed to be paid as such provision was to be secured, not as McNeel might choose, but as the condition declares, "so as to give full effect to the purposes thereof, according to the true intent, meaning, and spirit of these presents." This Bond, or marriage settlement, was clearly in its nature executory, and ought to be construed by a Court of Equity according to the intentions of the parties. To make the security for the provision as certain and effectual as could be, was the object of the contract. Now this object would have been defeated by the parties themselves, if they had contemplated the exclusion of the cattle and stock from the security, they being essential to the value of a mortgage upon a West Indian estate. It would be most unreasonable for a Court of Equity to exclude the cattle and stock by implication. Where an exception was really intended, it was especially expressed in the condition in this Bond as to the outlying lands of Petersville penn; and they are there designated as being the only thing intended to be excepted. Moreover, to give an assurance that the security was not impaired by the exclusion of these lands; it is noticed particularly in that condition, that they are uncultivated lands, and form no part of the works or buildings belonging to them. Again, the agreement provides that the interest annually accruing on the £5000 should be secured on the pro-[280]-perty to be placed in mortgage. It must, therefore, have been understood that the mortgage property would produce annual profits, to keep down the interest; but the annual profits would cease, if the plantation and the two

penns were to be deprived of the cattle and stock. The meaning given by the Jamaica Statutes show that a penn is not to be compared with anything like real estate in England. A penn by the Jamaica Statutes, 13 Geo. II., c. 29, and 23 Geo. II., c. 14, is considered as a personal chattel. The cases of *Lushington v. Sewell* (1 Sim. 435), and *Stewart v. Garrett* (3 Sim. 398), show that under a devise of a West Indian "plantation" the stock and implements will pass.

At the conclusion of the argument judgment was pronounced by

The Lord Justice Turner.—The sole question which their Lordships have to consider in the present case, is, whether the contract which is contained in the Bond which was entered into by McNeel for securing the sum of £5000, was, or was not, a contract to give security upon more than the real estate? The case has been argued mainly upon the doctrine of executory trusts. Their Lordships are of opinion, that the question of trusts, whether executory or not, has nothing whatever to do with this question. The question of executory trusts applies to what are to be the limitations of the property which is contained in the trust, and not to what is the property which is made subject to the trust. The case, therefore, must depend entirely on the lan-[281]-guage and expression of the Bond. Now, the words which are contained in this Bond (passing by recitals from which nothing particular can be collected) are these: "And it was further agreed by the said Thomas McNeel that the said principal sum and interest thereof, and all accumulations of interest thereof in his hands as aforesaid, shall be settled and further secured to the said trustees thereof by a good and sufficient conveyance by way of mortgage in fee simple, free from incumbrances, of certain estates and properties in the parish of Westmoreland aforesaid, whereof the said Thomas McNeel is now seised and possessed, that is to say:" then it enumerates the estates, "New Galloway estate, Caledonia penn, and Petersville penn, with all and every the lands thereunto respectively belonging, and their respective appurtenances, as the same are now held and possessed by the said Thomas McNeel, except only a portion of outlying lands (which the said Thomas McNeel is desirous of disposing of), consisting of one thousand acres or thereabouts of uncultivated land." Then the mortgage is to contain all the usual and proper covenants, namely, a covenant for good title, also for payment of monies and interest, "and all the usual and proper powers and provisions which are necessary to give full effect to the purposes thereof, according to the true intent and meaning of these presents, and that such mortgage deed, in case of disagreement amongst the intended parties thereto as to the form and effect thereof, or of any part thereof, shall be finally settled and approved by Her Majesty's Attorney-General of this Island."

Now, nothing can be more clear than that these words, standing by themselves, were intended to apply [282] exclusively to real estates. Some reliance was placed on the words "estates and properties," and also on the words "seised and possessed." Whatever effect might be attributable to those words if they had stood unqualified, it is clear the effect of them is entirely removed by the subsequent enumeration of the properties, "that is to say, New Galloway estate, Caledonia penn, and Petersville penn, with all and every the lands thereunto belonging, and their respective appurtenances."

It is clear, therefore, the whole meaning of this was, that the security should be given upon these three several estates.

Now, it was suggested in the course of the argument that the trustees would by this construction be placed in a position of great difficulty, if they were not to have the security upon the stock as well as upon the land; but it is obvious that there would be no difficulty arising to the trustees in this case, for the deed, by the recital of it, and likewise by the trusts which are declared, shows that the trustees are to have power at any time to enter into possession of the property; if, therefore, at any time, the mortgagee, being in possession of the estate, had denuded the estate of the stock which was necessary for cultivating the estate, then, under the powers contained in this deed, it would have been competent to the trustees instantly to enter upon the estate, and to exercise the powers which are given to them by the deed for calling in the money.

Some argument was attempted to be drawn from the mortgage deed, which was



subsequently executed to the Respondent in the present case, but the construction of that mortgage deed cannot at all affect the construction of the Bond; unless, indeed, it had [283] been made out in evidence that such mortgage deed was framed upon a general form which was used as a precedent for all the other mortgage deeds which are executed in the Island of Jamaica, and so as to show that under a contract to make a mortgage, the mortgage would extend to the stock, both present and future, upon the estate. It is needless to say, that there is no such evidence given in the present case, and that, therefore, the construction of the mortgage deed can in no way affect the construction of the Bond.

Arguments were further attempted to be deduced from the contents of this mortgage deed, in reference to the power of sale, under which power is given to the Respondent, in the event of the trustees of the Bond calling in the £5000, to sell the estate and the stock, and to stand possessed of the proceeds of the estate and the stock for payment of the money which was secured by the Bond. That is merely a power which is given to the mortgagee in the event of the trustees named in the Bond enforcing payment, that he should not be reduced to the position that the trustees of the Bond might, by enforcing the Bond, sell the estate, and so leave him the stock without the estate; but that he might, at his option, and at his option only, sell both the estate and the stock. Indeed, it is apparent that the provisions which speak of the existing mortgage exclude the stock from the Bond to the trustees. That that is the true meaning of the mortgage deed is clear from another clause which is contained in the deed, in which it is provided, "That the same last-mentioned plantations and hereditaments shall not be rendered further or more extensively liable thereto than the same were immediately before the [284] execution of these presents," and it is made still more clear by another part of the deed, which contains the covenant for title, which is to be "subject to the principal sum of £5000 hereinbefore mentioned, to be secured, or agreed to be secured, on the plantations, penns, and hereditaments hereinbefore firstly and secondly described." Not extending, therefore, to the stock. Another part of the same deed is in these terms: "and that there are no incumbrances whatsoever other than and except the said sum of £5000 hereinbefore mentioned to be secured on the plantations, penns, and premises hereinbefore firstly and secondly described, and the interest thereon."

It is perfectly clear, therefore, that it was not the intention of this deed in any way to extend the security which was given by the Bond, even if the deed could have that operation, which I think it is quite clear it could not, without the persons who are interested in the Bond being in some measure made parties to the arrangement.

Now, the only other part of the argument which it is necessary to advert to, is that founded on the cases of *Stewart v. Garnett* [3 Sim. 398] and *Lushington v. Sewell* [1 Sim. 435]. I take the case of *Stewart v. Garnett* [3 Sim. 398] to decide no more than this, that where there is a gift of "rents, issues, and profits," on the construction of a Will, such will be held to amount to a gift of the property which produces the rents, issues, and profits. That, therefore, has no application to the present case: and, with regard to *Lushington v. Sewell* [1 Sim. 435], there is no doubt the *dictum* of Sir Anthony Hart in that case must, of course, have considerable influence; but it is to be observed that that is the case of a Will and not of a mortgage deed, and it might well be that the Testator [285] might in his Will, in describing a plantation, so describe it as to show that he intended the property to be enjoyed as he enjoyed it, but it is a different question when you have to consider the construction of the same words in a mortgage deed, for you must look to the contract of the parties, and must construe the contract from the language of the deed in which it is contained.

Their Lordships are of opinion, that upon the whole, the judgment of the Vice-Chancellor of Jamaica must be varied to the extent of discharging the live and dead stock from the security of £5000. No costs of the appeal here on either side.

The following report was made upon the appeal:—"Their Lordships do humbly agree to report to your Majesty that the said decree ought to be varied by adding a declaration thereunto, that the live stock and the dead stock (not fixed to the freehold) upon the estates and penns described in the Bond of the 25th of January, 1842, in the pleadings mentioned, are not comprised in the security of the Respondent, created under the said Bond, and their Lordships are further of opinion,

that in lieu of the direction in the said decree, that the Appellant should, on or before the 10th of October then next, pay unto the Respondent the principal sum of £5000 with interest thereon, from the 25th of January, 1842, up to the day of payment thereof, deducting only the sum to be paid over to the Respondent by the Appellant, as the balances paid upon the Appellant's accounting in respect of the possession and management of the plantations and penms. subject to the said Bond: an account ought to be taken in the Court of Chancery, [286] in Jamaica, of what was due on the security of the estates comprised in the said Bond for principal and interest under the same, with the usual direction in default of payment, for redemption, foreclosure, or sale (their Lordships desiring that the question whether any interest on the said Bond has been paid or satisfied, shall be left perfectly open). And that each party shall pay their own costs in this appeal, but such order to be without prejudice to the Appellant's right to add to his security."

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 22. *West Indies*. As to right of mortgagee who is allowed his costs to add them to the security, cf. *Henry v. Byar*, 1830, 1 Knapp, 388.]

# ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

THE NETHERLANDS STEAM BOAT COMPANY,—*Appellants*; THOMAS STYLES,—*Respondent* \* [July 14, 1854].

## THE BATAVIER.

Damage by sinking a barge by a steamer causing a swell in the river Thames.

A large steamer in the charge of a licensed pilot, in proceeding up the pool at nearly high tide, and at a speed dangerous to small craft, caused such a swell that a barge laden with coals was sunk.

Upon appeal, held (affirming the decree of the Admiralty Court),—

First. That upon the evidence no blame or negligence was attributable to the barge [9 Moo. P.C. 295].

Second. That the steamer was to blame, as the swell which sunk the barge was attributable to the speed at which she was going [9 Moo. P.C. 297].

Third. That the steamer was to blame, (1), in not having kept a good look-out, as she might and ought to have seen the swell and the barge in time to have avoided the accident: and (2), that the pilot was solely to blame in not checking the speed, or stopping the steamer [9 Moo. P.C. 298].

Fourth. That as there was joint blame in the master and crew, and the pilot, the owners were not exempted from liability for damage by the Statute, 6th Geo. IV., c. 125, s. 55, by reason of having a licensed pilot on board [9 Moo. P.C. 298 *et seq.*].

*Quære?* Whether the rules and bye-laws passed by the Corporation of the City of London on the 29th of September, 1845, regulating the speed of vessels, are good by the Local Act, 7th and 8th Geo. IV., c. lxxv [9 Moo. P.C. 297].

This was a cause of damage, civil and maritime, promoted by the Respondent, the owner of a barge called the *Ann*, against the Netherlands steam-[287]-vessel, the *Batavier*, and the principal question was, whether the *Batavier*, having a licensed pilot on board, was so improperly navigated in proceeding up the pool, as to cause the swell in the river by which the barge was sunk.

The libel on behalf of the *Ann* pleaded, in substance, that the *Ann*, a barge of forty-nine tons burthen, having taken her cargo on board from a collier moored off Wapping, cast off and quitted the collier on her return to Long Ditton, in the

\* Present:—The Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.



county of Surrey, at about half-past three P.M. of the 5th of October, at which time it was nearly high water, and the tide was flowing; that the barge was navigated with her head to the tide, and was floating with the tide up the river stern foremost in charge of two persons named Gildon and Lee, being a sufficient number of persons to navigate her. That a few minutes after she had quitted the collier, the *Batavier* passed her at a distance of fifty yards, proceeding with tide and steam at the rate of nine or ten miles an hour, the pool at such time being clear. That from the great rate at which the steamer was proceeding, her paddle-wheels caused the river to rise and swell so much, that in consequence thereof the water flowed entirely over and filled the barge *Ann*, which thereby im-[288]-mediately sank and went down, the crew being only saved from drowning by being picked up by a boat, the *Batavier* proceeding without stopping or in any way attempting to save the crew. That by the rules and bye-laws of the Court of the Lord Mayor and Aldermen of the City of London, in pursuance of an Act of Parliament passed in the 7th and 8th years of the reign of His late Majesty George IV., intituled "An Act for the better regulation of the Watermen and Lightermen on the river Thames between Yantlet Creek and Windsor," it is provided, "That no steamboat or vessel of 200 tons burthen or upwards, registered tonnage, shall be navigated upon the river Thames westward of St. George's Stairs, Deptford, at a greater speed than at the rate of six miles in an hour with the tide, nor more than four miles in an hour against the tide." That the *Batavier* was of the burthen of 227 tons registered tonnage, and her engines of 140-horse power. That previous to and at the time of her passing and sinking the barge *Ann* by the swell of the water caused by her paddle-wheels, she was being navigated at the rate of nine or ten miles in an hour. That the sinking of the barge *Ann*, and the damage consequent thereon, was imputable solely to the master and crew of the *Batavier*, namely, from the dangerous and illegal speed at which she was then being navigated, and was not caused by or attributable in any manner to any misconduct or unskilfulness on the part of those on board the barge.

The allegation given in on behalf of the *Batavier* pleaded, that the *Batavier*, in the prosecution of her voyage from Rotterdam to London, with a general cargo and passengers, arrived at Gravesend [289] shortly after noon on the 5th of October, when and where the charge and command of her was given up by the master to a pilot, duly licensed by the Corporation of the Trinity House, to take charge of vessels of all burthens from Gravesend to London. That such pilot continued in charge and command of her from such time until her arrival at her moorings off St. Katherine's Docks, at about half-past three P.M., that all his orders and directions for the navigation and management of the vessel whilst so under his charge were promptly and implicitly obeyed and carried into effect by her master and crew. That the pilot, on the arrival of the *Batavier* off Greenwich, slackened her speed to five knots an hour, and thence gradually to three knots an hour, in order that she might not arrive at her moorings before the turn of the tide, and so to avoid the necessity of swinging her with the tide. That the *Batavier* passed the Stone Stairs, Wapping, at a speed of three knots an hour only, or thereabouts. That throughout her passage from Greenwich to her moorings off the St. Katherine's Dock, the pilot, master, and crew of the *Batavier* were stationed as follows:—the pilot on the bridge in charge of and directing the navigation of the ship; the master on the poop, as was also the sea pilot, two seamen at the wheel, and several seamen on deck on the look-out. That the *Batavier*, in passing the Stone Stairs, so little disturbed the smoothness of the water, that a common wherry put off from the said stairs and pulled alongside, and spoke her as she passed. That neither the barge *Ann*, nor any other barge, was then being navigated with her head to the tide, or being floated with the tide, up the river stern foremost or otherwise [290] within at least five times the distance of fifty yards from or at all within sight of the steam-ship. That several steam-ships passed the Stone Stairs going up and down the river, between the time when the *Batavier* passed those stairs, and that at which the barge *Ann* was sunk opposite thereto. That the sinking of the barge and the damage consequent thereon were occasioned either by the mismanagement of those in charge of the barge or by the swell produced by some one or more steam-vessel or steam-vessels passing the barge at the time other than

the *Batavier*. That at the time of the sinking of the *Ann*, the *Batavier* was in charge of, and was being navigated by, a duly licensed pilot, all of whose orders and directions in respect thereto were duly and promptly obeyed and carried into effect. That it was to the want of care or skill of the pilot that the *Ann* and the consequent damage must be imputed, if, notwithstanding the premises, it was to be held that they were imputable at all to the *Batavier*.

There was much discrepancy in the evidence of the witnesses on either side, as to the time the *Batavier* arrived at the docks, the mate swearing it was four o'clock, and the pilot who conducted her that it was three o'clock: and as to the rate of her steaming, the evidence varied from ten or eleven knots an hour to one knot and a half. And as to the evidence that the steamers that passed by shortly before the *Batavier* came up, some of the witnesses said they were Margate vessels, and another witness, on the contrary, deposed that they were not Margate vessels, but Foreign vessels. Witnesses were also examined for the *Batavier* who were on board her, and whose duty it was to keep or assist in keeping a good look-out, [291] and they deposed that they never saw the barge at all.

The learned Judge of the Admiralty Court (the Right Hon. Dr. Lushington), assisted by two of the elder brethren of the Trinity Corporation, by an interlocutory decree, dated the 20th of May, 1854, pronounced that the contents of the libel were proved, and that the Appellants had failed in proof of their allegation, and for the damage proceeded for in the cause, and condemned the *Batavier* and the owners to answer the action in such damage, referring the same to the Registrar and merchants to report the amount thereof. The material part of the judgment delivered by the learned Judge upon that occasion was as follows:—"We all concur in the opinion which I am now about to state. As to the first question, we think that the barge was sunk without any fault or defect attributable to her. We have taken into consideration what was urged on the part of the *Batavier* as to the evidence of one of the witnesses. As to the second question, whether the swell which sank the barge was attributable to the swell of the *Batavier*, or to that of the two steamers, we think that it was caused by the *Batavier*. Thirdly, the *Batavier* was to blame, for she might and ought to have seen the swell and the barge, and ought to have stopped in time to avoid the accident. This was her duty, however slow her actual rate of sailing might have been. Fourthly, we think that the pilot is to blame for not checking the speed or stopping the steamer, and is solely to blame in that respect. Fifthly, we think there was not a good look-out on board this vessel, for it appears from the evidence that neither the swell nor the barge was seen from the *Batavier*. We are of opinion, [292] that if there had been a good look-out the barge and the swell must have been seen. Then, with respect to the question proposed by the *Batavier's* Advocate, which I put to the Trinity Masters in the words given to me, their answer is—a subject on which I myself can give no opinion—that the sinking of the barge would most probably take place in the manner it is stated to have done in the evidence. The consequence is, that I must pronounce against the *Batavier*.

From the above decree the present appeal was brought.

The appeal was argued by Dr. Addams and Dr. Twiss, for the Appellants; and the Queen's Advocate (Sir John Harding) and Dr. Jenner, for the Respondent.

The argument turned in a great measure upon the discrepancy between the testimony of the witnesses as to the speed the *Batavier* was steaming at, and whether the sinking was attributable to the swell caused by her, or from the steamers which preceded the *Batavier*. And, further, whether there had been a good look-out by the *Batavier*.

The authorities cited were:—

First, as to the *onus probandi*; whether the case on behalf of the owner of the barge was sufficiently established by the affirmative evidence of the swell being occasioned by the *Batavier*, or by the negative testimony that it was occasioned by the steamers preceding her. *Luxford v. Large* (5 Carr. and Pay, 421).

Second. The liability at law of the steamer causing the swell. *Smith v. Dobson* (3 Man. and Gr. 59).

[293] Third. That the *Batavier* having a licensed pilot on board, the owners were exempted from liability by Statute, 6th Geo. IV., c. 125. Upon which point,



*The Diana* (1 W. Rob. 131; S.C. on appeal, 4 Moore's P.C. Cases, 11), *The Christiana* (7 Moore's P.C. Cases, 160), *The Lochlibo* (7 Moore's P.C. Cases, 427), *The Protector* (1 W. Rob. 45), *The George* (4 Notes of Cases in the Eccl. and Adm. Courts, 161), were cited.

At the conclusion of the argument, judgment was delivered by

The Right Hon. Sir John Patteson.—This case is not without very great difficulty, as was felt in the Court below, arising from the conflict of evidence with respect to many facts of the case, namely, the speed at which the *Batavier* was going, the speed of other vessels passing at the time, or nearly at the time, and also with regard to some other matters, whether or not it was immediately within five minutes after the barge had cast off from the collier that she went down, or whether she did not sink till ten minutes after the *Batavier* had passed, which must have been a quarter of an hour after she passed the collier. But, doubtless, when witnesses are examined particularly with respect to a few minutes of time, we find them frequently varying from each other, and this may occur without imputing to them that they are swearing knowingly and wilfully what they believe to be false. Therefore, we must get at the facts by a consideration of the whole evidence, as well as we can. This, however, is not a case [294] in which we are the first to determine that point; the case has been brought before the Court below, and been considered with great care and attention by the learned Judge and the Trinity Masters. They have come to the conclusion that the steamer must be condemned. In a Court of appeal, we apprehend, it is clear we should not be justified in setting aside that decision and determining in favour of the Appellants, unless we saw clearly there had been misapprehension and miscarriage in the Court below. We must be clearly satisfied before we should be justified in reversing such a decision.

Now, there is one point, not raised here for the first time, with respect to the conduct of the barge, whether the barge was to blame—it was raised in the Court below, it was determined she was not to blame at all, that nothing wrong had been done on her part: as far as we can judge from the evidence, indeed as the Appellants here very candidly admitted the point in which it was said the barge, and in which it was urged here she was to blame, was rather as to her having attached herself to some other vessel, as deposed in the evidence of Sullivan, than anything else. But the Appellants' Counsel, however, for the first time, brought to the attention of the Court that she had swamps on her, consequently she was not in a condition to turn her head to the swell, and therefore prevent the damage, supposing the swell to have risen even from the *Batavier*.

In Courts of law an admirable rule generally prevails on a point of fact of that kind. The verdict of a jury would not in such a case be allowed to be set aside on a motion for a new trial: because a Court of law says, that it should have been suggested at the trial and laid before the jury. That ought to be the case in the appellate Court, and, when we come to look at the evidence, though it is ingeniously and fairly put as an inference that may be drawn from that adduced here, yet we have no distinct evidence to show that the barge either was able to see that the swell was coming upon her before it actually did come, or that she might not, just previous to the time of going down, have had swamps on her. There are previous other ways in which we might account for it—the oars having been on the coals at the time when she went down. We have no distinct evidence upon that point; and, in the absence of evidence of that kind, their Lordships do not feel themselves justified in saying there was negligence on the part of the persons on board the barge in not having command of the barge so as to turn her to the swell. We cannot tell whether or not the attention of the witnesses had been particularly directed to that point in the Court below by interrogatory or by article, or if it was urged in the Court below, that some more evidence might not have been taken upon it. But we do not feel justified in drawing the inference that there was negligence of that sort from the evidence as it appears in the case. That being so, we think the Court below was right in saying that there was no fault in those who had the command of the barge. A variety of things may be conjectured which might have happened, but we are not at liberty to conjecture here, and we must decide on the evidence laid before us as it was before the Court below.

Then if that be so, and there was no fault in the barge, the question arises whether or not she went [296] down by reason of the swell of the water striking her, as it is said by some of the witnesses, on the side, and others on the head. I apprehend the witnesses who say she was struck first on one side and then on the other, mean striking amidship or on the side of the head, if I may so express myself. She went down in consequence of the water running over her occasioned by the swell; that is clear. Then was it the *Batavier* or the other steamers that caused the swell? The Court below came to the conclusion that it was the *Batavier*, and that it was not occasioned by the other steamers. The witnesses say other steamers had gone by, and the water had subsided to a considerable extent, but not entirely, and the Trinity Masters and the learned Judge of the Court below, looking at all the evidence of the case, came to the conclusion that the swell which immediately threw the water on the barge and sunk her, was really occasioned by the *Batavier*. We have been assisted by two gentlemen, the Sailing Masters, who attend to tell us what their opinions is; they agree in that opinion, and their Lordships concur that that is the fair result of the evidence. There was one case cited by Her Majesty's Advocate, in which it was determined that if there had been a previous swell which might have occasioned danger, and another vessel came up and increased that swell, and damage accrued, and such vessel was liable for the whole damage, and, if we had occasion to apply that rule to the present case, it would then be sufficient in order to fix the owners of this steamer, supposing there had been some swell before and that swell had been increased and augmented, and continued by the *Batavier* going at an improper speed. But from the [297] evidence it appears to all their Lordships that the swell that struck the barge was occasioned by the *Batavier* herself.

Then if that be so, was she to blame? Now, the rate at which she was going is not very capable of being ascertained. The evidence varies from ten miles an hour, to two, and two and a half, at most. There are various statements on that subject by the different witnesses; however, the rate of ten miles an hour seems to be exaggerated. It may be probably that she was not going above four or five knots an hour; we will say, at all events, most likely under the six miles an hour with the tide, fixed by the rules and bye-laws of the Corporation of the City of London under the Local Act, 7th and 8th Geo. IV., c. lxxv., though I protest I cannot find authority under that Act to make such bye-laws. That rate probably was not exceeded, but that does not conclude the case, because it certainly is a general law as laid down by the learned Judge below, that at whatever rate she was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate; at all events, she was bound to stop if it was necessary to do so, in order to prevent damage being done by the swell to the craft that were in the river.

Now, it seems to us to be perfectly clear, that the "*Batavier*" was going at such a rate as caused the swell which occasioned the damage, and that she ought not to have made that swell in the river if she was aware that there was any vessel which might be damaged and put in jeopardy by her doing so.

[298] So far, therefore, we get, and when it is said by the learned Judge, in his judgment, that "she might and ought to have seen the swell and the barge, and ought to have stopped in time to avoid the accident," I think we must take it he meant the swell which she herself was making, and that she ought to have stopped directly, so as to prevent the continuation of the swell damaging the barge. That must be the meaning; he never could mean the swell made by previous vessels, because in the course of the judgment the Court considered that if a swell had been made by a former vessel, that it had at all events subsided; neither could he mean, had made such a swell as would sink the barge, because, to stop after she had sunk the barge would be of no use; but it must mean, she ought to have seen she was making a swell in the river, and that the barge was in such a position that it was in jeopardy by that swell.

Then, there is blame on somebody, and, it is said, that the rate at which the "*Batavier*" was going was really the cause of the damage. We come, therefore, to consider whether, according to the Statute, 6th Geo. IV., c. 125, which protects the owner where a licensed pilot is taken on board, from the damage which may occur through the fault of the pilot, the owner of the steamer is protected. Without going into all the authorities cited upon this point, we consider that the rule is correctly



laid down by the learned Judge in the Court below, and two or three decisions in this Court have decided that if the master and crew of the vessel are to blame as well as the pilot—and, of course, if it is entirely their fault—the owners are not protected by this Act of Parliament. [299] The learned Judge upon this point states, "Fourthly, we think the pilot is to blame for not checking the speed or stopping the steamer; and he is solely to blame in that respect." Now, if these words were taken alone, it would seem as if he threw the blame entirely upon the pilot; but taking them along with the rest of the judgment, it is plain, that what he meant was, so far as the mere speed of the steamer was concerned, apart from other circumstances, the blame rested on the pilot for going at that speed; therefore, if the damage had arisen simply and solely from the speed of the steamer, without reference to the distance of other craft in the river and other circumstances, the pilot would be to blame. That is clearly all he meant, because if he had meant that the pilot was answerable for the speed, under all the circumstances, the decision would have been contrary to what it was, whereas the owners are here fixed. The case of "*The George*," cited by the Appellants, is very different from the present. There, the learned Judge said, if there was a balance of evidence with respect to not keeping a proper look-out, and he could not assume in the affirmative that there was such neglect, the owners must be discharged. But, he it observed, the damage did not arise merely from that, but there was, in the first place, prior to the question whether there was a look-out or not, error in judgment, and blame on the part of the pilot in going up at a time he ought to have stopped altogether. Therefore, nothing is said as to the necessity of the balance of evidence as to keeping a look-out or not. He attributed the cause, as it were, to the original default of the pilot, without which default clearly the other [300] question could not have arisen; she would have stopped earlier, and the second blame could not have taken place. In that case, he said, the owners were protected by the Act of Parliament, because she ought not to have gone at all.

Then we come to the point whether or not there was here any default or negligence on the part of the master and crew of the steamer, so as to throw the blame on the owners of the steamer, notwithstanding the pilot was on board. That really depends on the question of the look-out: that question, though it appears not to have been fully argued in the Court below, was placed before it, and stated generally in the argument. Though not brought prominently to the attention of the Court, it does not appear that it was not discussed or mooted. It did not altogether escape attention. The Respondent's Counsel tells us he did bring it to the notice of the Judge; the expression of the learned Judge is, it was not argued; and I take it to mean, not that it was not brought before his attention, because, in fact, his judgment proceeds upon it, but that it was not argued with stress and force. He founds his judgment mainly, indeed, upon there not being a proper look-out, or, if there were proper persons looking out, they did not do their duty, and did not inform the pilot.

Now, we have asked the opinion of the Sailing Masters, who assist us here, and they tell us that in all cases, notwithstanding there is a pilot on board, whether by day or night, some of the crew ought to be stationed to keep a proper look-out, right and left, in the bows of the fore-castle of the vessel. If that [301] be so, then, unquestionably, if there was no look-out there would be fault on the part of the crew, because we take it to be the duty of the master and crew to keep a look-out in order to assist and inform the pilot of anything occurring in the navigation which may require his attention and cause him to slacken the speed or take other steps which may be necessary. Was there, then, any look-out? We have it in evidence that there were three persons, the boatswain and two others, on the fore-castle on the look-out. That evidence is in answer to one of the articles of the plea—not by way of interrogatory, but in answer to an article that says, there were three persons, the boatswain and two others, on the look-out, who are not called as witnesses. Either, therefore, there was no look-out at all, and the witnesses are incorrect, or, if there were proper persons on the look-out, they neglected their duty, and did not see what they might have seen, the swell, and the barge, or did not inform the pilot. In either of these views the fault would be with the master and crew; the fault was in them if there was no look-out, and the fault was in them if

those who looked out did not see what they might have seen ; and the fault still was with them if they did see it and did not inform the pilot. If these three persons did see the swell, did see the barge, and did inform the pilot there was a swell, and the barge, and the pilot still insisted in going on, then the owners would be discharged ; but we have no evidence that that was the case, or that they did so inform him. There are no such facts, and all this is left in the dark. There is no witness called to show what they said, what they did, what they saw, or what they recollect about the matter.

[302] Therefore, upon the best consideration we can give to this case, their Lordships are of opinion, that the learned Judge and the Trinity Masters in the Court below, (the learned Judge more particularly, because the questions are rather for him than for them,) have come to a right conclusion, and that notwithstanding the difficulties that surround the case, arising from the conflicting evidence, their Lordships would not be justified in reversing the decision, and saying there had been any error or miscarriage in the Court below. Under these circumstances we must advise Her Majesty to affirm this decree with costs.

[Mews' Dig. tit. SHIPPING, XX. COLLISION, 1. *Negligence*, a. *Generally*, b. *In Particular Cases*, ii. *Speed*, iii. *Look out*, xii. *Various Cases*, 10. *Compulsory Pilotage*, d. *Duties of Pilot*, e. *Duties of Shipowner, Master and Crew* ; S.C. below, 1 Spinks 378. As to (i.) liability for the swell caused by excessive speed (9 Moo. P.C. 297), cf. *Loxford v. Large*, 1833, 5 C. and P. 421 ; (ii.) liability of wrong-doer, though not herself in collision, cf. *The Sisters*, 1876, 1 P.D. 117 ; *The Industrie*, 1871, L.R. 3 Ad. and E. 303 ; (iii.) duty of pilot as to checking speed, etc. (9 Moo. P.C. 298), cf. *The Calabar*, 1868, L.R. 2 P.C. 238 ; 5 Moo. P.C. (N.S.) 291 ; *The Velasquez*, 1867, L.R. 1 P.C. 494 ; 4 Moo. P.C. (N.S.) 426. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict., c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict., c. 53), the jurisdiction of the Judicial Committee upon any judgment or order of the High Court of Admiralty was, except as to prize, transferred to the Court of Appeal.]

### [303] ON APPEAL FROM THE COURT OF CHANCERY IN THE ISLE OF MAN.

EBENEZER BIRNIE and MARGARET MILLIGAN,—*Appellants* ; THOMAS CAYSTILE,—*Respondent* \* [Nov. 27, 28, 1854].

Exposition of the tenure of Quarter lands and Intacks in the Isle of Man of the nature of copyhold [9 Moo. P.C. 308, 310].

By a Statute of the Isle of Man, passed in 1835, intituled " An Act to amend the Law relating to Mortgages," so much of the Act of Settlement of 1703-4 as limited the redemption of mortgages to twenty-one years was repealed, and by section two it was enacted, that if the mortgage was not discharged at the end of twenty-one years from the date of the mortgage, it should be lawful for the mortgagee to sue out judgment, or execution, and cause the mortgaged premises to be sold to satisfy the mortgage, etc.

Held by the Judicial Committee:—

First. That there could be no foreclosure of a mortgage of copyholds of the tenure of Quarter lands, since the passing of that Statute [9 Moo. P.C. 323].

Second. That possession by the mortgagee of the mortgaged premises for twenty-one years could not affect the right of redemption of the mortgagor : for as long as the mortgage subsisted it was redeemable by the mortgagor : the remedy left to the mortgagee being the right to sell the mortgaged pre-

\* The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.



mises, after twenty-one years had elapsed from the date of the mortgage [9 Moo. P.C. 324].

In 1817, A. mortgaged copyhold lands, of the nature of Quarter lands, to B., who afterwards, in 1820, entered into possession. In 1824, the mortgage-money not having been paid, the lands were sold under an Order of the Court of Chancery in the Island, and B. became the purchaser. In 1852, A.'s representative filed a bill for redemption of the mortgage premises, which had been in possession of B., or those claiming under him, since 1820, and for an account. The defence was, first a denial of the Plaintiff's title; and secondly, that the remedy was barred by the possession of the mortgagee for twenty-one years without accounting. The Court of Chancery in the Island rejected this defence, and decreed redemption and account. Upon appeal, such decree affirmed [9 Moo. P.C. 324].

*Christain v. Goldie* (2 Moore's P.C. Cases, 226) observed upon [9 Moo. P.C. 310, 324].

This suit was instituted by the Respondent against the Appellants, and one Daniel Goldsmith (who was [304] no party to the appeal), and the object of the suit was the redemption of two fields and a close of land, containing altogether about sixteen acres, named Loughan Moar, Creggan Moar, and The Little Crofts, comprised in a mortgage dated the 4th of June, 1817, and for an account of the rents and profits received by the mortgagee, who had been in possession since the year 1820. The right to such redemption was contested by the Appellants, who pleaded as a defence in their answer to the Bill, first, a denial of the Respondent's title, and that the lands were part of an estate called Ballakamain, and were included in a mortgage from the Respondent's father, Thomas Caystile, and his wife, to one Grierson, dated 21st of June, 1819, or in a deed of sale by Grierson upon that mortgage, dated the 4th of June, 1824; and secondly, if not so included, that they were comprised in a mortgage from the Respondent's father and wife, dated the 4th of June, 1817, to one Kissack, and assigned by him in November, 1824, to Grierson, under whom the Appellants claimed; and lastly, they pleaded the Island Statute of Limitations, and that by reason of Grierson or those claiming under him, having been in possession from the year 1824 to the date of the institution of the suit in 1849, the Respondent's rights were barred by lapse of time.

The facts of the case, the evidence adduced on both sides, and the nature of the tenures of the land in the Isle of Man, are fully set forth in the judgment.

[305] The Court of Chancery of the Island, holden at Castle Rushen, by a decree, dated the 6th of February, 1852, declared that the Loughan Moar, The Creggan Moar, and The Little Crofts, forming part of Ballakamain, were not included in the mortgage security from Thomas Caystile and wife to Grierson, of the 21st of June, 1819, nor in the deed of sale to Grierson under the decree of the Court of Chancery of the Island, of the 4th of June, 1824, and referred the cause to the Clerk of the Rolls to take an account of the principal, interest, costs and charges of the Bond or mortgage granted by Thomas Caystile to William Kissack, dated the 4th of June, 1817, an assignment of which had subsequently been made by Kissack to Grierson, and the rents and profits of the lands and premises in and by the said deed granted in security, since Kissack was put into possession of the said lands and premises, and to report the same to the Court, in order to a final decree.

The present appeal was from this decree, and was argued by Mr. Wigham, Q.C., and Mr. Edmund F. Moore, for the Appellants; and Mr. Daniels, Q.C., and Mr. Selwyn, for the Respondent.

The following points were taken by the Appellants:

First. A denial of the Respondent's title to the three closes in question—(1) As to The Little Crofts, that he had shown no title to sue.—(2) As to Loughan Moar and Creggan Moar, that they were comprised in the mortgage to Grierson, in 1819, and that the Respondent's title was barred by the sale to [306] Grierson, in 1824, as forming part of Ballakamain, and that the misdescription in describing them as being situate in the parish of Kirk Bride instead of in the parish of St. Andreas, could not operate to defeat the object of the deed.

Second. That Grierson, under whom the Appellants claimed, had adverse posses-

sion in his character of mortgagee and purchaser, as against the mortgagors and their representatives for more than twenty-one years previous to the institution of the suit, and that by the law of the Isle of Man, the equity of redemption was barred.

The Respondent's case was, first, that the lands comprised in the mortgage of the 4th of June, 1817, sought by the Bill to be redeemed, were not comprised in the mortgage of the 21st of June, 1819, or in the deed of the sale of the 4th of June, 1824; and secondly, that by the law of the Isle of Man, the Respondent was not barred, by lapse of time, of the equity of redemption, which descended to him upon the death of his father.

The authorities cited were:—

As to the effect of the misdescription of the parish in which the lands were situated, *Doe dem. Dunning v. Cranstoun* (7 Mee. and Wels. 1. 10), *Goodtitle lessee of Radford v. Southern* (1 Mau. and Sel. 299), *Down v. Down* (7 Taunt. 343), *Doe dem. Beach v. Earl of Jersey* (3 Bar. and Cr. 870), *Doe dem. Chichester v. Oxenden* (3 Taunt. 147), *Hall v. Fisher* (1 Collier, 47).

[307] Upon the question of the equity of redemption being barred, *Christian v. Goldie* (2 Moore's P.C. Cases, 226); Act of Settlement, 1703-4; Mills' Statute laws of the Isle of Man, pp. 163, ib. pp. 76, 113, 117, 166, 177; Jeffcotts' Statute laws of the Isle of Man, pp. 22, 24.

And, by analogy to the law of England, that the Bill could not be maintained, as there had been twenty years adverse possession by the mortgagee, *Cholmondeley v. Clinton* (2 Jac. and Wal. 180; S.C. 4 Bligh, 1), *Cuthbert v. Creasy* (4 Bligh, 125, note), *Barron v. Martin* (19 Ves. 327, 330; S.C. Coop. 189), *Reeks v. Postlethwaite* (Coop. 160), *Bonny v. Ridgard* (1 Cox, 145), *Hodle v. Healey* (1 Ves. and Bea. 536), *Whiting v. White* (2 Cox, 290), *Harrison v. Hollins* (1 Sim. and Stu. 471), *Giffard v. Hort* (1 Sch. and Lef. 407, note). As to the operation of the Statute of Limitations, the Respondent being abroad at his father's death, *St. John v. Turner* (2 Vern. 418), *Hovenden v. Lord Annesley* (2 Sch. and Lef. 636).

And, lastly, upon the question whether the transaction could be considered in the nature of a Welsh mortgage, *Fenwick v. Reed* (1 Merr. 114) was cited.

Judgment was reserved and afterwards delivered by

The Right Hon. T. Pemberton Leigh (Jan. 10, 1855).—In this case, a decree was pronounced in the Court of Chancery of the Isle of Man, on the 6th of February, 1852, for redemption of a mortgage made by the Respondent's father in the year 1817, of three closes of land, containing altogether about sixteen acres.

[308] The Appellants, who are in possession of these lands, rested their title to them in the argument before us upon two points; they contended,

First, that the land in question formed part of an estate called Ballakamain; that the estate of Ballakamain, including these lands, was mortgaged to one Grierson (whom the Appellants claim under), in 1819, and was afterwards sold and conveyed to him in 1824, and that the Appellants have been and are in possession of the lands, not as mortgagees, but as purchasers.

Second, that if Grierson originally entered under a title as mortgagee, and the Appellants are to be considered as being in possession under such title, still there had been an adverse possession as against the mortgagor of more than twenty-one years at the time when the Bill was filed, and that thereby all equity of redemption in the lands had been barred.

These questions must be decided according to the law of the Isle of Man, which differs most essentially from the law of England, with respect to mortgages; and in order to understand the effect of the evidence in this case, it will be convenient to advert to the state of the law upon this subject at the time when the dealings between the parties took place, and to the alterations which have since been made in it.

The tenants in the Isle of Man hold their lands of the lord, by a customary or copyhold tenure, subject to the payment of an annual rent, and to fines on a change of tenancy, either by death or alienation. The Island is divided into parishes, and into certain districts, for purposes of civil jurisdiction, called "Sheadings;" each Sheading contains several parishes, and is provided with an officer called a "Coroner;" each [309] parish also has officers, called a "Setting Quest," whose duty it is to assess the rents and fines payable to the lord. The tenants' lands are known



by two denominations; namely, Quarter lands, or Farm lands (which seem to have been ancient inclosures); and Intacks, or new enclosures, which are or formerly were subject to different rules of descent and other incidents of property from the Quarter lands. The names of the tenants, the lands which they hold, the rents to which they are liable, and the Quarter land to which they belong (if they be of the denomination of Quarter lands), are entered in the Lord's Books, or Court Rolls.

By an Island Statute, passed in the year 1691, it was enacted, that whenever lands held at one rent should be divided, and an alienation should take place of a part, either absolutely or by way of mortgage, the Setting Quest of the parish in which the lands might be, should apportion the rent fairly between the lands so alienated and the portion which should remain unalienated. When a dispute, therefore, arises to what estate particular lands belong, there can hardly be a better criterion than the apportioned rent at which they are held as appearing by the records of the lord.

For many years previous to 1704, great disputes had subsisted between the lord and the tenants, as to their respective rights and interests in the lands; but after much negotiation, an arrangement was made, by which these disputes were settled, and a Statute, called "the Act of Settlement," was passed in the Island in that year, for the purpose of carrying the arrangement into effect.

By this Statute, the rents charged upon the Quarter [310] lands (with which alone we are concerned in this case) were fixed and made perpetual; the lands were declared to be customary of inheritance, subject to the payment of a fine to the lord upon every alienation, and, with respect to mortgages, this provision was made; that if any tenant should mortgage any part of his land, and should not actually redeem the same within the space of five years, such mortgage should be looked upon as an alienation, and the mortgagee should be admitted tenant, and his name entered upon the Court Rolls, and should pay the third part of the general fine chargeable upon the said lands; provided, nevertheless, that the mortgagor should have the power of redemption, in equity, within twenty-one years from the date of the mortgage.

Under this Statute, it was held by the Courts in the Isle of Man, that if a mortgage was not redeemed within twenty-one years it became irredeemable at the end of twenty-one years from the date, however the possession might have been dealt with in the meantime. In the case of *Christie v. Goldie*, before this Court (2 Moore's P.C. Cases, 226), it was decided that this was the law of the Island. It has since been altered in the manner which we shall presently state.

This then being the state of the law in the year 1817, it appears that the deed was executed, under which, as the Respondent contends, the Appellants came into possession of the disputed lands. This Deed or Bill of Mortgage, as it is called, is dated the 4th of June, 1817, and thereby, Thomas Caystile and Catherine his wife, in consideration of the sum of £129 5s., grant, alienate and pass over in mortgage to William Kissack and Katherine Kissack, and their [311] heirs, "all their right and title to two parcels, situated in the parish of Kirk Andreas, the same being Quarter lands, known and distinguished by the names of Loughan Moars Jast and Loughan Moar Thonie and Creggan Moar (there is then a description of the metes and bounds of Loughan Moars and Creggan Moar, which are situate at some considerable distance from each other), of the annual lord's rent, as the Setting Quest of Andreas shall proportion thereon; likewise our right and title to two small parcels of land, situated in the parish of Lezayre, being part of the Quarter land of Balladoil, known by the name of The Little Crofts (then there is a description of the metes and bounds), of the annual lord's rent, as the Setting Quest of Lezayre shall proportion thereon."

It would seem from the deed and from the evidence, that the Loughan Moars originally consisted of two closes and The Little Crofts of two parcels, but in the argument they are treated as each one parcel of land, and no question arises upon this point. If they were two, they have in either case been laid together. In this minute description of the mortgaged premises there is no reference to any portion of the lands as being part of, or belonging to, the estate of Ballakamain. There is then a covenant in the mortgage deed, that if Caystile pays the rent regularly, he shall be permitted to remain in possession, but upon failure of such payment it shall be lawful for the mortgagees "to enter upon and possess, hold and enjoy the said mortgaged premises from year to year, until the said consideration money (with all

interest, costs, and charges attending the said Bill of Mortgage) be fully paid and satisfied at one entire payment."

There is no covenant for payment of the mortgage [312] money, nor have the mortgagees, as far as appears from the deed, any right to call in the principal. At the end of five years, it was necessary by the general law of the Island, that the mortgagees should be entered as tenants in the Lord's Court, at a rent to be assessed, and if the mortgage remained unsatisfied at the end of twenty-one years from its date, the lands became the absolute property of the mortgagees.

In 1820, the interest being in arrear, a suit was instituted by the mortgagees against the mortgagor, and an Order was made by the Court on the 26th of January, 1820, under which, on the following day, the Kissacks were put in possession of the mortgaged premises by the Coroner of Ayre; the Sheading within which the lands lie.

With respect to the lands themselves, the particulars appear to be as follows:—

In the answer of the Appellant Birnie, Loughan Moar is described as containing, 8a. 3r. 25p.; Creggan Moar, 6a. 22p.; and The Little Crofts, 3r. 20p.; making together 15a. 3r. 27p. By the evidence it appears, that Loughan Moar and Creggan Moar are entered in the Lord's Rolls, by the Setting Quest of Andreas, in which parish they are situate, as follows: Loughan Moar (described as part of the Quarter land of Ballaslig), at an apportioned rent of 1s. 8d.; Creggan Moar (described as part of the Quarter land of Ballacottier), at 1s. 3d.; and The Little Crofts is entered in the parish of Lazayre, described as part of the Quarter land of Balladoole, 4½d; making together, 3s. 3½d.

Ballakamain, on the other hand, either itself forms a Quarter land, or is part of a Quarter land of the same name, in the parish of Kirk Bride.

[313] There is no doubt as to the accuracy of the description of the disputed lands, to which we have thus referred. The question is, whether these lands, or any of them, are included under the description of the estate of Ballakamain, in the deed which we are now about to state.

On the 21st of June, 1819, Caystile was the owner of an estate called "Ballakamain," which had descended to him from his father; he borrowed of one Grierson a sum of £800, and, to secure the repayment, executed a deed bearing date on that day, in which it is contended by the Appellants that the closes already described are included.

The form and substance of this mortgage deed is very different from that to the Kissacks, but, as no question arises upon it, except as to the parcels which it includes, it is not necessary to examine it minutely, except with reference to that subject.

The deed purports to be made by Thomas Caystile, of Ballakamain, in the parish of Kirk Bride, in the Isle of Man, yeoman, with the assent of Catherine his wife, who, in effect, joins as a party in the deed, and thereby, after a covenant for payment of the mortgage money, at the end of five years, Caystile and his wife assign and pass over in security unto James Grierson certain lands, by the following description: "all that estate, with the houses, lands, and premises thereto belonging, situate, lying, and being in the parish of Kirk Bride aforesaid, at present in the occupation and possession of the said Thomas Caystile, commonly called and known by the name of Ballakamain, containing by admeasurement 94a. 2r. and 30p., be the same more or less, and which said estate is of the yearly free rent of 12s. 5½d., [314] payable to the Duke of Athol, as lord of the said Isle of Man, all which said hereditaments and premises were late the property of John Caystile deceased, the father of the said Thomas Caystile, and upon his death the same descended and came to the said Thomas Caystile, as his son and heir-at-law. The deed then contains a covenant, that the mortgagors shall remain in possession as long as the interest is paid, but that upon failure of regular payment of the interest, it should be lawful for the mortgagee to issue execution for the £800, interest and costs, and to sell and dispose of the whole estate by public auction.

The interest on this mortgage fell in arrear, and in consequence, Grierson, in 1823, presented a petition to the Chancellor of the Isle, praying for a sale of the mortgaged estate, according to terms of the deed. On the 3rd of July, 1823, the Chancellor made an Order that the said lands and premises at Ballakamain should be sold for payment of the principal, interest, and costs due on the mortgage.



In pursuance of this Order, the Coroner of the Sheading of Ayre, after duly appraising the estate of Ballakamain, advertised and legally published the said lands and premises to be sold by public auction, on the 25th of March, 1824. At this sale, Grierson, by a gentleman named Lamothe (an Advocate), as his agent, became the purchaser at the price of £1012.

By deed, dated the 14th of June, 1824, the Coroner of Ayre, in consideration of the sum of £1012, conveyed the mortgaged premises to Grierson, by a description in all material points identical with the description in the mortgage deed.

Nothing, therefore, can be clearer than that, if Grierson became a mortgagee of those closes, under [315] the deed of 1819, he became a purchaser of them under the deed of 1824. Whether they were included in those deeds, is the first question in the appeal.

It is admitted on all hands, that the lands in question do not fall strictly within the terms of description found in the deed. They are not situate in the parish of Kirk Bride: they are not covered by the rent of 12s. 5½d.; they do not belong to the Quarter land of Ballakamain, and the close called The Little Crofts had never belonged to the father of Thomas Caystile, but belonged to a family called Cowle, and came to Caystile on his marriage with Catherine Cowle, the heiress of the property. But it is said, on the part of the Appellants, that the lands included in their mortgage are described as containing by admeasurement 94a. 2r. and 30p., more or less; that the lands properly forming part of the estate of Ballakamain, and situate in the parish of Kirk Bride, do not contain that quantity, or nearly that quantity, and that it is competent to them, therefore, to show by parol evidence, that other lands not strictly answering the description in the deed, except as they have been treated as part of the estate of Ballakamain, were intended to be included, and were, in fact, included therein, and they undertake to prove by evidence, that the disputed lands were always treated as part of the Ballakamain estate, and in particular, that they were so treated in a map produced to Grierson, at the time of his mortgage.

The Respondent, on the other hand, has argued—First, that by the rules of English law, extrinsic evidence is not admissible for any such purpose as that for which the Appellants proposed to produce it; but [316] secondly, that if such evidence be admissible, the Appellants have entirely failed in proving their case.

As we agree with the Court below upon the second point, it will not be necessary for us to give any opinion upon the first. If the question of law were to depend upon the English authorities, they would be found to turn upon such nice distinctions, that we should be unwilling, needlessly, to decide it; but it must, in truth, be governed by the rules of evidence prevailing in the Isle of Man, and we do not find that in the Court below any objection was taken to the admissibility of the evidence.

We proceed, therefore, to examine the evidence, observing only, that what the Appellants undertake to show is, not that the disputed lands were intended to pass, and were by mistake omitted, but that they did, in fact, form part of the estate of Ballakamain: were so treated by the owners of the estate, and constituted part of the ninety-four acres and upwards, of which the estate of Ballakamain consisted.

The first point to be proved, then, by the Appellants is, that the estate of Ballakamain, in the parish of Kirk Bride, belonging to Caystile, does not contain the quantity of land included in the mortgage.

Now, not only is there no proof of this, but the direct contrary is proved by the Appellants' own evidence. They have put in evidence a deposition made in 1845, by Thomas Caystile, the mortgagor, in a case of "*Lace v. Lace*," in which he distinctly states, that he was at one time owner of an estate in the parish of Bride, called Ballakamain, and that the estate consisted of ninety-four acres, and that it was sold in 1825 or 1826, for £1000 or £1100.

It appears from the Respondent's evidence, that [317] this statement is perfectly true. John Cowle, a member of the Setting Quest of Kirk Bride, states, that the lord's rent of the part of Ballakamain belonging to Caystile was 15s. 5½d., of which rent Caystile stood entered for 12s. 5½d., and William Kneale (a mortgagee) for 3s.

Now, the portion of Ballakamain, in the parish of Kirk Bride, covered by the rent of 12s. 5½d., is represented by the Appellants to be about seventy-eight acres; if we add a proportionate quantity of land for the rent of 3s., we shall find that

there will be fully ninety-four acres and rather more; tallying with the statement of Caystile.

It is plain, therefore, that at the date of Grierson's mortgage, there were lands in the parish of Kirk Bride belonging to Caystile, which had descended from his father, forming a part of the estate of Ballakamain, amply sufficient to satisfy the quantity of land proposed to be included in the mortgage, though a portion of those lands was subject to a prior mortgage, to William Kneale.

It appears that this mortgage was afterwards, in fact, paid off by Grierson; for John Cowle, a member of the Setting Quest of Kirk Bride, who must, therefore, be well acquainted with the subject, after stating that the lord's rent of that part of Ballakamain belonging to Caystile was 15s. 5½d., and that Grierson stood entered for 12s. 5½d., part of the rent, and William Kneale, a mortgagee, for 3s., adds, "James Grierson now stands entered for the whole 15s. 5½d. rent."

It is stated in Birnie's answer, that a mortgage on this estate, besides Kissack's, was paid off by Grierson, [318] and there can be little doubt that this is the mortgage in question.

The *onus* is upon the Appellants, to prove that they have not got under their deed the full quantity of land described in it; they give not one particle of proof to this effect, and the inference from the evidence is, that they have got that quantity and probably more.

If we look for proof that the closes in question were treated as part of Ballakamain, not one witness ventures to swear that they were. As to The Little Crofts, it is admitted, that it never was nor could have been so treated; and as to the other two closes, one of the Appellants' witnesses, Joughin, states that the "lands called Creggan Moar do not join Ballakamain," that the lands called Loughan Moar "do join the said estate, but are not part of the said Quarter land." It appears that the estate of Ballakamain either itself forms a Quarter land, or is part of a Quarter land of the same name.

Now, in the face of all this evidence, both on the part of the Appellants and the Respondent, the Appellants rely upon a map which is produced, and to the effect of which we shall now advert, having first pointed out in what manner the answer speaks of this instrument.

Birnie, in his answer, says, he believes that at the time of the application to Grierson for the loan of £800, "Caystile laid before him a map of the said premises or estate of Ballakamain, wherein was comprised, as part and parcel of the said estate, the two fields and croft in the Bill claimed by the complainant, namely, the Loughan Moar, the Creggan Moar, and [319] The Little Crofts, one of which fields contain 6a. 22p., the other 8a. 3r. 25p., and The Little Crofts 3r. 20p., or thereabouts;" he afterwards states that two mortgages, one to the Kissacks, and another held by a person named Joughin (which, in all probability, was the mortgage originally made to Kneale), were, in November, 1824, assigned to Grierson, but "that this Defendant has never seen the said assignments, nor can he discover what has become of the same, although the most diligent search and inquiry has been made for the same, as well as for the original map of the said estate, the measurement of which is referred to in the said Bond and security of the 19th of June, 1819, as aforesaid."

This passage is not very accurately worded, but we take it to mean that at the time when the answer was put in, this map could not be found.

Now, on looking into the evidence, there is not the shadow of proof that any map whatever was shown to Grierson; but a document is put in evidence, and represented to be the map referred to in the answer, a most extraordinary document, as will appear when we come to examine it.

Considering that this document could not be found when the answer was put in, one looks with some curiosity for an explanation, when and where and how it was discovered, and from what custody it comes. Upon these points, there is a total absence of evidence.

What is sworn is, that a man named Daniel Cown (now dead), formerly a school-master, was in the habit of mapping estates; one of the Defendant's witnesses, John Cowle, states, that Cown made a map of Ballakamain; that in 1810 or 1811, he (the witness) went [320] to see it, and he believes it to be the exhibit produced;



that he believes he frequently afterwards saw the plan at Ballakamain, and that it was hung up in the parlour. He says he saw the plan in the hands of Grierson, after he got possession of the estate, and that he (the witness) surveyed some of the fields, and made notes in pencil upon different parts of it. Other witnesses say, they believe that the name of Cown, appearing on the map, the different letters and figures, are in Cown's handwriting.

Now, the map itself, unless a table marked upon it called "References" be read as part of it, shows nothing whatever. All that appears upon it is, that in addition to that part of Ballakamain, of which the quantities are described, there was another part of Ballakamain, of which the quantities are not described. But there is a tabular statement of the quantities of land with this heading, "A plan and survey of Ballakamain estate, in the parish of Kirk Bride, belonging to Mr. Thomas Caystile, surveyed by Daniel Cown, 1805," and in this tabular statement, Creggan Moar and Loughan Moar appear to be included, and the quantity is summed up, as containing in the whole, 94a. 2r. 30p., the precise quantity mentioned in Grierson's mortgage and purchase.

It appears that the figures marking the quantities contained in this table are not accurately cast up, and that the real quantities amount to 94a. 1r. 20p.; that the quantities stated are not the real quantities as ascertained by a more accurate measurement, viz. the Tithe map in 1839; and, as to some of the closes, by measurement made by the witness Cowle, at the instance of Grierson, after he had entered into possession of all the property.

[321] But neither does this map in other respects agree with that alleged to have been shown to Grierson. In the map shown to him, The Little Crofts was included in the 94a. 2r. 30p. In this map there is no trace of The Little Crofts. The Appellants represent Creggan Moar to contain 6a. 22p. Here it is put down for 9a. 3r. They represent Loughan Moar to contain 8a. 3r. 25p. Here the two closes marked as representing Loughan Moar are set down as containing together 5a. 3r. and 13p. If another close adjoining be added, the whole quantity will be 8a. 1r. 24p.

But if this map, in which these closes are described "as part of the Ballakamain estate, in the parish of Kirk Bride," was hung up in the parlour of the Mansion-house at Ballakamain, and was considered and held out by the owner of that estate as an accurate description of it, how is it that the mortgage of 1817, to the Kissacks, does not describe these closes, either as being part of the Ballakamain estate, or as being in the parish of Kirk Bride, but, on the contrary, expressly describes them as being in the parish of Kirk Andreas? And what time the tabular statement on the map was placed there, we have no evidence whatever. After Grierson paid off Kissack's mortgage, there is abundant evidence that he wished to treat these closes, and did treat them, as part of Ballakamain, but there is no evidence of their having been ever so treated at an earlier period.

But, the conduct of Grierson himself appears to us to remove all doubt upon this part of the case. Before Grierson made his purchase in 1824, the mortgaged lands were appraised by the public officer, and advertised for public sale. Were these lands included in the appraisement? Were these lands included in [322] the advertisement? If they had been, could Grierson, the mortgagee and purchaser, have been ignorant of those facts, and would not his representatives have put them in evidence?

But, in June, 1824, Grierson had taken a conveyance of the estate, and was in possession as purchaser. According to the Appellants' case, he had purchased the equity of redemption of the lands, now in dispute, subject to Kissack's mortgage. He was, therefore, entitled to redeem that mortgage, and to take a conveyance of the lands as purchaser.

What is the course which he pursues? Why, he enters into a treaty with the Kissacks, for a transfer of their mortgage: he inquires whether they are willing to part with it; whether they will take their money, and transfer their interest to him. After some negotiation, they agree to do so, and by a deed dated the 9th of November, 1824, after reciting the mortgage, and that there was then due to the mortgagees for principal, interest, and costs, £161 11s. 7d., Kissack assigns over his mortgage deed, and the lands therein comprised, to Grierson, to hold in as ample a manner as Kissack, his executors or administrators, could have held

the same. In other words, he takes them subject to redemption, as Kissack held them.

These transactions were conducted, as regards the legal part of them, on behalf of Grierson, by Lamothe, an Advocate, and no surprise or mistake is alleged.

Is it possible, then, that parties who purchase an estate in the parish of Kirk Bride, and take a conveyance accordingly, and afterwards take a transfer of a mortgage on lands in the parish of Andreas and Lazayre, to hold as mortgagees, can be heard to say, that this latter transaction is a mistake from the be-[323]-ginning to the end, and that they really hold the latter lands under the same title and deed as the first? We are clearly of opinion, that they cannot. If we had any doubt upon this part of the case, the question is one of fact, upon which the Court below is much better able to appreciate the effect of evidence depending in a great degree on local usages than we can be, and we should be very reluctant to disturb their finding.

But, the Appellants insist, in the second place, that supposing their title to be founded on the mortgage to the Kissacks, they, the Appellants, and those under whom they claim, have been in possession, without accounting, for more than twenty-one years, and that thereby all equity of redemption on the part of the mortgagor has been barred.

If the law of the Isle of Man, as we have already stated, had remained unaltered, this would, no doubt, have been so. But by a Statute passed in the Island in 1835, within twenty-one years of Kissack's mortgage, it was by the first section enacted, that so much of the Act of 1704 as limited the redemption of mortgages to twenty-one years should be repealed, and that from and after the promulgation of the Act, no deed of mortgage upon any lands in the Island should at any time be held to lapse in law, so as to preclude the grantor from the power of redeeming the same.

Nothing can be more distinct than this enactment, nor is it attended with the smallest hardship to the mortgagee, for by the next section it is enacted, that at the end of twenty-one years from the date of any mortgage, it shall be lawful for the mortgagee to sue out judgment and execution, and in virtue of such judgment and execution to cause the mortgaged premises to be sold for payment of the mortgage.

[324] There is no such thing, therefore, as what we call foreclosure of a mortgage; and possession of the estate has nothing to do with the right to redemption. As long as the mortgage subsists it is redeemable; if after twenty-one years the mortgagee wishes to realize his security, he may at any time bring the estate to sale.

It is material to observe, that in the case of *Christian v. Goldie* [2 Moo. P.C. 226], already referred to, there is a mistake on this subject, in the argument of Counsel. The repeal of the Act of 1704 is there referred to the general Statute of Limitations, of the Imperial Parliament of 1833 (3rd and 4th Will. IV., c. 27); whereas that Statute has nothing to do with the question, which turned entirely upon the Island Statute of 1835. Had the question depended on the English law, it would have been necessary to examine the deed of 1817, in order to see whether it was not in effect of the nature of a Welsh mortgage, and whether the mortgagee was not to take possession and hold until his mortgage should be satisfied out of the rents, in which case there could be no adverse possession until the mortgage had been satisfied; but, on looking into the Island Statute, no question can arise on that point.

With respect to The Little Crofts, it was said that the Respondent had not shown any title, for that he sued as heir of his father, whereas that property appeared to have been the estate of his mother. We are of opinion that no such point as this is open to the Appellants upon the pleadings, nor does it appear to have been raised in the Court below.

On the whole we shall humbly advise Her Majesty to affirm the decree complained of, with costs.

[Mews' Dig. tit. ISLE OF MAN; 2. LEGISLATURE, LAWS AND CUSTOMS—*Lands*. See *Boardman v. Quayle*, 1857, 11 Moo. P.C. 245.]



## [325] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM ANDERSON.—*Appellant*: CATERINE LANEUVILLE.—*Respondent* \*  
[Nov. 29 and 30, 1854].

A Testator whose *domicilium originis* was Ireland, where he inherited considerable estates, abandoned such, and by a long residence in England acquired an English domicile. In the year 1836, he sold his house and furniture, and broke up his establishment in England, and went to reside in France, where he bought and furnished a house in which he resided permanently (cohabiting with a French woman) to the period of his death, in 1849: with the exception only of occasional visits of short duration to England for purposes of business relating to his estates in Ireland, and his property in the English funds.

Held, under such circumstances, that the Testator's domicile was French, and was not affected by his having expressed an intention to return to England, in an event which never happened, or of his having, on one occasion when in England, executed a Will according to the English form and law, or from the circumstance that the bulk of his property at his death was in the English funds.

William Anderson, the Testator in the cause, was born in 1768, at Agacross, in the county of Cork, in Ireland, of Irish parents, being the eldest son of William Anderson, of that place, at whose death he succeeded to considerable estates situate there. In the year 1787, he was sent to France for his education, and there became acquainted with the Respondent, who was then unmarried. Whilst in France, the first revolution broke out, and in 1790, by her assistance, at the risk of her own life, he was enabled to escape from that country. On his return to England, he resided with his father, first at Clifton and then at Bath, and afterwards, during his father's lifetime and [326] after his father's death, he resided at different places in the counties of Gloucester and Somersetshire, but never returned to Ireland.

In the month of August, 1835, the Testator caused an advertisement to be inserted in a French newspaper for the purpose of discovering the residence of the Respondent. By means of this advertisement, Madame Laneuville, who had married since the Testator left France, and become a widow, became apprised of the Testator being still in existence, and of his anxiety to find her, and thereupon wrote him a letter, which was answered by him on the 14th of November, 1835, wherein he expressed his happiness at finding that she was still alive. Shortly afterwards he proceeded to Paris, where he took apartments, and resided and cohabited with Madame Laneuville, in the Rue des Magazins, till the April following, when he returned to England for the purpose of disposing of his house and furniture at Clifton. The sale of the house and furniture took place in June, 1836, when he broke up his establishment, dismissed his servants, and returned to Paris, and again took up his abode with Madame Laneuville, in the Rue des Magazins. In 1837, they removed to the Rue d'Echiquier, and in 1838, to No. 12, Rue Plaisance, at Nogent-sur-Marne, near Paris. In 1839, the Testator purchased that house, which he furnished, and grounds, and had a conveyance of the same to himself for life, with remainder to the Respondent and her grandchildren, and, with the exception of an annual visit to England for a few weeks in each year for the purpose of business, he resided with Madame Laneuville at Nogent. He died at Paris, on the 23rd of December, 1849 (where he had gone temporarily [327] for medical advice), a bachelor, leaving the Appellant, his nephew, and in case of his intestacy, supposing him to be domiciled in England, his sole next of kin. After the sale of the house and furniture at Clifton, the Testator had no place in England, even of temporary abode, which he could call his own; but during his visits he occupied different

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apartments at a lodging-house at Bristol. The property left by the Testator consisted of freehold estates in Ireland, descended to him through his father, the sum of £33,350, in the English funds, the principal part whereof had been invested in May, 1836, and the remainder in the years 1841, 1844, and 1848, a balance in the hands of his bankers at Bristol, and some property in France of trifling value.

During one of the Testator's visits to England, and on the 24th of June, 1843, he executed a Will principally in favour of the Appellant, whom he appointed sole executor. The Testator also, in France, wrote out, in the French language, and signed, another Will, dated the 26th of January, 1848, whereby he constituted Madame Laneuville his universal legatee. This Will was holograph, and unattested, but was valid by the law of France, in the event of the Testator being domiciled in that country. The only question raised by the pleadings and decided in the Court below, and at issue upon the present appeal, was, whether the Testator was at the time of his death domiciled in France.

The French Will was propounded by the Respondent, Madame Laneuville, in an allegation, which, when finally admitted, pleaded only sufficient facts to raise the question of domicile.

The Appellant, after having asserted and waived an appeal against the admission of this allegation, brought [328] in an Act on Petition, shortly setting forth the above facts respecting the Testator, and submitting that even if the French Will of 1848 was of any force or validity, and if the facts pleaded in the allegation were admitted, yet that the Will of 1848 would be of no force or validity to revoke the former Will of 1843, which, he contended, was, under the circumstances, a good and valid Will, so far as regarded the Testator's estate, both real and personal, in Great Britain and Ireland.

This Act on Petition was rejected by the then Judge of the Prerogative Court (Sir Herbert Jenner Fust), as being novel and unprecedented, and contrary to the practice of the Court, and that Judge stated that the only question he was called upon to decide was, whether the Testator was a domiciled Frenchman or not, which would be determined by the allegation. A responsive allegation was then brought in by the Appellant pleading a variety of facts, to show that the domicile was English, that the Testator had not, as required by the French law, obtained an act of Government to entitle him to establish his domicile in France, and that he was liable to be expelled by the police as a foreigner. A further allegation was also given in by the Respondent in answer to certain parts of this responsive allegation, and admitted by the Court.

A great number of witnesses were examined in France and England, upon these allegations, the effect of whose evidence, as well as the letters of the deceased put in evidence, tended to prove that the Testator, almost to his dying day, had declared his fixed attention of remaining in France, and had treated that country as his home; that he had spent large sums upon improvements in the house and grounds at Nogent-sur-Marne, and had negotiated for the purchase [329] of some adjoining property to add to the grounds. One of the French witnesses deposed that the Testator had declared that he would, in the event of the Respondent dying, return to England.

The Judge of the Prerogative Court (Sir John Dodson) delivered judgment, on the 11th of March, 1853, by which he held, that the validity of the testamentary instrument executed by the Testator in France was to be governed by the law of the place of his domicile, both in case of testacy or intestacy, citing, in support of this position, *De Bonneval v. De Bonneval* (1 Curt. 856), and *Croker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 348), and, upon the disputed fact of his domicile, he was of opinion, that the Testator had lost, in the first instance, his *domicilium originis* in Ireland, and had acquired an English domicile, but that afterwards, by selling his furniture, dismissing his servants, parting with his home in England, and going to France, where he fixed his abode for the last years of his life, he had acquired a French domicile which he never lost, and, therefore, he declared that at the time of his death the Testator was domiciled in France; and, by a final interlocutory decree of the same date, pronounced "that William Anderson, the deceased in the cause, was, at the time of making and executing his last Will and



Testament, bearing date the 26th day of January, 1848, and at the time of his death, domiciled in France."

The present appeal was brought against this decree.

The Solicitor-General (Sir Richard Bethell), and Dr. Addams, for the Appellant.—The sole question the Court has to decide, is, whether [330]—the Testator's legal domicile is to be deemed a French or an English domicile. Great difficulty always existed in defining what is the domicile of a person in circumstances like the present, as the Court must necessarily determine that fact from the particular habits of each individual. Here there is nothing to fix the domicile as French; the taking lodgings, or a house for a kept mistress, cannot constitute a domicile; still more so when, as in this case, the Testator avows his intention to return to England on her death; no case can be cited which goes to that extent; the very fact of his funded property being in England, and his real estate in Ireland, is decisive of the English domicile, and agrees with the definition of domicile in the Civil law, "*Ubi quis larem, rerumque, ac fortune suarum summam constituit*" (Code, lib. x., tit. xxxix., sec. vii.). His investments in the English stocks, made, too, during his residence in France, strongly tend to show that he never thought of abandoning his English domicile. Indeed, he could not acquire a French domicile, as he had not complied with the requisites required by the law of that country to give him a French domicile. He had not obtained an act of Government entitling him to fix his domicile in France. They referred to *Collier v. Riva*; (2 Curt. 855), *Viesca v. D'Aramburu* (2 Curt. 277), *Craigie v. Lewin* (3 Curt. 435); and see also the case of *Forbes v. Forbes* (1 Kay, 341), where all the authorities upon this point are collected).

Mr. Rolt, Q.C., and Dr. Jenner, appeared for the Respondent, but were not called upon to address their Lordships.

[331] The Right Hon. Dr. Lushington.—In this case we do not think it necessary to hear the Respondent's Counsel.

The sole question which was raised in the pleadings was this: whether the Testator at the period of his death was domiciled in France or in England. It is not necessary to consider why the learned Judge (Sir Herbert Jenner Fust) who then presided in the Prerogative Court, thought fit so to narrow this question; though one reason, I apprehend, was, that if the domicile turned out to be English, in that case the French Will, not having been executed according to the Statute, 1st Vict., c. 26, would have been altogether void, and there would have been an end of the whole contest. And, if, indeed, the domicile should ultimately be established to be a French domicile, then the Prerogative Court would know by what law the validity of that Will was to be governed. What would be the form is another question, and on which their Lordships express no opinion.

Now, the leading facts of the case may be very shortly stated. What is called the domicile of origin of the Testator was Ireland; for he was born in Ireland, of Irish parents, and inherited considerable Irish estate, but for very many years before his death he had ceased to reside in Ireland, and his domicile of origin was clearly lost. An English domicile was acquired by long residence in different parts of England, principally in the county of Gloucester. It appears, that the deceased became acquainted with Madame Laneuville some time about the commencement of the French revolution. We shall not stop to consider whether the early history set forth in this case be true or not; for his attachment to this lady, what [332]—ever was the cause, is beyond dispute: whether it arose from her having rescued him at that period from impending danger be true or not, the fact is undoubted, that he became most sincerely attached to her. It is a fact, proved beyond all controversy; it is admitted in this cause by both parties.

In the year 1835, it appears that the Testator, having been estranged from Madame Laneuville during the intervening period, again discovered her. That fact appears from a letter in his own handwriting, in which he thus addresses her: "My dear, dear Catherine, I have received your letter, and am now the happiest man in the world in knowing you are alive and well, and I hope happy." Then he goes on to state a variety of other circumstances, which it is not necessary to recapitulate. At this period, it appears that the Testator was residing at Bedford Villa, Clifton, and immediately after having discovered her residence in Paris he proceeded there to visit her, either in the end of 1835 or in the beginning of

1836. In 1836, he sells off his furniture and quits his residence at Bedford Villa, Clifton, and after that (but at what precise period does not appear from any evidence I have been able to discover in the cause), and not before, he takes lodgings in Trinity Street, Bristol, but for what period, or in what manner, there is no evidence. It is to be observed, that he had not become permanently resident at that time in Trinity Street, Bristol, but he takes these lodgings merely for a temporary purpose, after he had sold off his furniture, and after he had quitted Bedford Villa.

From that time, 1836, until his death in 1849, he continued to reside in France, with the exception of such intervals as presently it will be necessary to [333] notice. He resides in Paris until the year 1839, and after that he resides at a house purchased at Hogent-sur-Marne, a few miles from Paris. Without entering into any discussion as to the particular form and manner in which that house was purchased, and furnished, or to the particular interest he had in it, it is sufficient to say, that he had a life interest in that house. He visited England every year, according to the evidence of one of the witnesses, Mrs. Price, and he remained for a few weeks, the time varying from seven to eight weeks, at her lodgings in Trinity Street, Bristol; but all his letters show that he came there, not from choice, but that he came there for the purposes of business, and that he was always anxious to return, as soon as that business was disposed of, to his residence in France.

Here then is a residence in France of thirteen years, with occasionally a break of short duration, and that only for the purpose of business.

I think that an observation was made by the Lord Chancellor in the case of *Bempde v. Johnstone* (3 Ves. 201), which strongly applies to this state of the case. Speaking of the deceased in that case, the Lord Chancellor said, "wherever he had a place of residence, that could not be referred to an occasional and temporary purpose, that is found in England, and nowhere else." So, on the present occasion, during those thirteen years, wherever the Testator had a place of residence which was not for an occasional and temporary purpose, that residence was to be found in France, and nowhere else. We apprehend, therefore, looking at this state of facts alone, that *prima facie*, the domicile in England was abandoned, and that there would be sufficient to constitute a French [334] domicile, although at the same time we may be of opinion, that if this were properly to be considered a domicile of origin, it is necessary to have very strong facts in order to change such a domicile.

Now, looking at this state of things, what are the facts, and what are the arguments which have been adduced in opposition to the conclusion which such a residence, under such circumstances, would necessarily induce their Lordships to come to?

The facts are short, and the arguments equally so. It was contended, that the Testator intended to reside in France only during Madame Laneuville's lifetime. Assuming that to be the fact, assuming that he had seriously intended to quit France when Madame Laneuville died, it does not at all follow that that would tend to establish the conclusion that he had not acquired a domicile in France. For what is it that prevents the acquisition of a domicile by long residence in a country? It is the fact of the individual being there for a temporary purpose. It never can be said that residing in a country until the death of an individual is a residence merely for a temporary purpose. A residence in India, in the East India Company's service, has long since been established to constitute a domicile, yet, in such a case, there is always an *animus revertendi* at some period, though the period may be remote, and very uncertain. In order to prevent the acquisition of a domicile by residence in another country, it is laid down in all the books, that if the residence be merely for a purpose which, in its nature, is temporary, and not likely to last long, then the residence would not constitute in itself the acquisition of a domicile.

It has also been contended, that all the property of the deceased was in this country, or in Ireland. No [335] doubt it was so; the real estate was situated in Ireland and the funded property in this country; but the argument to be derived from the *lex loci rei sitae* has long been disposed of by the highest authorities.

With regard to any declarations made by the deceased with respect to his intentions, their Lordships are not desirous of following those declarations in detail; because, although those declarations are undoubtedly admissible evidence for that purpose, they are not entitled to the first degree of consideration. In the case of *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 447), there were a number of declarations of



the intention of the Testator to return to this country; but the Court of Delegates were clearly of opinion, after the most mature consideration, that the declarations of the Testator could not be allowed to weigh against a continued domicile in a foreign country.

We do not propose to enter further into the consideration of the evidence, though there are very many points of it which appear to their Lordships very strongly to tend to the conclusion to which they have come. We do not intend so to do, because we are of opinion, that the learned Judge in the Court below has stated the law with very great ability, and with perfect accuracy; and that in following this case to the conclusion to which he has come, he has shown in a manner most perfectly satisfactory to their Lordships, that all his conclusions were justly founded from the facts and circumstances of the case.

Approving, therefore, as we do, of the judgment of the learned Judge *in toto*, we think it unnecessary to hear the Respondent's counsel. The appeal must be dismissed, with costs.

[Mews' Dig. tit. INTERNATIONAL LAW; V. DOMICIL; c. *Change of Domicil—Form of Will—When Acts of Party are contrary to expressed intention*. S.C. 2 Spinks, 41. Cf. *Hooper v. Gumm*, 1867, L.R. 2 Ch. 282, 289; *Alcock v. Smith* (1892), 1 Ch. 238.]

### [336] ON APPEAL FROM THE SUPREME COURT OF CIVIL JUSTICE OF BRITISH GUIANA.

JOHN FORTE, WILLIAM BRANCH POLLARD, SARAH MARIA GILGEOS, and  
WILLIAM BENJAMIN GILGEOS,—*Appellants*; JOHN BEETE, and  
Others,—*Respondents* \* [Nov. 28, 1854].

*Heard ex parte.*

A. purchased, at an execution sale in British Guiana, certain real estates, and having paid the purchase-money into the Registry of the Supreme Court was put into possession by the Provost Marshal, but A. being unable to get a transport of the estates from the Supreme Court, as no title could be given, petitioned the Supreme Court for annulment of the sale and return of the purchase-money.

The Supreme Court refused to make any Order, on the ground, that admitting that an execution sale could be annulled, the purchaser's remedy was by petition to the Sovereign for relief, *restitutio in integrum*, with *committimus* to the Court.

Upon appeal, held by the Judicial Committee that as it was a mere question of the mode of giving relief, to which it was not denied the purchaser was entitled, it was competent to give such upon petition to the Court, and decreed annulment of the execution sale, and return of the purchase-money to the purchaser; the rents and profits received by the purchaser while in possession, to be set-off against interest on the purchase-money, as well as for money expended on improvements and for the costs.

This was an appeal from two Orders of the Supreme Court of Civil Justice of British Guiana, bearing date the 3rd and 5th of July, 1849, made on two several petitions presented to that Court by the Appellants.

The circumstances which led to the making of these Orders were these:—

[337] By the law of the Colony of British Guiana, debts which have accrued due

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.

either for stores supplied for the use of plantations, or otherwise in respect of such plantations, are recoverable by the following process:—An action at law is commenced against the proprietor or representative of the plantation in respect of which the debt is owing, without ascertaining or naming the particular individual to whom the plantation may belong. A citation or summons is then served by one of the Marshals of the Court, by affixing it to the principal building on the plantation. If an appearance is entered on behalf of the proprietor, the action proceeds in the usual manner; and on the Plaintiff establishing his claim, the Court gives sentence, decreeing the plantation to be executable for the amount of the debt and costs. If no appearance is made, the Plaintiff (after a second citation in the same manner) obtains a similar sentence by default. On such sentence being pronounced, the Marshal levies upon and takes in execution the plantation expressed in the sentence to be executable for the debt. In the case of taxes due in respect of a plantation, there is a more summary method of procedure. Without going through the form of an action at law, the Receiver-General causes a “summary summons” to be affixed to the principal building on the plantation, requiring “the proprietor or representative” to pay the taxes due within twenty-four hours. In default of payment, an order from a Judge is obtained, declaring the plantation executable for the amount due; and the Marshal proceeds to levy on and take in execution the plantation, in the same way as if it had been made executable by a sentence pronounced in an ordinary suit, as above stated. At this stage, [338] the Plaintiff, whether the Receiver-General or a private individual, ceases to have any control over the proceedings, which are subsequently carried on without his intervention or privity, by the Marshal and other officers of the Court. The full Court, or Chief Justice during non-session, upon petition of the Marshal, appoints two sequestrators to superintend the cultivation and management of the plantation, and to receive the produce thereof until the day of sale, which cannot take place until one year after levy, and the particular description of the plantation and notice of the sale shall have been three times advertised in the *London Gazette* and *Amsterdam Courant*. At the expiration of the year, and after due notice, as above mentioned, the Court, or Chief Justice during non-session, upon petition of the Marshal, fixes a precise day of sale, which is advertised for four successive Saturdays in the Government newspaper of the colony. At the time of sale the Marshal, assisted by the Registrar, or a sworn clerk, acts as auctioneer; the person who is declared the highest bidder, pays to the Marshal a sufficient sum in cash, to defray the expenses and charges of that officer, and delivers to the Registrar bills of exchange, drawn at three, six, nine, and twelve months’ sight, for the amount of the purchase-money after deducting therefrom the above-mentioned cash payment, and is thereupon let into the possession of the plantation by the Marshal.

On the purchaser presenting to the Court the Registrar’s certificate that the whole of the purchase-money had been paid into the registry, the Court grants to such purchaser, on petition, Letters of Decree under the seal of the Court. No conveyance or other deed is executed by the former proprietor, nor [339] in his concurrence in the transaction required in any way, after his property has been duly taken in execution by the Marshal; but until Letters of Decree have been granted, the purchaser, although he may have been put into possession of the property, has no power to sell or mortgage any part of it, as by law all “transports,” or conveyances and mortgages of real property, must be executed and passed before a Judge, who requires to be satisfied that the vendor’s or mortgagor’s title is perfect.

In the year 1842, Meinhard Johannes Retemeyer, the Receiver-General of British Guiana, commenced proceedings by summary summons against the proprietor of plantations Best and Waller’s Delight, in the Colony, for the recovery of taxes due in respect of those plantations. Execution was levied on these plantations in due course on the 20th September, 1842, when there were surrendered to the Marshal plantations Best, Phoenix, and Waller’s Delight.

By the Order of the Chief Justice of British Guiana, dated September 23rd, 1842, on the petition of the Provost Marshal, sequestrators were appointed to administer the above plantations, and on the 27th of October, 1843, the Chief Justice appointed the 21st of November then next, as the day of sale, when they were



accordingly put up to execution sale, and the Appellant, Forte, became the highest bidder and the purchaser for the sum of 41,000 dollars.

Immediately after the purchase, the Appellant, Forte, having complied with the conditions of sale in respect of the cash payments thereby required, was put into possession of the plantations by the Provost Marshal.

Within one month after the day of sale, the Registrar issued an advertisement three times in the Government newspaper of the Colony, on the 9th, 14th, and 16th December, 1843, calling upon all claimants on the net proceeds of the plantations Best, Phoenix, and Waller's Delight, to appear at the Roll Court to file their respective claims: in consequence of which claims were shortly afterwards filed by various creditors.

On the 19th January, 1844, the Appellant, Forte, deposited in the registry of Court the Marshal's receipt for 1543 dollars, 700 dollars in cash, and Bills of exchange for 38,757 dollars, the amount of balance due, making together 41,000 dollars, the full amount of the purchase-money.

These Bills remained in the registry of the Court until the coming into operation of Ordinance, No. 21, 1844, when notice was given by the Registrar to the Appellants, to pay in cash into the registry of Court the amount of money expressed in every of such Bills of exchange; and this notice not being complied with within fourteen days, the Provost Marshal was ordered by the Supreme Court, on the 5th April, 1845, to retake and re-sell plantations Best, Phoenix, and Waller's Delight. This last-mentioned Order, however, was not acted upon, in consequence of the passing of Ordinances, Nos. 8 and 15, 1845; and on the 11th December, 1845, Forte's securities, the other Appellants, Sarah Maria Gilgeous, William Benjamin Gilgeous, and William Branch Pollard, caused to be paid into the registry of Court the sum of 38,757 dollars, the balance of the purchase-money.

By the law of the Colony the right of property in a plantation sold at execution sale does not devolve to the purchaser until the purchase-money has been [341] fully paid, and Letters of Decree have been obtained from the Court; and as by Article 7 of the conditions of sale, Letters of Decree, or title, were only to be granted when the instalments were paid up, the Appellant, Forte, to that time, had not been entitled to apply for Letters of Decree. As soon, however, as the payment in cash had been completed, the Appellant presented a petition to the Supreme Court for Letters of Decree for plantations Best, Phoenix, and Waller's Delight: on which the Order of the Court was, "The Court cannot grant the prayer of this petition." As it is the practice of the Court to sit with closed doors while considering petitions, and to assign no reasons for the Orders made thereon, the Appellant could not at first ascertain the grounds upon which the prayer of the petition had been refused. The Appellants, however, afterwards discovered that, in the advertisements of notice of the execution sale required by law to be published, the property had been described as plantations Best and Waller's Delight, omitting the name "Phoenix;" and having reason to believe that the refusal of the Court to grant Letters of Decree was founded on that fact, Forte presented another petition for Letters of Decree. On this petition, in which the facts of the case were fully set out, and also an argument tending to show that the validity of the execution sale was not affected by the terms of the advertisements, the Order of the Court was, "The Court cannot grant the prayer of this petition."

Finding it thus impracticable to obtain from the Court a title to the property which he had purchased and paid for, Forte petitioned the Court for a return to him of the sum of 39,457 dollars, which had been [342] paid into the Registry as balance of the purchase-money of the plantations Best, Phoenix, and Waller's Delight; on which petition the Order of the Court was, "The Court cannot grant the prayer of this petition, referring the Petitioner to his ordinary remedy."

In consequence of this last Order, Forte, in the month of April, 1846, brought an action against Thomas Cochrane Hammill, the Provost Marshal, who had signed the condition and memorandum of contract of sale, claiming that by sentence of the Court the Defendant should be condemned to procure, obtain for, and deliver to the Plaintiff, Letters of Decree, or title to the plantations Best, Phoenix, and Waller's Delight; the Plaintiff offering to defray all such reasonable costs as the Defendant might incur in the procuring of such Letters of Decree, and to do all

legal acts the Defendant might reasonably require him to do, for the purpose of enabling the Defendant to procure Letters of Decree. In this action the sentence of the Court, on the 12th of January, 1847, was, as follows: "The Court having heard the parties on the exceptions of '*Ineptus et obscurus libellus*,' and '*Tibi adversus me non competit haec actio*' proposed by the Defendant, now rejects the exception of '*Ineptus et obscurus libellus*,' and admits the exception of '*Tibi adversus me non competit haec actio*;' and for the benefit thereof absolves the Defendant of this instance, with condemnation of the Plaintiff in the costs."

The Appellant again petitioned the Court for Letters of Decree, on which the Order of the Court, on the 7th April, 1847, was, "The Petitioner is referred to the orders made by this Court on the 19th [343] and 31st of January, 1846, on the two several petitions presented by the Petitioner in this matter."

On the 7th January, 1848, Forte presented another petition, in which he set forth the hardship of his case, showing that the difficulties had arisen from errors committed by the Officers of the Court; that the plantation Best, having no buildings upon it, would be useless for the purpose of cultivation, unless accompanied by the possession of the adjoining plantation Phoenix, on which were all the buildings used for the crops of both plantations; that at the time of his purchase, he had contemplated the sale, and, before the payment of the purchase-money, had contracted to sell upwards of 150 lots of land on the estates to labourers, who would have become resident on the property, and thereby enhanced its value; but who, on the failure to obtain Letters of Decree, had located themselves elsewhere; and concluding with the prayer, that the Court would declare as null and void, upon the ground of manifest error, the execution sale of the 21st November, 1843: on which petition the Order of the Court, on the 18th January, 1848, was, "The Court cannot grant the prayer of this petition."

In June, 1849, the two inventories referred to in the conditions of sale, could not be found in the Marshal's office; and it was in evidence that they were destroyed in a fire which occurred in October, 1848; it was also proved that one purported to be an inventory of the plantations Best and Phoenix, and the other of the plantation Waller's Delight.

On the 22nd of June, 1849, the Appellants presented their joint petition to the Supreme Court, embodying the facts of their case, and concluding with [344] the prayer that the Court would be pleased to make an Order directing the Registrar, after deducting such reasonable charges as the Court might be pleased to direct, to pay out to Forte the sum of 700 dollars paid by him into the registry of Court, on the 19th day of January, 1844, on account of the Purchase-money of plantations Best, Phoenix, and Waller's Delight, *cum annexis*, and also to pay out to the other petitioners the sum of 38,757 dollars paid into the registry as balance of the purchase-money by the last-mentioned petitioners; or in case that the Court should not be disposed at once to make such Order, then that the Court would be pleased to appoint a day for hearing Counsel for the Petitioners, and also Counsel for any other party that the Court might consider entitled to be so heard, as to whether the Court would make such Order; on which petition the Court placed an Order bearing date the 3rd of July, 1849, in the following words:—"The Court cannot grant the prayer of this petition." The Appellants then presented a further petition for leave to appeal to Her Majesty in Council from the Order made on the 3rd of July, 1849; which leave was refused by Order of the Court of the 5th of July, 1849.

The Appellants, thereupon, applied by petition to Her Majesty in Council for leave to appeal from the above Orders, dated the 3rd and 5th of July, 1849, which was granted upon terms of giving security for £300, which condition the Appellants complied with.

No appearance having been entered for the Respondents, the appeal now came on to be heard *ex parte*.

The grounds relied upon by the Appellants in sup-[345]-port of the appeal, as embodied in the reasons to their case, were:—

First, that the execution under colour of which the plantations Best, Phoenix, and Waller's Delight were sold at the execution sale on the 21st of November, 1843, was for taxes due in respect only of plantations Best and Waller's Delight.

Second, that the execution sale was informal and illegal, inasmuch as no particular description, and no notice of the sale of one of the three plantations then



sold, namely, plantation Phoenix, had been advertised either in the London Gazette or Amsterdam Courant, as required by law.

Third, that the preliminary proceedings necessary to give validity to an execution sale of a plantation, had not been duly taken in respect of plantation Phoenix.

Fourth, that no Letters of Decree or title could be granted, and no legal transport made to the Appellant, Forte, for the plantations which he contracted to purchase at the execution sale.

Fifth, that the plantation Best, having no buildings on it necessary for its occupation and cultivation as a plantation, was useless to him without a legal transport of the adjoining plantation Phoenix.

Sixth, that the Supreme Court could not grant Letters of Decree for the plantations Best, Phoenix, and Waller's Delight, although the Appellants had, on their parts, complied with all the conditions of sale, and done all acts required to be done by them to entitle them, or some of them, to such Letters of Decree.

Seventh, that the nett proceeds of the execution sale of the plantations Best, Phoenix, and Waller's [346] Delight, in the registry of the Court, could not be legally paid out to the creditors' claimants on the proceeds, or to any persons other than the Appellants.

Mr. Greene, and Mr. W. P. C. Thompson, for the Appellants.

The Lord Justice Knight Bruce.—Their Lordships are of opinion, that this is simply a question of the mode of giving relief, and that the Appellants are certainly entitled to some relief, for it would be contrary to equity and justice that they should be denied a title to the purchased plantations, and yet refused a return of the purchase-money paid into the registry of the Supreme Court, or allowed interest for the same. We shall, therefore, advise Her Majesty to annul the execution sale, and direct the Appellants to give up possession of the plantations to the Provost Marshal. The purchase-money paid into the registry of the Court must be returned to the Appellants, but as the Appellants have been in possession, the rents and profits received by them must be considered and deemed a set-off for interest on the purchase-money and such costs as have been incurred by the Appellants, as well as for improvement or permanent repairs made by them upon the plantations.

The following report was made by the Committee, which was afterwards confirmed by Her Majesty's Order in Council:—

“Their Lordships do agree humbly to report to your Majesty as their opinion, that the sale of the plantations Best, Phoenix, and Waller's Delight, *cum* [347] *annexis*, made to the Appellant, John Forte, at the execution sale held on the 21st of November, 1843, in the proceedings under appeal mentioned, ought to be annulled, and that the Appellants respectively should redeliver or cause to be redelivered to the Provost Marshal of the said Colony, the possession of all such part of any of the said plantations as may not already have been given up to him; and their Lordships are further of opinion, that the sum of 700 dollars deposited by the Appellant, John Forte, in the registry of the Supreme Court of British Guiana, on the 19th of January, 1844, on account of the purchase-money of the said plantations, ought to be forthwith repaid by the Registrar of the said Court to the said Appellant, John Forte, or his certain attorney, and that the sum of 38,735 dollars paid by the Appellants, William Branch Pollard, Sarah Maria Gilgeous, and William Benjamin Gilgeous, to the Registrar of the said Court, on the 11th of December, 1845, as the balance of the said purchase-money, ought to be forthwith repaid by the Registrar of the said Court to the said last-mentioned Appellants, or to the survivors or survivor of them, or to their certain attorney; and their Lordships do further recommend that the rents and profits of any of the said plantations received by the Appellants, or any of them, be deemed and taken to be a set-off against the interest of the said monies paid into the said Court, and to the Registrar thereof as aforesaid, and against the accumulations of such interest, and against the costs incurred by the Appellants, or any of them, in their several proceedings in the said Court, and against the costs of this appeal, and against the sum of 1543 dollars paid by the Appellant, John Forte, for expenses incurred in bringing [348] the said plantation to sale, and against any monies expended by the Appellants, or any

of them, in the permanent improvements, or substantial or necessary repairs of the said plantations; and their Lordships do further recommend that this suit and petition be remitted to the said Supreme Court of Civil Justice in British Guiana to give effect to this report in all its parts, in case your Majesty should be pleased to approve the same, and to order, as is herein set forth and recommended, and that the Appellants and the said Provost Marshal, or any of them, be at liberty to apply to the said Supreme Court as they may be advised" (a).

(a) As this case was heard *ex parte* in the Court below, as well as here, and no reasons were given by the Court of Civil Justice of British Guiana, according to the practice of that Court, upon an Order made on a petition (see Ordinance, No. 5, 1846, sec. 52, where it is confined to a judgment or sentence of the Court), it is thought desirable to set out the material part of the reasons transmitted to the Privy Council, pursuant to the Rule issued by the Privy Council, dated the 12th of February, 1845 (4 Moore's P.C. Cases, Appendix, p. xxv.), under the Statute, 7th and 8th Vict., c. 69, sec. 11, by His Honor the Chief Justice Arrindell, the other Judges who joined in making the Orders being either dead or absent from the Colony.

The Chief Justice, after stating the law as set forth in the opening of the case, expressed his regret that it had not hitherto been rendered incumbent on the Judges of the Supreme Court of Civil Justice to give their reasons for granting or rejecting petitions, as well as the grounds or reasons for sentences when pronounced; but stated the following as the reasons for the dismissal of the several petitions presented by the Appellants.

"Because the petition of the 22nd June, 1849, on which the Order of the 3rd of July, 1849, was placed, expressly referred to a petition of John Forte, the purchaser of the property mentioned in the petition, praying to be paid back the very money mentioned [349] in the petition of the 22nd of June, 1849, and which petition was rejected by the Court, then composed of Jeffrey Hart Bent, Chief Justice, John Downie, and Samuel Firebrace, all of whom were dead, and that the present Chief Justice, then acting in the place of Mr. Bent, did not consider himself authorised to give any other Order than that appealed from, inasmuch as any Order granting the prayer of the said petition of 22nd of June, 1849, would have been in direct opposition to the same Court's Order of the 7th of February, 1846, which last-mentioned Order was then, and is still, in force, the same never having been appealed from, and the same having been granted without the parties having been heard.

"Because, upon another petition presented by John Forte, dated the 7th of January, 1848, to have the sale of plantations Best, Phoenix, and Waller's Delight declared null and void, the Court, then consisting of the said William Arrindell, John Downie, and Samuel Firebrace, made an Order, dated the 18th of January, 1848, rejecting such last-mentioned petition: and, because to have granted the prayer of the petition of the 22nd of June, 1849, would have been in effect to have reversed the last-mentioned Order of the 18th of January, 1848, which was then, and still is, in force and unappealed from, and which the Court had no authority to do.

"Because on the petition of John Forte to have paid back to him the same purchase-money, the Court, then consisting of Jeffrey Hart Bent, Chief Justice, John Downie, and Samuel Firebrace, in their Order of the 7th of February, 1846, rejecting the said last-mentioned petition, referred the party to his ordinary remedy.

"Because the ordinary remedy mentioned by the Court in its Order of the 7th of February, 1846, was a petition to the Sovereign for relief, *restitutio in integrum*; \* and because the Court was unauthorized to entertain any process or

\* See upon this point, *In re Grosvenor Butts* (3 Moore's P.C. Cases, 441), and precedent, *ib.* p. 443, where an Order was made, under similar circumstances, by the Judicial Committee, on petition for a *mandament* of substantial relief, *restitutio in integrum*, and *committimus* to the Judge of the Supreme Court of British Guiana.



application for the annulment of an execution sale, except upon an Order of the Sovereign, known, in the Dutch law, as a *mandament* of relief, that is, substantial relief.

That the Chief Justice Arrindell joined in the Order of the 5th [350] of July, 1849, rejecting the petition for appeal, because from the reasons which he has given for joining in rejecting the petition of the 22nd of June, 1849, by the Order of the 3rd of July, 1849, such Order was not equivalent to a definitive sentence or judgment, inasmuch as the Order was merely to the extent that the Court could not grant the remedy prayed for in the mode and manner prayed for, and because there was a remedy, viz. by petition to the Sovereign for substantial relief.

That although the remedy, if the parties have a remedy at all, is by petition to the Sovereign for relief (see Grotius, 'Introduction to Dutch Jurisprudence,' translated by Herbert, lib. 3, chap. 48, sec. 5, and Van der Linden, as cited hereafter), and although some authors maintain that the remedy of relief is open to a party to annul an execution sale, yet other authors maintain that there is no relief whereby an execution sale, that is, a public sale *ex decreto judicis*, can be annulled. See Neostadius, Curiae. Holl. Decis. 75 and 128; Voet ad Pandectas, b. xviii., tit. 5, sec. 16; Van der Keessel, Thesis, 189, 198, and 901, and authorities there cited. Thus it is doubtful whether an execution sale can be annulled at all; but, admitting that under special circumstances it can be annulled, it must be upon petition to the Sovereign for relief, with *committimus* to the Court, and not upon mere petition to the Court.

That the reason for this is obvious, namely, that upon a mere petition to the Court, the merits of the case cannot be as fully developed, as there is no process for the attendance and examination of witnesses as upon a regular process of mandament claim and demand, answer, replication, joining of issues, and examination and cross-examination of witnesses *viva voce* in open Court.

That although the authorities quoted in the petition of the 22nd of June, 1849, viz.—Censura Forensis, lib. iv., tit. 19, sec. 4; Burge 'On Foreign and Colonial Law,' vol. ii. p. 502; Voet ad Pandectas, lib. xviii., tit. 1, sec. 5; Henry's Translation of Van der Linden, pp. 188 and 208, and Wood's 'Institutes of the Civil Law,' pp. 232, 233,—show that error forms one of the grounds of rendering a contract null and void, yet these authorities do not treat of the mode and manner of annulling such a contract, such mode and manner and form of process being pointed out in Van der Linden, lib. iv., chap. i., sec. 1, 2, 3, 4, and 5."

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 3. *British Guiana*.]

### [351] ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT AT AGRA.

SETO LUCHMEECHUND,—Appellant; SETO ZORAWUR MULL,—Respondent \*  
[Nov. 30, 1854].

Appeal from the Sudder Court in India, which stood dismissed under Rule 5 of the Order in Council of the 13th of June, 1853, for want of effectual prosecution restored, as the Appellant was in ignorance of the existence of the new Rules, the Sudder Court having served the Appellant (after the interposition of the appeal) with notice that two years was allowed after the arrival of the transcript in England for prosecuting the appeal [9 Moo. P.C. 352].

Where Government securities for the due prosecution of the appeal and costs were deposited in the Registry of the Sudder Court, the Judicial Committee in restoring the appeal dispensed with the usual recognizance in England [9 Moo. P.C. 353].

In this case, the transcript of the proceedings arrived in England and was registered in the Council Office on the 12th of October, 1853, but no effectual steps

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

having been taken for the prosecution of the appeal within six months, pursuant to Rule 5 of the Order in Council of the 13th of June, 1853 (see Rules [Stat. R. and O. Rev. iv., 305]), the appeal stood dismissed under that rule.

It appeared that no notice of the existence of the new Rules had been given to the Appellant, who was resident in India, in time to cause effectual steps to be taken to prosecute the appeal, and that upon the appeal being preferred in the Court below, the Appel-[352]-lant had had notice served upon him in India by the Sudder Dewanny Court that he was to prosecute the appeal within two years from the registering of the receipt of the copies of the transcript in the Privy Council Office. The Appellant now presented a petition setting forth the above facts, stating the largeness of the sum involved in the appeal, and praying for leave to restore the appeal. An affidavit was also filed by the agent in England stating his ignorance of the operation of the new rules, and confirming the circumstances above mentioned.

Mr. Leith, for the Petitioner, cited *Gudadhur Purshad Tewarree v. Moosumat Soonderkoomaree* (ante [9 Moo. P.C.], p. 86).

The Right Hon. Dr. Lushington.—The question is, whether there was sufficient means adopted by the Sudder Court to promulgate the new Rules and Regulations in India. It does not appear that the Petitioner was served with any notice, or had means of knowing of the existence of the new Rules, and the Appellant very naturally relied upon the notice served upon him by the Sudder Court, by which two years were allowed for prosecuting the appeal after the arrival of the transcript in England. The mere fact of the arrival of the transcript here in such circumstances, and that no steps have been taken to bring the appeal on for hearing, is not, in our opinion, sufficient to entirely shut out the appeal. The appeal will be restored upon terms of giving security here for £1000.

[353] By the report of the Committee, the appeal was ordered to be restored, and the Appellant allowed to prosecute the same upon lodging in the Council Office, within six months from the date of Her Majesty's Order in Council approving the report, a certificate of recognizance to Her Majesty in the penalty of £1000. This report was confirmed by an Order in Council, dated the 11th of December, 1854.

Mr. Leith, for the Petitioner, afterwards moved (March 26, 1855 \*) upon petition for liberty to waive so much of this Order as required the recognizance to be entered into in England for costs, on the ground that there was already a sum of Rs. 10,000, in Government securities, deposited in the Registry of the Sudder Dewanny Court for that purpose.—[The Lord Justice Turner: This Court has been accustomed to require security to be entered into here. Is not the appeal originally allowed in India defunct?—The security now lodged in the Court in India is amply sufficient for the costs, and it would only inconvenience the parties to get fresh security here.

The Right Hon. T. Pemberton Leigh.—In the circumstances this application will be granted, but it must be upon condition that the money deposited in India remain in deposit to abide the appeal here.

By the Order in Council made upon this petition, it was ordered that so much of the Order of the 11th [354] of December, 1854, as required that recognizance be entered into in the penal sum of £1000 sterling be dispensed with, and that the Government securities for Rs. 10,000 be held in deposit by the Sudder Dewanny Adawlut, to stand and abide the determination of the appeal, and such costs as might be awarded by the Lords of the Committee.

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\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.



## ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

SIBNARAIN GHOSE,—*Appellant*; HULLODHUR DOSS,—*Respondent* \*  
[Nov. 30, 1854].

If leave to appeal be obtained *ex parte*, the Respondent may, as a matter of course, present a counter-petition to dismiss.

Where an appeal had been granted *ex parte* upon an allegation unfounded in fact, the Judicial Committee refused to hear the case, and dismissed the appeal with costs.

In this appeal special leave to appeal was granted by the Committee on an application made *ex parte* by the Appellant, upon, among other grounds, an allegation that certain exceptions taken in the Court below to the return made by Partition Commissioners had been overruled, as, of course, in consequence of the [355] absence of the Appellant's Counsel (8 Moore's P.C. Cases, pp. 276-7). This allegation turned out to be wholly unfounded, as it appeared that Counsel on both sides, had been present on the occasion in question, and that the Appellant's Counsel had stated that he was unable to support the exceptions.

Mr. Rolt, Q.C., now moved for leave to present a petition to dismiss the appeal.

The Right Hon. Dr. Lushington.—This application is unnecessary, as you are entitled of course, to move to dismiss, upon presenting a counter-petition for that purpose (see *In re Ames*, 3 Moore's P.C. Cases, 413).

Upon the appeal coming on for hearing (Nov. 30, 1855 †) Mr. R. Palmer, Q.C., Mr. Leith, and Mr. Maule, appeared for the Appellant; and Mr. Rolt, Q.C., and Mr. A. Gordon, for the Respondent.

When the Respondent objected to the hearing, as leave had been granted upon an erroneous allegation that the Appellant's Counsel had been absent at the hearing of the exceptions in the Court below, whereas the certificate of the Judges in India distinctly showed that Counsel was present, and that he declined to argue the exceptions.

[356] The Lord Justice Turner.—We consider it a matter of the utmost importance that parties who come here for an indulgence upon an *ex parte* application, should take care and speak the truth. In this case, the Appellant in his petition for leave to appeal, has erroneously alleged as a ground for the indulgence of the Court, a fact to which the Judges in the Court below certify the contrary. Their Lordships are fully satisfied that this is so, and, that this case may operate as a warning in future, they dismiss the appeal with costs (see *Wilson v. Callender*, ante [9 Moo. P.C.], p. 100, where the Judicial Committee, under similar circumstances, stopped the hearing of an appeal, and dismissed it with costs).

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 1. *When an Appeal lies generally*—Counter petition, 3. *Leave to Appeal*—Counter petition to dismiss.]

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

† Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir William Maule.

## [357] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

THOMAS MILLAR MACKAY and JAMES BAINES,—*Appellants*; MARGARET ROBERTS and Others,—*Respondents* \* [Dec. 4, 1854].

## THE FORTUNE.

A barque held solely to blame for causing a collision off the Lizard, for not giving way upon a dark night to a small schooner close hauled to the wind on the starboard tack under close reefed sails.

The schooner of 116 tons burthen exhibited a light in a lantern, with a candle of eight to the pound, which was hung at the forestay about four of five feet above the deck, and also a binnacle light. Held a sufficient compliance with the Admiralty Regulations respecting vessels exhibiting lights, made pursuant to the Statute, 14th and 15th Vict., c. 79, s. 26.

Construction of section 28 of the 14th and 15th Vict., c. 79.

This appeal arose out of an action of damage, civil and maritime, brought by the Appellants, the owners [358] of the barque *Fortune*, against the schooner *Margaret Roberts*, of which the Respondent, Roberts, was the sole owner; and also from a cross action brought by the Respondent, Roberts, and the other Respondents, the owners of the cargo, and the master and crew of the schooner, against the *Fortune*, for like damage, arising from a collision between the two vessels.

The libel on behalf of the *Margaret Roberts*, alleged in substance, that the schooner was of the burthen of 116 tons, and was on her voyage from Milford Haven for the port of London. That about 40 minutes past five o'clock A.M., of the 11th of December, 1853, the Lizard Lights bore about N.  $\frac{1}{2}$  W. distant about ten miles from the schooner, that the wind was S.E., and the weather, which had been rather rough, was moderating. That the schooner was close hauled to the wind on the starboard tack under close reefed sails heading E.N.E., and sailing at the rate of  $2\frac{1}{2}$  knots an hour, making about four points lee way, and that a signal lantern which had been fixed to the forestay several hours before, and was visible forwards either way, was burning brightly. That it was the mate's watch, who was walking the deck looking out; that an apprentice named Lewis, of the age of eighteen, was stationed on the port side, also looking out; and that an able seaman was at the helm. That at that time a light from the barque *Fortune* was seen by the watch on deck, about four points on the schooner's lee bow, approaching the schooner, and distant from her about two miles, and that the barque was also seen to be close hauled on the port tack at the time. That as the barque continued to approach, the mate called up the master of [359] the schooner, who, notwithstanding that the signal lamp was burning brightly, exhibited the binnacle light over the schooner's lee quarter as soon as he came on deck. That the mate also, as soon as the barque came within hailing distance, loudly hailed her, but that no notice was taken either of such two lights, or of such hailing, and that the barque, notwithstanding, continued to approach the schooner without altering her course, until she was close to the schooner, when her helm was altered for the first time, and was put first to starboard and then aport, thereby rendering a collision between the two vessels inevitable, and whereupon the helm of the schooner was ported in order to ease the blow, but that almost immediately after this had been done, the barque ran into the schooner stem on, striking her with great force amidships on the port side, and cut her down nearly to the water's edge, and carried away the stauncheons, bulwarks, and fore and main rigging. That the master and crew of the schooner, fearing that she was about to founder, then jumped on board the barque and assisted the crew of the barque to cut away her head gear, in order to clear the two vessels, which they succeeded in doing about seven o'clock of that day. That the master of the schooner and three of her crew then went into the barque's boat to inspect the schooner, and which they found to be in a sinking state with both masts overboard, so that they were com-

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.



pelled to return to the barque and abandon the schooner, which foundered in about half an hour afterwards, and together with her cargo and everything on board (save the ship's papers and a few of the master's and crew's clothes which were saved) was totally lost. That the collision, and the [360] damages consequent thereon, were imputable solely to those on board the *Fortune*, from her not having kept clear of the *Margaret Roberts*, as she was bound to have done, but having run into the schooner, and that the same were not owing to any default or misconduct on the part of any one on board the *Margaret Roberts*.

The allegation on behalf of the *Fortune*, pleaded that the barque *Fortune*, of the burthen of 571 tons, laden with a cargo of guano and silver, was on her voyage from Queenstown in Ireland to London, and that at four A.M., on the 11th of December, being off the Lizard, the chief mate's watch was set, and the gale, which had previously been blowing hard, having somewhat abated, a reef was shaken out of the topsails. That Foster, an able seaman, was then ordered by the chief mate to trim the lamp, which he accordingly did, and then replaced it in its former position at the bowsprit end. That such lamp was a brilliant patent copper lamp, having strong glasses in the front and two sides, and a powerful reflector behind; that the lamp burnt brilliantly at and after the time when it was so trimmed, and until the collision thereafter mentioned. That the watch consisted of six hands, of whom the chief mate was stationed on the poop, the boatswain on the forecastle, an able seaman at the wheel, another able seaman upon the deck, and two able seamen were placed on the foreyard, for the express purpose of keeping a more careful and vigilant look-out than ordinary, on account of the darkness of the night; and the watch, from the time of taking their respective positions, kept a careful and vigilant look-out. That the weather at that time was hazy and very dark, but that lights could be seen [361] at some distance off. That at about half-past five A.M., in consequence of the thickness and darkness of the atmosphere, and of lights from on board one or two vessels in their proximity having been seen, the chief mate burnt a blue light over the barque's larboard waist, in order to show her position more plainly to the other vessels, and that at about 5.45 A.M., the master, who had not taken off his clothes after going into his cabin, which was on the deck, came on deck (as he had done more than once before), and upon the report of the chief mate that several lights from vessels had been seen, ordered a second blue light to be burnt, which was accordingly done. And the fifth article pleaded, that a little before six o'clock of the morning, and about a quarter of an hour after the second blue light had been burnt, the vessel was proceeding with the wind, strong from the S.E., close hauled on the larboard tack, and going between four and five knots an hour, under single reefed topsails, mainsail, spanker, jib, and fore topmast staysail set, and making about a point and a half leeway; the look-out men on the foreyard, both at the same moment, reported a sail on the lee bow, and that one of them, Foster, called out, "Be quick and put your helm up, or she will be into us." That the chief mate thereupon immediately ran forward, but that before he was able to make out how the strange vessel was standing, she had approached so close as to render it impossible to avoid a collision. That in order to lessen the consequences of the impending collision, the chief mate called out to the man at the wheel to put the helm down, and at the same time (together with the boatswain) hailed the strange vessel to put her helm down; and in contradiction to what [362] was pleaded in the libel, that the helm of the barque was neither put to starboard or to port, it was alleged, that before the order to put the barque's helm down could be obeyed, the schooner *Margaret Roberts* ran under the barque's bows. That the flying jib-boom of the *Fortune* passed between the forestay and the foremast of the schooner, and the stem of the barque struck her a little before the fore rigging, and not amidships as alleged and pleaded in the libel; that at no period of the time whilst the schooner and the barque were so approaching each other, was any light whatever visible on board the schooner and that had there been any such light, the same must have been seen by the look-out men, who were keeping a careful look-out, and the collision would not have taken place, as the schooner was seen by the look-out men as soon as a vessel of her size without a light could possibly be seen in the then state of the weather. That the master of the barque, on hearing the strange vessel reported, immediately came on deck, which he had barely reached before the two vessels came

into collision. That immediately after the collision, the master of the schooner, with no other clothing than his shirt and drawers, together with all his crew, jumped on board the *Fortune*. That whilst the two vessels were in contact, some of the *Fortune's* crew observed a small lantern containing a small lighted candle hanging on the fore-stay of the schooner, between four and five feet from her deck. That the schooner's deck was only about three feet from the water, and that her jib and staysail were set, and that such sails must have effectually concealed any light so placed from those on board the barque, had the same been there whilst the vessels [363] were approaching each other. That as soon as the two vessels separated, the masts of the schooner fell overboard, and she ultimately sunk. That the *Fortune*, on the collision, sustained considerable damage forward, but the entire loss of the schooner, and the principal part of the damage sustained by the barque, were mainly, if not altogether, attributable to the fact of the master and crew of the schooner having left their vessel under the bows of the *Fortune* for upwards of an hour without making any attempt to clear the schooner, and that the principal part of the damage sustained by the schooner did not arise from the violence with which the two vessels first came into contact, but from their afterwards rising and striking each other with the lift of the sea during the time they were so in collision. And after pleading sections 26 and 28 of the Statute, 14th and 15th Vict., c. 79, and the Admiralty Regulations (see 8 Moore's P.C. Cases, p. 168, where the Regulations respecting sailing-vessels exhibiting lights are set out) respecting the exhibiting of lights by sailing-vessels, it alleged that the collision, and the damage caused thereby, was not in any manner occasioned by, and was not attributable to, any mismanagement or default of any one on board the *Fortune*, for that a good and efficient look-out was kept by all the watch on board the barque prior to and at the time of the collision, and that the schooner was seen as soon as a vessel of her size without a light could be seen in the night, and that a brilliant patent signal lamp, visible at a considerable distance, was, in conformity with the Admiralty Regulations, kept burning brightly on board the vessel, but that the collision was entirely caused by the fault and neglect of those on board [364] the schooner, in not keeping a good look-out (shown in their neither hailing nor altering their helm), and that they did not comply with the Admiralty Regulations, and that had a good look-out been kept on board the schooner, or had a proper light been shown on board her as required by the aforesaid regulations, the collision and the damage consequent thereon, would not have occurred.

Witnesses were examined on both sides, the effect of whose testimony is sufficiently stated in the judgment of the learned Judge of the Admiralty Court.

The Judge (the Right Hon. Dr. Lushington), on the 2nd of March, 1854, in addressing the Trinity Masters, by whom he was assisted, said, he should consider first the case of the *Margaret Roberts*, "to see whether, in the course she pursued, and the measures she adopted, she was right in what she did, or whether there was any omission on her part. She was upon the starboard tack close hauled, with her head to the east-north-east, and the wind was from the south east. Now, independently of the rules of navigation which are applicable to a vessel in such a position, you will recollect that we have in this case to deal with an Act of Parliament, and it is my duty to bring the provisions of that Act under your consideration, in order to ascertain whether they have been complied with or not. The Statute, as you know, enables the Lords of the Admiralty to prescribe certain Regulations with regard to the hoisting of lights; and the rule as laid down there is, 'That all sailing-vessels when under sail, or being towed, approaching, or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light in such a position that it may best be seen by [365] such vessel or vessels, and in sufficient time to avoid collision.'

"Such is the direction given in the Statute, and we will first examine whether that direction has or has not been complied with; and if it has not been complied with, we must then consider what are the consequences of the omission to comply with it—bearing in mind that the regulation is a parliamentary regulation, and not only a rule of the sea, properly so called.

"The light which is stated to have been displayed on board the *Margaret Roberts*, is represented as being a lantern, with a candle of eight to the pound, and if this be a true description of it, I apprehend that, looking to the size of the vessel



itself, it can hardly be contended that the light was deficient in point of size; but that will be a matter for your consideration. The argument which has been principally relied upon is, that the lantern was placed in such a position as not to answer the purpose intended: viz., to give notice to vessels approaching, and perhaps, in this case, to give notice to a vessel approaching on the lee side.

"How far this light was sufficient or otherwise, is a question I must refer to your particular attention; because I am unable from my own knowledge to solve at all what would be the effect of the lantern being hung up in the place in which it is described to have been hung, namely, at the forestay; more especially at the witnesses vary in their statements as to the height at which it was suspended, from four to five or six feet above the deck. It is my duty, however, to point out to you the evidence of the mate, without myself venturing any opinion at all upon it. The [366] words that he uses are these: 'Our standing jib was the only headsail we had, and that was not at all in the way of the lantern. I think it was the best place to hang the lantern, as our ship was driving with our jibboom right under water at times. I will swear that our light could be seen by a vessel approaching us like the barque to leeward.' The evidence of the other witnesses is much to the same purport, that this lantern was suspended at the forestay, and was visible, especially to vessels being to leeward. Now, it will be for you to determine whether you think this lantern was a sufficient lantern, and whether you think it was suspended in a proper place, so as to be reasonably visible to vessels approaching.

"But, even supposing the light at the forestay to have been insufficient, that does not dispose of this particular case altogether, for then arises another question, to which I must direct your attention: I mean the exhibition of the binnacle light. In my view of the matter, there can, I think, be no question whatever, that if the binnacle light was exhibited in time, such light would be quite sufficient to answer and to comply with the regulations of the Admiralty; and then arises the question of fact, whether the binnacle light was shown in due time, so as to allow the approaching vessel an opportunity of resorting to a proper manoeuvre to avoid the collision.

"Upon this part of the case, the evidence is to the following effect:—The master states that the binnacle light was shown when the vessels were from two to three cables' length off. It will be for you to decide whether, if the binnacle light was shown from two to three cables' length off, there would, in that case, have been ample time and opportunity to have [367] ported the helm, and to have avoided the collision. Parry, the mate, states, that when the master first came on deck, or rather as he was coming on deck, he ordered the binnacle light to be shown, and that he afterwards ordered the helm to be put to port, and he says about a minute or two after he came on deck the collision took place. Now, I put this evidence before you for two reasons. One witness, in describing distance, speaks of the distance itself, as being two or three cables' length; the other witness does not speak of length, but of time, which of course will be a measure of distance, and you will consider, taking this evidence into account, the fact of whether the binnacle light was shown in time or not.

"But we will further assume, that the light at the forestay was insufficient and not capable of being seen, and that the binnacle light was not exhibited in due time; what would be the legal consequences of such an assumption?

"It is my duty to point out to you that, according to the construction which has been put upon the Act of Parliament, it would not follow as a matter of necessity, even in such a state of things, that, because this regulation as to the hoisting of the light is disobeyed, the owners of this vessel could not recover in this case; because the 14th and 15th Vict., c. 79, s. 28, says, 'If in any case of a collision between two vessels, it appear that such collision was occasioned by the non-observance of either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the Lord High Admiral or the Commissioners for executing the office of Lord High Admiral, with respect to the exhibition of lights, the owner of the vessel by which any such [368] rule has been infringed, shall not be entitled to recover.' The true construction of this is, that if the rule has been violated or omitted to be obeyed, and yet such violation of the rule does not occasion the collision, it is the same as if it had not been violated at all. Now, such being the legal construction of the Act of Parliament, you will perceive that the second question we have to consider is, whether this collision was,

in point of fact, occasioned by the non-exhibition of a proper light, assuming for a moment that such light was not exhibited.

"This consideration brings us to another point of the case, and that point is, the state of the weather and the darkness of the night; because if there was a sufficient opportunity for the *Fortune*, with a good look-out, to have seen the schooner in due time, and to have avoided the collision by porting her helm, then, in that case, light or no light, the schooner will be entitled to recover. Now, let us consider, a little, the state of the weather. The weather is represented in various ways by the different witnesses, and no doubt it was a dark night; but whether it was a very dark night or not; whether it was so dark that even, independently of the lights, these two vessels might not have been seen from each other in due time, is also another and very different question.

"Now, certainly, the evidence is strongly in the affirmative as to the darkness of the night, and as it comes from the persons on board the *Fortune* it deserves due consideration; but there are certain facts connected with the darkness of the night to which I shall draw your attention. In the first place, neither of these masters was on deck. I apprehend if it had been a dangerously dark night, a particularly dark [369] night, just at the chops of the Channel, where they were meeting a number of vessels, in all probability we should have found at least one of the masters on deck keeping a look-out; but it was not so.

"Another fact to be noticed is, that at four o'clock in the morning the master of the *Fortune* shook out a reef of the topsail, which I apprehend would have the effect of accelerating the rate at which he was sailing. You will consider whether he would have done that if the night was so dark as he represents. The other master, it is true, declined to hoist more sail till it was light. The last fact to which I shall direct your attention is, that the master of the *Fortune* says that he could see a vessel from 200 to 250 yards off; and if seeing a vessel at that distance, there would have been time under the circumstances to have avoided her, of course he is to blame.

"I have now brought under your consideration all the main facts connected with the conduct of the *Margaret Roberts*; but I am also under the necessity before I quit the case of that vessel, of touching upon another point which has been adverted to in the argument; namely, the provision contained in the 27th section of the Act, which requires that when two vessels approach each other so as to involve any risk of a collision, if they continue to approach, the helm of each vessel shall be put to port. Now, it appears in this case the helm of the *Margaret Roberts* was not put to port until a very late period, when the master came on deck; and you will, therefore consider whether the delay in so doing was not the occasion in any way of the collision itself, because if it was not the occasion of the collision the result will [370] be the same as that which I have already explained to you with regard to the not hoisting a light, under the express provision of the Act of Parliament.

"I come next to consider the case of the *Fortune*; and I think I cannot do it better than by stating to you what their own representation of the case is.—[The learned Judge here read the fifth article.] Therefore, they plead themselves, that the order of the chief mate was to put the helm down, or to starboard it, 'and at the same time (together with the boatswain) hailed the strange vessel to put her helm down.' Now, I must leave it of course to your judgment whether, supposing this to be true, it is consistent with the proper measures to be pursued according to the rules of navigation. I confess that, to my mind, there was a possibility of escaping collision by directing that both helms should be put down at the time the vessels were approaching each other. Then they go on stating that the helm of the barque, after all, was neither put to larboard nor starboard, and there they leave the fact according to their statement. Supposing we were to take this statement as true, of course I should have to put to you whether, according to the facts as stated by themselves in this representation, they did pursue the proper measures or not, because, according to their statement, nothing whatever was done after all. But it would not be right, seeing that the statement which the owners give is in some degree contradictory, it would not be right to take the statement alone without some reference to the evidence. But when I come to the depositions of the witnesses, I hardly find any evidence upon this article. This is a case of very considerable



importance in point of value; therefore, you [371] will pardon me occupying your time a few moments longer, in order to bring your attention to the evidence.

"Upon the fifth article, the witness, Hardy, who was at the helm at the time, says, 'The men from the foreyard first reported the schooner. They reported her as a vessel on the lee bow.' He goes on to state this: 'The mate upon that asked "Which tack is she on?" but they replied they could not tell, and with that the mate ran forward, and while there, ordered me to put the helm down.' Certainly this person ought to know, he was the helmsman, and it was his duty to attend to the orders given by the person in command on deck. 'I put it down immediately, and just as I got it down he gave the order "Helm hard up," and I put it hard up at once, and in two or three seconds afterwards she struck.' And then he says, 'On recollection, the helm was about midway, and neither up nor down, when the blow was struck.'

"There is also the evidence of a witness named Pile, upon the same article, to which I wish particularly to call your attention. He was the mate, and his evidence is, that as soon as the *Margaret Roberts* was reported, she 'was immediately under our lee bow. The collision occurred not two minutes after I first saw her.' Then he goes on to speak of the wind and so on, and says, 'They reported her as a vessel on our lee bow; be quick and do something'—not so pleaded in the libel—'do something or she will be foul of us, but they did not suggest what to do that I heard. Those were the words that I heard, but of course I was excited at the time. I ran forward upon that as quickly as possible, and shouted out to put the helm down. The boatswain was beside me, and [372] passed the word aft. I meant it to apply to both vessels, "Hard down." "Hard down" were the words I sang out, and I gave the order the moment I got forward and saw the schooner, which was then right under our lee bow, too close to avoid a collision; but I was just in the hopes that by both vessels having their helms down, they might come alongside one another. Our helm was not put down, for the captain, who immediately rushed out, countermanded the order. I did not, however, hear the captain do so. I did not observe that our vessel altered her course at all under the influence of either helm, nor did the schooner; in fact, they had no room to do so. I gave no other order to the helm.' I cannot reconcile this statement with the evidence of the helmsman, Hardy, to which I have already referred you. You must believe that which you think most credible, but the evidence is utterly irreconcilable.

"Fee, another witness on this article, gives a statement which is not consistent with either of his fellow-witnesses. He says, 'The mate immediately came forward and jumped on the forecastle and roared out to the schooner, and at the same time to the man at our wheel to put the helm down, and the collision happened just about when he got on the forecastle; I do not think the man at the wheel could have had time to put our helm down.'

"There is also the evidence of Foster, who was on the look-out. On the fifth article he says, after having stated the time at which the collision occurred, 'We reported her as a vessel rather ahead, and she was a little, but not much, on our lee bow. We both of us added at the same time, "Look sharp and put the helm up or the vessel will be into us," or [373] something of that kind, though there was then no time for either vessel to answer her helm; we were too close together. The chief mate, on our reporting the schooner, ran forward to see where she was. He came on the forecastle and sung out from there to our helmsman to put the helm up, that would be to port; but we were approaching that quick to the schooner that there was then no time for our ship to answer her helm. I did not hear the mate give any other order to the man at the helm.'

"The master was not on deck at the time, and I do not think it necessary to travel further into the evidence. The question I must put to you is, whether, under the circumstances of this case, with reasonable vigilance, the schooner might not have been seen in time for the *Fortune* to have adopted proper measures to have avoided this collision, and whether such collision would not have been avoided, if the *Fortune*, as soon as she descried the schooner, according to her own representation, had ported her helm, instead of either starboarding, or doing nothing at all."

The Trinity Masters were of opinion, and in that opinion the learned Judge concurred, that the *Fortune* was alone to blame for the collision, and by an interlocutory decree of the Court, the *Fortune* was condemned in the damage sued for.

The present appeal was against this decree.

Sir Fitz Roy Kelly, Q.C., and Dr. Deane, for the Appellants, took two points, first, whether the lantern light from a common candle fixed to the forestay of the *Margaret Roberts* was a sufficient compliance with [374] the requirements of the Admiralty Regulations (see Regulations, 8 Moore's P.C. Cases, 168), passed pursuant to the Statute, 14th and 15th Vict., c. 79, s. 26, and whether the rule laid down in *Valentine v. Cleugh* (8 Moore's P.C. Cases, 167), that the light ought to have been exhibited at the mast-head, extended to a case where one of the vessels was not at anchor, and, secondly, upon the evidence of the witnesses, they contended that the light on board the *Margaret Roberts* was placed in such a position as to be seen by the *Fortune*, and that she ought to have avoided the collision.

Dr. Addams and Dr. Twiss, for the Respondents, were not called upon to address their Lordships.

Judgment was delivered by

The Right Hon. T. Pemberton Leigh.—We do not think it necessary to hear the Respondents, as we concur with the learned Judge of the Court below in the judgment he has pronounced. It is a rule of this Court not to disturb the sentence or decree of the Court below, unless we find either mistake in law or fact. It does not appear to us, nor can it be shown upon any particular point, that the judgment appealed from is wrong. There were two points raised for the Court's consideration: first, the situation of the light on board the schooner, and the sufficiency or insufficiency of such light; and, secondly, the conduct of the parties in respect of the collision. Upon which of these grounds the Court founded its judgment, we do not know. We have consulted the Sailing Masters who assist us, and they [375] concur in the judgment appealed from, assuming that it was founded on both points. It is greatly to be lamented that there is no definition of what constitutes a bright light within the meaning of the Act of Parliament; but, if it were necessary to found our judgment on the character of the light exhibited by the schooner, it being such as ships of that class usually carry, such a light as she exhibited would, we think, be sufficient. If we were, therefore, to decide the appeal upon the question, whether the light was sufficient or not, we should be bound to say, that the Court below had come to a right conclusion. But it is admitted that, in the circumstances, the *Fortune* should have changed her course, and so have avoided the collision; and the Sailing Masters are clearly of opinion, that it was the duty of the *Fortune* to get out of the way; the schooner had put down her helm, but it appears that nothing was done by the *Fortune* which would have prevented the collision. On the whole, we are of opinion, that the decree of the Court below must be affirmed, and with costs.

[Mews' Dig. tit. SHIPPING; XX. COLLISION; 11. *The Regulations*; b. *Cases on the Regulations*. Article 17. See Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), ss. 418 *et seq.* As to Admiralty jurisdiction of Judicial Committee, see note to *The Batavier*, 1854, 9 Moo. P.C., at p. 302.]

[376]

*In re FOARDE'S PATENT* \* [Jan. 10, 1855].

After an assignee of a Patentee had incurred considerable loss in carrying out a Patent for a smoke prevention apparatus, an Act of Parliament passed to compel the owners of furnaces in the Metropolis to construct them so as to consume their own smoke. Held, on an application for a prolongation of the Letters Patent, that though the Act of Parliament might, in effect, compel the use of the Petitioner's Patent, yet that such circumstance formed no objection to a renewal of the term of the Letters Patent, the merits of the invention, and loss incurred in carrying it out being established.

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson.



Application by the assignee of the Patentee for prolongation of Letters Patent for "smoke prevention apparatus." The petition alleged, that although there was great merit in the invention and to the community, yet that the public had not adopted it. That by the 16th and 17th Viet., c. 128, sec. 1, it was enacted, that from and after the 1st day of August, 1854, every furnace employed, or to be employed, in the metropolis in the working of engines by steam, etc., should in all cases be constructed or altered so as to consume or burn the smoke arising from such furnace. That from the operation of that clause there were good grounds for believing that if the Patent was extended, the Petitioner would be reimbursed the expenses he had been put to, he having received no remuneration: and the Petitioner prayed for an extension of fourteen years. There was no opposition. The evidence showed that the Petitioner had incurred heavy losses by introducing the Patent.

Mr. Hindmarch, for the Petitioner, Mr. Welsby, for the Attorney-General, objected to a renewal, as the Statute, 16th and 17th Viet., c. 128, sec. 1, made it compulsory upon owners [377] of furnaces in the metropolis to construct them so as to consume their own smoke, and urged that the effect of a renewal would be to prevent the public carrying out the provisions of the Statute, except by using the patented invention, instead of having the choice of employing the cheapest and best machines.

The Right Hon. T. Pemberton Leigh.—Their Lordships are of opinion, that the Petitioner, in this case, has brought himself within those principles under which their Lordships are in the habit of advising the Crown to grant an extension of Letters Patent. The invention is proved to be extremely useful, and it is further proved, that the Petitioner has not been able to obtain the slightest remuneration for it: on the contrary, he has incurred very heavy expenses. Circumstances have now occurred by which in all probability, by a moderate extension of the Patent, some adequate remuneration may be received. Their Lordships will not recommend fourteen years or anything like it, but they are disposed to recommend, under all the circumstances, an extension of six years from the time of the expiration of the Patent.

[378]

*In re* HONIBALL'S PATENT \* [Feb. 1 and 2, 1855].

The authority conferred upon the Crown, by Section 2 of the 5th and 6th Will. IV., c. 83, to confirm Letters Patent, is discretionary in the Judicial Committee, to recommend or not a confirmation. The jurisdiction is one which is most cautiously and sparingly to be exercised, as the effect of a confirmation of Letters Patent is to give force and validity, by a *quasi* legislative authority to a grant of monopoly actually void, and to exclude from the use of the invention not only other subjects of Her Majesty in England, but even the first and original inventor, who may have actually brought it into public, though not into general, use, before the Patent was taken out [9 Moo. P.C. 386, 391, 392].

Two conditions are required from a Petitioner applying for a confirmation, to establish to the satisfaction of the Judicial Committee: first, that before the date of the Letters Patent, (the subject of application,) the invention was not publicly and generally used; and second, that the grantee of such Letters Patent believed himself the first and original inventor [9 Moo. P.C. 388].

Construction of the words "publicly and generally used" [9 Moo. P.C. 389].

A first and original inventor means a person who could claim the merit of the first invention without reference to the user [9 Moo. P.C. 390].

Although a party may believe himself to be the first and original inventor, yet

\* Present: The Lord Chief Justice of the Common Pleas (the Right Hon. Sir John Jervis), the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson.

he cannot shelter himself under wilful ignorance, but will be fixed not only with what he knew, but with that which he might have known had he made the inquiries which it was incumbent upon him to make [9 Moo. P.C. 390].

The Statute, 5th and 6th Will. IV., c. 83, s. 2, applies to confirmation of Letters Patent for an extended term, as the grant of such extended term is a grant of new Letters Patent, which are subject to the same conditions, and open to the same objections, and entitled to the same advantages as the original Letters Patent [9 Moo. P.C. 387].

In 1852, the assignee of a Patentee obtained an extension of Letters Patent originally granted in 1838. In 1854, it was determined at a trial at law, in an action for infringement, that the Letters Patent were invalid by reason of the prior use and sale of the Patent article. Upon an application by the assignee of the Patentee to the Judicial Committee for a confirmation, under the 2nd Section of the Statute, 5th and 6th Will. IV., c. 83, of the new Letters Patent, it was proved that the Patentee was not the first inventor, and that the principle had been discovered ten years before the date of the original Patent, but that the invention, though publicly known, had not been generally used at the date of the grant of the original Letters Patent, and that the Patentee had notice not only of the original invention, but of the use of such invention. In such circumstances the Judicial Committee refused to recommend the Crown to confirm the Letters Patent [9 Moo. P.C. 394].

Opposition to an application for extension or confirmation of Letters Patent is rather encouraged by this Court than otherwise, and upon a successful opposition the Opposers' costs will, in general, be allowed [9 Moo. P.C. 394].

This was an application under the second section of the Statute, 5th and 6th Will. IV., c. 83, for confir-[379]-mation of extended Letters Patent for improvements in anchors, which had been granted to the Petitioner, Mary Honiball, the widow and executrix of James Honiball, the assignee of W. H. Porter, the original Patentee.

The original Letters Patent for England and Scotland bore date the 15th of August, 1838, and were granted to Porter. On the 19th of July, 1852,\* the Judicial Committee, upon the petition of James Honiball, the assignee of Porter, in whom the Letters Patent were then vested, granted a prolongation of the term for six years, upon the ground of the merits of the invention and want of adequate remuneration. New Letters Patent were granted to the Petitioner, the widow and executrix of Honiball, who had died in the interval between the Order in Council and the sealing of the new Letters Patent. On the 29th of June, 1854, an action was tried in the Court of Exchequer by the Petitioner against Bloomer, one of the firm of Messrs. Bloomer, for the infringement of the new Letters Patent. The Defendant pleaded, amongst other pleas, that Porter was not the true and first inventor of the invention. At the trial, evidence was given for the Defendant in support of this plea, and a witness named Logan, of the firm of Logan and [380] Co., of Liverpool, anchor-makers, deposed that he had made an anchor, in the year 1826, similar to the anchor of Porter's, and had sold it in the ordinary course of business to the master of a steam-vessel, called the *William Huskisson*, and that it was used on board for some time, when, in consequence of some damage, it was returned to them, and remained in their yard for about ten years. The anchor was produced in Court, and found to be the same as Porter's patented anchor. Upon this evidence, the Judge (Baron Martin) intimated his opinion that the Patent was invalidated by the sale and use, when the Plaintiff elected to be non-suited.

The present application was in consequence. The petition, after stating the history of the invention, the extension of the term, the action for infringement, and the substance of the evidence given at the trial impeaching Porter's title as the true and first inventor and its result, prayed for confirmation of the new Letters Patent.

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\* Present: The Right Hon. Dr. Lushington, the Right Hon. Lord Cranworth, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir Edward Ryan.



The application was opposed by Messrs. Bloomers, one of whom was the Defendant in the above action.

Sir Frederick Thesiger, Q.C., and Mr. Webster, for the Petitioner.—An important question is involved in this application: whether there can be a confirmation of Letters Patent which have been, as in this case, prolonged under the 4th section of the 5th and 6th Will. IV., c. 83. There is no express provision in the 2nd section of that Statute which applies to a case like the present, but we submit, that as that section clearly applies to original Letters Patent, it must, *ex necessitate*, extend to renewed Letters Patent, which are, in fact, new [381] Letters Patent. In *Russell v. Ledsam* (14 Mee. and Wels. 574; S.C. 16 Mee. and Wels. 633), upon a construction of the 4th section of that Statute, it was held by the Court of Exchequer, that a renewed grant was not confined to grantees, but extended to assignees, although assignees were not mentioned in that section. Assuming, then, that the section has a wider application and does apply, it may be urged, that if this Patent be confirmed, it may affect those who made or used the Patent article previous to the granting of the Patent, and that they would be affected by a confirmation; that, however, will not ensue, for the confirmation would be *quoad* the right of the original inventor. The Petitioner brings herself within the 2nd section, as Porter believed himself the first and original inventor. There was public user by Messrs. Logan it must be admitted, but not general user. It is, therefore, such a case as the Legislature by this section intended to provide for. This Court will not enter into the question whether Porter was the first inventor or not.—[Sir John Jervis: We must inquire into the public user. Is not the question to be ascertained by us one of fact, namely, who was the first and true inventor, and who was the party who first brought it into use? Suppose a party brings an invention from France and obtains a patent for it in this country, he is not the first inventor, but the first who brings it into public use.]

Mr. M. Chambers, Q.C., Mr. Serjeant Atkinson, and Mr. Russell, for the Opponents.—This Court has no jurisdiction to confirm extended [382] Letters Patent. The second section of the 5th and 6th Will. IV., c. 83, under which this application is made, contemplates only an original Patent. It was intended only to apply in circumstances where a party having obtained a Patent, it was afterwards discovered that it had been known and understood previously, as if a prior inventor had kept the invention in his study, and only shown it to a few persons. If the section does apply, the Court must be satisfied, and the *onus probandi* lies on the Petitioner to prove affirmatively, first, that Porter believed himself to be the first and original inventor; and secondly, that such invention, or part thereof, had not been generally and publicly used. Now, here the extended Letters Patent are, in fact, new Letters Patent, and when the assignee obtained such new Letters Patent, the invention was known to have been used.—[Sir John Jervis: In Kay's Patent (3 Moore's P.C. Cases, 24) an application for an extension was allowed, though there was *lis pendens* respecting the validity of the Letters Patent.]—This Court, from the serious consequences which affect those who have used the invention, will construe the section strictly, and, if there has been public user, refuse to confirm, as they did in Card's Patent (6 Moore's P.C. Cases, 207), and in Westrupp and Gibbins' Patent (1 Webster's Pat. Cases, 554).—[Sir John Jervis: Is the power given by the second section to this Committee discretionary or compulsory?—Discretionary.]

Mr. Welsby, in the absence of the Attorney-General (Sir Alexander Cockburn), for the Crown.—Although in the second section the words "the first Letters Patent" occur, yet this Court has jurisdiction [383] under that section to confirm Letters Patent which have been granted under the powers contained in the fourth section; for the grantee of new Letters Patent is a Patentee within the meaning of the second section, just as much as the party who obtained the original Letters Patent. The second and fourth sections must be construed together. Now, the fourth section empowers the Crown to make a new grant of Letters Patent; the second section enacts, "and being satisfied that such Patentee believed himself to be the first and original inventor, and being satisfied that such invention, or part thereof, had not been publicly and generally used before the date of such Letters Patent," that is, the "Letters Patent" so granted upon such application; the sentence has reference to the grant of new "Letters Patent" under the fourth section, and the words,

"that such invention, or part thereof, had not been publicly and generally used before the date of such Letters Patent," and the previous words "that such Patentee believed himself the first and original inventor," ought to be referred to that period.—[Sir John Jervis: If your construction be correct, is it not fatal to the application?—The merit of the Patent is not now in question, that was investigated at the hearing for the extension; but it must be shown affirmatively by the Petitioner that the knowledge of Porter that he was not the first inventor, was *bona fide* acquired after the period of the new grant, and that till that period he believed himself the first and original inventor. If Porter up to a certain period knew only of the making of the previous anchor, and of its having been tried experimentally only, but did not know that it had been used in such a sense as to defeat the Patent, it would not prevent his application [384] for a confirmation, as it is clear that the term "first and original inventor" is to be construed in reference to Patent Law, not as meaning a party who is a discoverer, but a party who is a legal inventor in such a sense as would defeat a subsequent Patent.—[Sir John Jervis: Then your argument is, that if he found it out during the currency of his first Letters Patent, he ought to have come during the currency of that Patent for confirmation. Could a confirmed Patentee renew it?—Under the second section this Committee may confirm, or grant *de novo*. The user must be both public and general. Another difficult question arises, as to the operation of the confirmed Letters Patent against persons who have no notice of the proceedings. The words of the section are, "as against all persons whatsoever." It is a strong thing to say, that it shall operate not only against those who appear and oppose, but against persons who have no notice of the proceedings. Whether any recital could or ought to be introduced into such Letters Patent as would limit the effect of it, is a consideration upon which great doubts exist. There are no words in the Act of Parliament which empower the introduction of such a recital, and if introduced, it is difficult to see how it can operate upon the plain terms of the Act of Parliament. These difficulties arise mainly out of the wording of the Statute.—[Sir John Jervis: Admitting that we have a discretion to recommend the Crown, and as the Act of Parliament is so embarrassing that we cannot understand it, ought we not to leave a Court of Law to decide it?]

Witnesses were examined by the Petitioner and the Opponents, the purport of whose evidence is fully considered and referred to in the judgment.

[385] The consideration of the judgment was reserved, and was now delivered by

The Right Hon. T. Pemberton Leigh (Feb. 10, 1855).—In this case, a Patent was granted on the 15th of August, 1838, to Porter for an improvement in the manufacture of anchors. That Patent expired on the 15th of August, 1852. On the 18th of February, 1853, Her Majesty was pleased, on the report of the Judicial Committee, to grant to the assignee of Porter's Patent a further term of six years for the exclusive use of the invention.

This term was granted by new Letters Patent, which contain a condition similar to that in the original Patent, namely, that the grant is to be void if it should appear that the said invention is not a new invention as to the public use and exercise thereof in England, or not invented and found out by the said W. H. Porter.

In an action brought against a person of the name of Bloomer for the infringement of this Patent, which came on for trial in the month of June, 1854, it was proved that this was not a new invention within the conditions of the Letters Patent, and it is agreed on all hands, that the Patent at present is void. The Legislature, however, has thought fit to vest in the Crown, under certain circumstances, on the recommendation of the Judicial Committee, the power of restoring and giving effect to the grant so become void, and upon petition by the grantee of the renewed Patent to the Crown for the exercise of this power and the confirmation of the Patent, it has been referred to us by Her Majesty to inquire whether it is fit that the application should be granted.

The power is conferred upon the Crown by the [386] second section of the 5th and 6th of Will. IV., c. 83, and it is admitted that, even if the Petitioner brings



himself within the provisions of the Act, it is still left to the discretion of the Judicial Committee to recommend or not the confirmation of the Patent, as justice to all parties may appear to them to require. The section, as far as it applies to the present case, is in these words:—"And be it enacted, that if in any suit or action it shall be proved, or specially found by the verdict of a jury, that any person who shall have obtained Letters Patent for any invention, or supposed invention, was not the first inventor thereof, or of some part thereof, by reason of some other person or persons having invented or used the same,"—not, be it observed, "invented and used," but "invented or used,"—"or some part thereof, before the date of such Letters Patent, or if such Patentee or his assigns shall discover that some other person had, unknown to such Patentee, invented or used the same, or some part thereof, before the date of such Letters Patent, it shall and may be lawful for such Patentee, or his assigns, to petition His Majesty in Council to confirm the said Letters Patent, or to grant new Letters Patent, the matter of which petition shall be heard before the Judicial Committee of the Privy Council; and such Committee, upon examining the said matter, and being satisfied that such Patentee believed himself to be the first and original inventor, and being satisfied that such invention, or part thereof, had not been publicly and generally used before the date of such first Letters Patent, may report to His Majesty their opinion that the prayer of such petition ought to be complied with, whereupon His Majesty may, if he think fit, grant such prayer; and the said Letters Patent shall be available in law and equity to give to [387] such Petitioner the sole right of using, making, and vending such invention as against all persons whatsoever, any law, usage, or custom to the contrary thereof notwithstanding."

Now, it being admitted that the exercise of this authority on the part of the Judicial Committee is discretionary, there are two questions before us: First, whether the Petitioner has proved those facts which are necessary in order to enable the Judicial Committee to recommend a confirmation; and secondly, whether the circumstances appearing before us are such as to make it fit that we should exercise our discretion by recommending a confirmation, if we have the power to do so.

It was objected by the Opponents to the petition that these questions do not arise in this case, for that the provisions for confirmation of a Patent do not apply to a Patent for an extended term. But the grant for an extended term as a new grant by new Letters Patent, subject to the same conditions, open to the same objections, and it should seem, therefore, in ordinary cases at least, entitled to the same advantages as the original grant.

In the case of Aube's Patent (9 Moore's P.C. Cases, 43), which was an application for an extension of the original term, and which came before this Committee in February, 1854, it was decided that the grant of an extended term must be considered as a new grant, and as open to the same objection which would apply to an original grant. There appears to be nothing in the nature of the benefit now sought which should exclude its application to a Patent for an extended term.

We proceed, therefore, to the consideration of the [388] question, whether the Petitioner has established those facts which are necessary in order to give jurisdiction to the Committee. The *onus* of proof lies on the Petitioner, and she must satisfy the Committee, first, that before the date of the original Patent, the invention was not publicly and generally used; and, secondly, that the grantee of the original Patent believed himself to be the first and original inventor.

It is proved by the evidence before us that Porter was in no sense of the term the first inventor of the improvement. It appears distinctly that the principle had been discovered and put in use by James Logan more than ten years before the date of Porter's Patent: that he had made drawings of his invention, which he had shown to a great number of persons; that he had procured models of it to be made, which he had sent to anchor-smiths and other persons likely to bring the invention into use; that he had caused one of these models to be hung up in the room of the Underwriters at Liverpool, where Logan carried on business, which model remained there for twelve or fifteen years, and must, therefore, in all probability have been there at the time when Porter took out his Patent. It further appears, that he had actually, in 1826, manufactured a large anchor upon this principle, and had sold

it in that or the following year; that it was put on board a steamer called the *William Huskisson*, at that time trading to the Clyde; that it remained in use on board the *William Huskisson* (which was afterwards sold to the Dublin Steam Packet Company) till the year 1836, when, one of the toggles having been broken, it was sent to the yard of Messrs. Logan, as one of the witnesses said, to be repaired, and that from that time it lay in the [389] yard open to the inspection of all the workmen who were employed there, amounting, we are told, to about two hundred and fifty, and of all persons whom business or other circumstances might bring to Messrs. Logan's works.

If we could rely with confidence on the accuracy of James Logan's recollection, the case would be carried much further with respect to the user of the invention, for he tells us that before the manufacture of the anchor of the *William Huskisson* he made and sold five or six of the same description, and several others afterwards. But he is unable to give any particulars of such other anchors, or of the persons to whom he sold them. No books or accounts have been produced in verification of such sales. His brother, David Logan, who was in partnership with him, has no knowledge of any such anchors; and Irving, who was in the employ of the firm of Messrs. Logan for thirty-seven years, says, that no anchors were made of a similar description to that for the *William Huskisson*. As to the evidence given by the seamen of the use of similar anchors on board the *Mars*, the *Venus*, the *Atalanta*, and many vessels in the Thames, we deem it wholly unworthy of attention, and calculated rather to discredit than to strengthen the case of the Opponents to the petition.

It is not very easy to define what is the exact meaning of the expression "publicly and generally used," contained in the section. No Patent is likely to be taken out for a process or machine already in public and general use in the ordinary sense of those words; but certainly we cannot consider the use of the invention on board a single ship, however public or for whatever length of time, as a general user, and, [390] though negative evidence in its nature can hardly be very conclusive, and that produced by the Petitioner applies only to a particular firm, we should be inclined to hold, if it were necessary to decide the point, that we were satisfied that the invention had not been generally, though it has been publicly, used at the date of the original Letters Patent.

Whether the Petitioner has made out the second point, namely, that the original Patentee believed himself to be the first and original inventor, depends entirely upon the period at which the belief must be proved to have existed. There is no reason to doubt that he so believed himself when the original Letters Patent were granted. On the other hand, it is plain that he could entertain no such belief at the time when the renewed grant was made. It is proved that he had full notice in 1839, of James Logan's prior invention, and it appears to us to be clear on the context of this clause that the expression "first and original inventor" was intended to mean a person who could claim the merit of the first invention, without reference to the user. But however that may be, we think that, according to the doctrine laid down by Lord Lyndhurst in *Westrupp and Gibbins' Patent* (*Webster's Pat. Cases*, 555), a party cannot be permitted to shelter himself under wilful ignorance, but must be fixed with knowledge not only of what he did know, but of that which he would have known if he had made the inquiries which it was incumbent upon him to make.

Now, it appears from Porter's letter of the 26th of June, 1839, that he was at that time not only informed by Messrs. Logan that they had invented and made an anchor similar to his, but that he was shown [391] the anchor itself, and was told that it had been "put on board a steamer for some little time, and then returned." He had notice, therefore, not only of the prior invention, but of the use of the invention, and was bound to inquire, and, indeed, probably did inquire, into the circumstances of the user; of the importance of which, with reference to the validity of his own Patent, he seems to have been aware.

It is argued, however, very forcibly, that the belief of the original Patentee here spoken of, must mean a belief at the time when the original Patent was taken out, and that neither the merit of the original Patentee nor the rights of the assignee can be affected by circumstances which came to the knowledge of the former only



after the Patent had been granted, and when possibly, as in this case, all his interest in it had ceased. It is impossible to deny that there is great weight in this argument, but, on the other hand, it must be remembered, that it is the new Patent which it is sought to confirm. That it is as a new and original Patent, that it is brought within the meaning of the clause, and that there is nothing unreasonable, when it claims the same advantages, in subjecting it to the same restrictions as an original grant.

But whatever doubts we may entertain upon other points in this case, upon that which is sufficient for its decision, namely, the mode in which we are to exercise our discretion if the circumstance give occasion for it, we can entertain no doubt whatever. The power given to the Crown is to provide an extraordinary remedy for extraordinary cases; to supersede the ordinary rules of law at the expense of the public, in favour of an individual, to give force and va-<sup>[392]</sup>lidity by a *quasi* legislative authority to a grant of monopoly actually void, and to exclude from the use of the invention not only the other subjects of Her Majesty in England, but even the first and original inventor who had actually brought it into public though not into general use, before the first Patent was taken out. That this is the effect of a confirmation is perfectly clear, though it appears from Lord Lyndhurst's observations in the case of Westrupp and Gibbins [1 Web. P.C. 555], that such was not the intention of the framer of the Act, nor its effect as it was originally introduced into, and as it left, the House of Lords. To what extent, under the language of the Act, other objections to the validity of the Patent are removed by the confirmation may be doubtful. In the case of Card's Patent (6 Moore's P.C. Cases, 213), Lord Campbell suggests that the generality of the expression was probably intended to be limited to prior use of the invention. His Lordship also intimates that the provisions of the clause were meant to be confined to cases where either doubts might exist, whether there had been such a prior use as to vitiate the Patent, or where the use of the invention, after some fruitless trials, had been thrown aside and abandoned by the original inventor.

Every Judge who has had to consider the effect of this provision has felt, and we entirely share that feeling, that the jurisdiction is one which is to be most cautiously and sparingly exercised. In the particular case before us, there is no room for doubt that if the facts which actually existed had been known at the time when the original Patent was taken out, no Patent ought ever to have been granted to Porter. The consideration for the monopoly created by a <sup>[393]</sup>Patent is the benefit derived by the public from the communication of a new and useful invention. What new discovery did Porter communicate, or what information did he afford of which the public had not been for years in full possession by the proceedings of Messrs. Logan, to which we have already referred? So far from having a right to the exclusive use of the invention against them, they would have had a clear right by taking out a Patent to the exclusive use against him, if they had not, by divulging and publishing their invention, made it a matter of common right, and prevented it from being the fit subject of a Patent either to themselves or to anybody else. There is not the least pretence for supposing that they had abandoned the use of the invention, though their first efforts to bring it into general use had been unsuccessful, in consequence, as it appeared, of the expense of the manufactured article being greater than the advantage supposed to be derived from it. If the facts now in proof had been known to their Lordships when they recommended an extension of this Patent, they never could have given any such recommendation to the Crown. It has been again and again stated in this place that the grant of an extended term is anything but a matter of course: that in order to obtain it, a very special case must be made; that the novelty, merit, and utility of the invention must be proved, and it must be shown that all reasonable means have been used in order to make the invention productive; but that in spite of such exertions the remuneration obtained by the inventor has either entirely failed, or has been quite disproportioned to his merits, and to the benefit conferred upon the public. These rules will be found to be laid <sup>[394]</sup>down by Lord Brougham in Soames' Patent Case (1 Webster's Pat. Cases, 729), in Morgan's Patent (1 Webster's Pat. Cases, 737), in Jones's Patent (1 Webster's Pat. Cases, 579), by Lord Lyndhurst in Swaine's Patent (1 Webster's Pat. Cases, 560), and by other Lords in a variety of subsequent cases

down to the late case of Heath's Patent (8 Moore's P.C. Cases, 217), and we think it of great importance that they should be strictly observed. If this extended grant ought never to have been made, still less can we now recommend that the ordinary rules of law should be superseded in order to give it validity.

We have considered what ought to be done with respect to the costs of the Opponents. It is of great importance that parties should not be discouraged from bringing important facts to the knowledge of the Court by the fear of the costs which they may have to pay, even if their opposition be successful; and upon this ground, in Westrupp and Gibbins' Patent [1 Web. P.C. 555], the parties opposing were allowed their costs. But we are not satisfied with the manner in which this opposition has been conducted. Much expense has been occasioned by relying upon Patents for inventions which have really no resemblance to this, and witnesses have been produced to whose testimony, as we have already intimated, we cannot give the smallest credit.

On the whole, we shall humbly advise Her Majesty that the Petitioner's application ought not to be granted, but that no costs should be awarded to the Opponents.

[Mews' Dig. tit. PATENT, B. FOR WHAT GRANTED, 3. *Prior Publication and User—By Patentee—Knowledge of Patentee*; F. CONFIRMATION, RENEWAL, AND EXTENSION OF LETTERS PATENT, 1. *Confirmation*, 2. *Renewal*, a. *Generally—Opposition encouraged*, v. *Practice on Application for—Costs of Opposition*. As to confirmation of patents, see *In re Jablochkoff's Patent* (1891), A.C. 293; *In re Marshall's Patent* (1891), A.C. 430; and note to *In re Robinson's Patent*, 1845, 5 Moo. P.C. at p. 68.]

### [395] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

CHARLES AHIER,—*Appellant*; JOHN NATHANIEL WESTAWAY.—  
*Respondent* \* [Feb. 3, 1855].

*Semble.* The "*Clameur de Haro*," in the Island of Jersey, being in its nature essentially a criminal as well as a civil process, the Attorney-General of the Island is a necessary party in all the stages of the cause.

In an action relating to real estate in the Island, founded on a "*Clameur de Haro*" by the Attorney-General and his "*ajoint*" against the Defendant, to undergo the fine of "*Clameur de Haro*," the Defendant raised certain preliminary questions, which were overruled, and the inferior number of the Royal Court, upon the merits, imposed a fine upon the Defendant. He at once appealed upon the preliminary questions and the merits, and the inferior number of the Court held that as there was no appeal in respect of the fine, the Attorney-General ought not to be continued in the appeal. The full number of the Royal Court held that the Attorney-General was a necessary party, and refused to hear the appeal either upon the preliminary points or the merits.

The Judicial Committee, in the circumstances of the case, remitted the cause to the full number of the Royal Court to be heard upon the merits, the Appellant consenting to abandon the preliminary questions [9 Moo. P.C. 406].

Appeal abated by the death of the Respondent, revived by the Appellant by making the deceased's heir, Respondent in his stead [9 Moo. P.C. 403].

This was an appeal from a judgment of the Royal Court of the Island of Jersey, in an action relating to real property in that Island, founded on a "*Clameur de Haro*," in which Her Majesty's Attorney-General and Nathaniel Westaway, deceased, (the father of the Respondent,) as "*ajoint*," were Plaintiffs, and the

\* Present: The Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.



Appellant was Defendant, by which judgment the full number of the Royal Court declared an appeal from a decision of the inferior number of that Court to be defective, on the ground that the Appellant had [396] not continued the Attorney-General a party in the appeal.

The questions in the appeal arose out of certain proceedings peculiar to the Channel Islands, the first relating to the administration of insolvents' estates, which are said to be "*en décret*," and the second relating to the trial of a forcible entry called a "*Clameur de Haro*."

The circumstances under which the "*ajoint*" (of whom the Respondent was the representative) had instituted the suit were as follows:—

Elias Payn was a builder. On the 21st of September, 1844, he sold to Westaway eighteen quarters of wheat-rent charged generally on his estates both present and future. The Appellant had also large transactions with Payn, and had purchased and exchanged various houses and parcels of land from and with him, and by contracts dated the 1st of March, 1845, and the 6th of June, 1846, the sites of the two houses in question in this cause were conveyed to Payn.

On the 1st of May, 1847, Payn made a cession of all his estate, real and personal: a "*décret*" was ordered, and the regular proceedings were taken thereupon. The claimants on the estate, junior to the Appellant, having renounced, the Appellant, when it came to his turn in respect of the contract of exchange and counter-exchange of houses and lands, dated the 6th of June, 1846, also renounced. On the 10th of July, 1847, one Cuerton, in virtue of a deed of purchase, dated the 6th of December, 1845, declared himself tenant, and so became responsible for all the estate of Payn, and forthwith assigned the "*teneure*" or the property thus adjudged to him to [397] one Kilford on condition that the latter should make good Cuerton's purchase. On the 17th of July, 1847, the assignment to Kilford was duly confirmed to him and his heirs, subject to the legal charges thereon, which included the contracts of the Appellant of the 1st of March, 1845, and of Westaway, of the 21st of September, 1844. On the same day, and before he had been put in possession by the officer, Kilford, as assignee of the tenant after decree upon Payn's estate, by a contract of exchange and counter-exchange of that date, exchanged with the Appellant some portions of the estate of Payn, to which he was entitled under the tenancy, for some of the property which the Appellant held under the deed of the 1st of March, 1845, with Payn: and by the same contract varied some of the conditions of the latter deed.

Subsequently, on the 23rd of November, 1848, Kilford himself became insolvent, and having made a cession of his real and personal estate, a "*décret*" thereof was ordered, and the proceedings thereon were taken in the usual manner. On the 27th of January, 1849, the Appellant renounced under the "*décret*" against Kilford in respect of the contract of exchange and counter-exchange of the 17th of July, 1847, which thereby became null and void; but on the 3rd day of February, 1849, the Appellant made himself tenant after decree upon Kilford's estate on a contract of the 24th of September, 1846.

On the 21st of February, 1849, the Appellant as such tenant, after decree of Kilford's estate, exercised the option allowed by the 34th article of the law "*décret*," dated the 19th of January, 1832, and renounced the act of the 17th of July, 1847, by which Kilford had been substituted as assignee of Cuerton, [398] the tenant after decree of Payn's estate. In consequence of this renunciation by the Appellant, the prosecution of Payn's "*décret*" was resumed on the 28th of February, 1849, in order to find a tenant to the vacant property among the prior claimants whose contracts were still in force.

On the 17th of March, 1849, the Appellant renounced under Payn's decree in respect of his deed of exchange and counter-exchange of the 1st of March, 1845. On the same day, all the other parties on the registry having renounced until it came to the turn of Westaway, he made himself tenant under Payn's decree in respect of his contract of the 21st of September, 1844, whereby all deeds subsequent to that date became null and void, subject to the option of revival under the 43rd article of the law "*décret*," dated the 19th of January, 1832. The record of "*teneure*" of Westaway was confirmed on the 23rd of March, 1849, and the proper officers were authorised to put him in possession of all Payn's estates.

On the 30th of March, 1849, Westaway, according to the 43rd article of the law

"*décret*," in his quality of "*tenant après décret*" of Payn's estate, signified to the Appellant his option that the deeds of the 1st of March, 1845, and the 6th of June, 1846, should stand good and continue in force although renounced in the register of the "*décret*" which had been conducted on the property of Payn. Accordingly, on the same day, Westaway was put into actual possession by the officer of all Payn's estate, including the two houses above described.

On the 7th of April, 1849, the Appellant, who alleged that Westaway had no right to exercise such option, re-entered, whereupon Westaway raised the [399] "*Clameur de Haro*," (a) and afterwards, on the 2nd of June, 1849, commenced the action which is the subject of the present appeal.

In this action the Attorney-General of the Island, and Westaway as "*ajoint*," sued the Appellant to undergo the fine of "*Clameur de Haro*," which the "*ajoint*" alleged he was so obliged to raise on the 7th of April, and the Appellant was sued to be condemned to such punishment and fine, to make such [400] recompense and pay such damages to the "*ajoint*" as the Court should deem proper for the injury and prejudice which he had sustained, and to allow the "*ajoint*" to enjoy the property peaceably and without interruption, according to law.

On the cause coming on for hearing before the inferior number of the Royal Court, consisting of the Bailiff and three jurats, the Appellant demanded that the Viscount should be sent on the premises to examine them, and report thereon; but the Court, considering that the question submitted to it was a right of property claimed by both parties, which ought to be decided on the production of titles by the parties respectively, and that the view of the premises could not enlighten the Court as to the nature of this question, overruled the demand; but from this sentence the Appellant was allowed to appeal "*en fin de cause*" before the full Court. The Appellant then alleged that the "*ajoint*" had infringed the "*Clameur de Haro*," and had continued to make alterations to the property in question, notwithstanding the "*Clameur de Haro*," but the Court overruled the objection, reserving to the Appellant to urge it ultimately, if there were reason for it, and from this sentence the Appellant was also allowed to appeal "*en fin de cause*" before the greater number. The Appellant further alleged that the "*ajoint*" was not in legal possession of the houses. And the "*ajoint*" having alleged that at the time the "*Clameur de Haro*" was raised, on the 7th of April, 1849, he was in legal possession, the Court overruled the Appel-

(a) The proceeding upon the "*Clameur de Haro*" prevailing in Jersey partakes of a two-fold character; first, as a criminal and prerogative prosecution, involving a fine on one or other of the parties to it, and possibly also calling for imprisonment; and secondly, as uniting with it "*causes en ajonction*," the remedies of a civil action, in which the rights of private individuals are determined. The origin of the "*Clameur de Haro*" appears to be lost in antiquity. It has been assigned by local historians and legal writers of eminence to Rollo the first Duke of Normandy, but he appears only to have adapted and modified an institution already existing in other parts of France, and also in England, under the Anglo-Saxons. See 2 Hovard's "*Anciennes Lois des Français*," tit. "*Sur les Lois d'Edouard le Confesseur*," Art. 5, p. 119, and Art. 48, pp. 124 and 126; Beaumanoir "*Coutumes de Beauvoises*," ch. 67, pp. 341, and note, 453. A similar cry was used in Brittany under the term "*Bia-fora*," answering to the Norman "*Clameur de Haro*," see vol. iv., "*Coutume Générale*," ch. 148, p. 233 (Edit. 1724); "*La très Ancienne Coutume de Bretagne*," 1 Laurière, "*Glossaire du Droit Français*," pp. 158, 304; 2 Laurière, p. 4; Roquefort, "*Glossaire de la Langue Romane*," p. 153, tit. "*Biaforo*." It corresponds also with the Anglo-Saxon "*Hue and Cry*"—"Hutesium et Clamor," see 1 Coke, 2nd Inst., p. 171; Black. Com., vol. iv., p. 293-4. Glanville, lib. xiv., ch. 3, p. 354 (Edit. by Beames), mentions the "*Clamor popularis*," which Lord Coke calls "*Hue and Cry*." See also the Jersey authorities upon the "*Clameur de Haro*" as to its criminal and civil nature, Terrien's Comms., liv. xii., ch. 28, p. 503, 506 (Edit. 1578); Rouillé, "*Grand Coustumier*," fol. 74, 76, ch. 54, p. 113, ch. 93; Falle's History of Jersey, pp. 10 and 286, note 20 (Edit. by Durell); Du Cange, Glossary, verbo "*Haro*," and First Rep. of the Comms. on the State of the Crim. Law in the Channel Islands (Jersey), p. 240.



lant's plea; from which sentence also the Appellant was allowed to appeal "*en fin de cause*" before the greater number.

Afterwards the parties were heard upon the merits, [401] "*sur le fond*," and the Court, having taken time to consider, ultimately, on the 16th of June, 1849, decided that Westaway, as proprietor by virtue of his option, was fully justified in raising the "*Clameur de Haro*," and sentenced the Appellant to the fine of "*Clameur de Haro*" and to the costs, from which sentence, so far as regards the preliminary questions raised by the Appellant, and that "*du fond*" (upon the merits) only, and not on the question of fine, the Appellant was allowed to appeal before the superior number.

The Appellant immediately paid the sum of ten livres, being the amount of the fine (*amende*), of "*Clameur de Haro*," to which he was so condemned. And his Advocate stating, that as there was no appeal in respect of the fine, and the Crown had no longer any interest in the cause, the Attorney-General ought not to be continued in the appeal, the Court through the Bailiff declared, that there being no appeal in respect of the fine, it was not necessary to continue the Attorney-General as a party to the appeal. The Advocate then requested that the declaration should form part of the act of Court; but the Bailiff observed that it was not necessary, the Court having, with a view to obviate all ambiguity in the act, added the word "only" after the words "*du fond*."

From this judgment the Appellant appealed to the full number of the Royal Court on the preliminary questions as well as the merits, without making the Attorney-General a party, and summoned the Respondent to have the appeal heard on the 21st of November, 1849, but the hearing was then postponed for want of time; and it was afterwards from time [402] to time postponed for want of number, until the 15th of October, 1851, when it came on to be heard before the Bailiff, assisted by Edward Leonard Bisson, Philip Winter Nicolle, Charles Bertram, Philip Picot, John Pelgue, Francis Arthur, and David De Quetteville, Esquires, jurats; when Westaway having objected that the appeal was defective, because the Appellant having appealed, not only as to the merits but also on the preliminary questions raised by him, ought to have continued the Attorney-General a party in the cause, in order to keep his appeal in force; insisted that the preliminary questions, as to the form of the action; to the alleged infringement of the "*clameur*" by alterations in the property; the nature of the acts which constituted an infringement of a "*clameur*," as also with respect to the fine which ought to result from an infringement being proved, could not be re-examined without hearing the Attorney-General, and further objected that the procedure adopted by the Appellant would lead to the supposition that a legal and final condemnation of the fine might exist in an action which might be afterwards declared irregular. On the other hand, the Appellant urged that, in a "*Clameur de Haro*" the Attorney-General had never been continued in the cause on an appeal, as his functions terminated by the condemnation to a fine from which he could not appeal. The Court, however, decided that, as the Appellant had appealed upon the preliminary questions as well as upon the merits, the Attorney-General ought to have been continued in the cause, and that, from his absence, the action being irregular, the appeal was defective (*désert*). The Bailiff, in delivering the judgment, stated that the jurats who concurred in such judgment were [403] Messrs. Nicolle, Bertram, Arthur, and De Quetteville; the opinion of the other three jurats being the other way.

From the above judgment the present appeal was preferred. Nathaniel Westaway died shortly after its institution, and the Appellant, by an Order in Council, dated the 10th of August, 1852, revived the appeal against the Respondent, his son and heir.

The appeal now came on for hearing.

Mr. Field, for the Appellant.—According to the practice in Jersey, as laid down by the Bailiff and the inferior number of the Royal Court, it was, after the imposition of the fine, unnecessary to continue the Attorney-General as a party to the appeal to the full Court (*a*). There are several precedents remitted with the papers to

(a) First Rep. of the Commissioners on the State of the Crim. Law in the Channel Islands (Jersey), p. 252.

that effect (*b*). The suit of "*Clameur de Haro*" is one of a class of causes known as "*causes en ajonction*" by [404] which titles to land, assaults, and other wrongs, are tried. The Attorney-General commences the suit as Plaintiff, but, having joined with him the party really interested, the "*ajoint*;" it is clear, if the Plaintiff is entitled to succeed in a case similar to the present, where, in truth, nothing but a civil right is in question, it must be considered as a civil action. It is treated by writers of authority (Hemery and Dumaresq's Orders in Council, etc., p. 31) as a mere civil action, and a fine merely nominal is imposed by way of satisfaction for the supposed public wrong, such public wrong having, however, no foundation in fact. Although an appeal lies from the decision on the points raised in the cause, there is none from the fine. The utmost effect of the absence of the Attorney-General was to prevent the Appellant from going into the appeal upon the preliminary questions. Upon the merits the full Court was competent, and ought to have heard the appeal.—[The Lord Justice Knight Bruce: If you fail here your appeal is barred for ever.]—Yes, that is one of our chief grievances. By the law and practice of Jersey, all appeals to the full Court must be prosecuted within six months from the date of the judgment, and it is too late now, therefore, to prosecute a fresh appeal. The six months elapsed by no fault of the Appellant. No objection to the fact of the Attorney-General being a necessary party was taken on the 21st of November, when the appeal first stood for hearing, when, if it had been held not valid, there would have been time to have prosecuted a fresh appeal within the prescribed time. We were misled by the judgment of the inferior number of the Royal Court.—[The Lord Justice Knight Bruce: What had the Attorney-General to do with the cause after the imposition of the fine?—Nothing.—[The [405] Lord Justice Knight Bruce: If he was a necessary party, might not the full Court have made the Attorney-General a party?—The Court might have heard the case upon the merits, Terrien (Comms. liv. viii., ch. xi., p. 272 (2nd Edit.); Hemery and Dumaresq's Orders in Council, etc., p. 31). We are ready now to abandon the preliminary questions if the appeal be permitted to be heard on the merits by the full Court.]

Mr. R. Palmer, Q.C., and Mr. Mackeson, for the Respondent.—The Attorney-General not having been continued as a party to the appeal to the full Court, such appeal was irregular, and the effect of that must necessarily be the abatement of the appeal. *In re Whitfield* (5 Moore's P.C. Cases, 157), a petition of appeal to Her Majesty in Council was discharged because all the parties to the cause in the Court below were not summoned on the appeal. There can be no question that the Attorney-General was a necessary party in the appeal to the full Court; the "*Clameur de Haro*" being essentially as well a criminal as a civil process. It affects the revenue of the Crown, and, involving as it does a breach of the public peace, fine and imprisonment may, in any stage of the cause, be the result. None of the preliminary questions raised could be inquired into or any judgment founded upon them without affecting the rights and duties of the Attorney-General as public prosecutor. The decision of the full Court of Jersey, being upon a point of practice, this Court will not interfere with it. Moreover, we submit, that it is not in the power of the Court to accede to the offer of the Appellant to abandon the preliminary [406] questions, and remit the cause; the objection of the want of parties being fatal.

Mr. Field, was heard in reply.

Judgment was pronounced by

(*b*) These precedents were set out in the joint appendix, and consisted of an Act of the Court, dated the 12th of December, 1829, at the instance of His Majesty's Attorney-General and Solier, attorney of Le Touzel "*ajoint*," against Hocquard and his surety; Act of the full Court, dated the 4th of May, 1830, between Solier, attorney of Le Touzel, heretofore "*ajoint*" with His Majesty's Attorney-General, on the one part, and Hocquard and his surety on the other part; Act of the full Court, dated the 9th of November, 1820, at the instance of His Majesty's Attorney-General and Lemprière, Lord of the Fief and Lordship of Rozel "*ajoint*," against Becquet; Act of the Court, dated the 1st of December, 1828, between Lemprière and Becquet, with an Order in Council, dated the 31st of July, 1828; Act of the Court, dated the 24th of September, 1819, at the instance of His Majesty's Attorney-General and John Langlois and others, against Gaudin.



The Lord Justice Knight Bruce.—Their Lordships consider it immaterial to canvass the case as to the preliminary questions raised, or whether the Attorney-General of the Island ought to be a party during their discussion. Neither do they pronounce any opinion upon the merits, as in the view they take of the matter it would be unnecessary, as the Appellant has elected to waive the preliminary questions, and consents to the case being sent back and tried upon the merits.

Two questions arise, first, whether the Appellant ought, under the circumstances, to have an opportunity of trying the case upon the merits, and, secondly, as to the costs.

Upon the first point, their Lordships are of opinion that the Appellant ought to be permitted to be heard on the merits, and that the right of trying the question upon the merits be conceded to him, when the second point as to costs can be opened, as it very much depends upon the fact whether the Appellant was right or wrong in the course he adopted in the Court of appeal in Jersey. In the first place, the point was not taken there at all, and, again, when the case was before the inferior number of the Royal Court in 1849, that Court expressed an opinion that the Attorney-General was not a necessary party to the appeal, as there was no appeal against the fine; whether it was the opinion of the Bailiff alone, or the opinion of the Court expressed through the Bailiff, is wholly immaterial. It is manifest that the opinion of the [407] Court was, that the Attorney-General was an unnecessary party in the ulterior stages of the cause.

When the matter was brought by way of appeal before the full Court, two courses were open: first, the Court might have said we decide against you on account of the preliminary questions, but we will hear you upon the merits, or we will give you leave to make the Attorney-General a party; but the time for appealing having elapsed, perhaps presented a difficulty, and prevented the adoption of such a course; secondly, the Appellant might have applied for leave to add the Attorney-General as a party, but here again the lapse of time might have caused the difficulty, as well also as the fact of the payment of the fine; but if the Appellant had abandoned the preliminary questions, and asked the Court to proceed with the argument on the merits, that would have had the effect of precluding him from appealing here on the preliminary questions. Upon the whole we are of opinion that the case ought to be remitted to the full Court, and that there should be no costs on either side.

The Order in Council made upon the appeal was as follows:—

“It is hereby ordered that, by the consent of the Appellant, his appeal to the superior number of the Royal Court, on which the Act or Order of the 15th day of October, 1851, was pronounced, be and the same is hereby declared to be abandoned, or ‘*désert*,’ so far as the preliminary questions raised by the Appellant therein are concerned, but not as to the merits, or ‘*fond*,’ and that the case be remitted to the Royal Court of Jersey before a superior number, to proceed and adjudicate upon the Appellant’s appeal to that Court upon the ‘*fond*,’ or merits.”

[Mews’ Dig. tit. COLONY: II. PARTICULAR COLONIES; 13. *Jersey and Guernsey*; b. *Constitution*: III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; b. *Abatement and Revivor*.]

#### [408] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

ELIZABETH BISHOP,—*Appellant*; TIMOTHY WILDBORE and JOHN BRIDGES,  
—*Respondents* \* [Feb. 7, 1855].

A married woman who was entitled to an annuity left to her separate use, charged upon property which was in course of administration in the Court of Chancery, but without any immediate prospect of obtaining the arrears

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

of such annuity, allowed to sue in *forma pauperis*, in the Prerogative Court, in a testamentary cause. Her husband being an uncertificated Bankrupt with protection, and, although in temporary employment as an attorney's clerk, was with his wife in destitute circumstances.

This was an appeal from a grievance alleged to have been committed by the Judge of the Prerogative Court of Canterbury, having refused to allow the Appellant to take proceedings in a testamentary suit, in *forma pauperis*.

The cause originated in the Prerogative Court in a business of granting probate to the Will and Codicil of one Lydia Wilson, promoted by the Respondents as her executors against the Appellant, one of the deceased's next of kin, and of showing cause why the Appellant should not be allowed to sue in *forma pauperis* in order to prosecute her interest. Mrs. Bishop and her husband, Robert Bishop, swore that they were not respectively worth five pounds, after payment of [409] their just and lawful debts; but the executors having objected to her suing in *forma pauperis*, she was assigned to bring in her petition. It appeared from the proceedings and affidavit that the Appellant was entitled to an annuity of £100 under her father's Will, which annuity was limited to her separate use, but that she was not in receipt of such annuity, the same being two years and a half in arrear; that her father's estate was in the course of administration in the Court of Chancery, and not likely to be realised or settled for some time. It further appeared that her husband was an uncertificated Bankrupt with protection from arrest, and that he then was in the temporary employment of a solicitor as clerk to make out bills of costs, but that such employment was uncertain and would soon cease, and that he and his wife were in an impoverished and distressed state.

By an interlocutory decree dated the 3rd of August, 1854, the learned Judge rejected the Appellant's application. The present appeal was from that rejection.

Mr. Bishop (the husband of the Appellant), in person, in support of the appeal.

Dr. Twiss, for the Respondents, opposed.

The husband of the Appellant is capable of obtaining a livelihood, and is, in fact, now in employ as an attorney's clerk; his wife has also an annuity under her father's Will; the Court will not, in such circumstances, admit the Appellant to carry on the proceedings in *forma pauperis*. *Walker v. Walker* (1 Curt. 561), *Lovekin v. Edwards* (1 Phill. 183).

[410] The Right Hon. Dr. Lushington.—The circumstances of this case are very peculiar. No similar case has, as far as we are aware, come under the consideration of any of the Ecclesiastical Courts. The Appellant's husband is an uncertificated Bankrupt with protection from arrest. It has been urged that the Appellant ought not to be admitted to sue as a pauper, as she has an annuity under the Will of her father limited to her separate use and secured on real property, but it appears that the Testator's estate, upon which her annuity is charged, has been brought into Chancery, and there is no prospect of an immediate or early payment of the annuity being made, and consequently she must be considered as entirely destitute of funds, and her husband's affidavit shows that he is in a similar position. The fact of his being an uncertificated Bankrupt, and unable to acquire property beyond the means of furnishing him with the necessaries of life, distinguishes the case from *Walker v. Walker* [1 Curt. 561]. As it appears to their Lordships that the husband and wife are in a state of destitution, we think that the decree of the Court below must be reversed, and the party admitted to sue in *forma pauperis*. No order will be made as to costs.



## [411] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

GUNGADHUR SEAL,—*Appellant*; SREEMUTTY RADDAMONEY DOSSEE,—*Respondent* \* [Feb. 19, 1855].

The Judicial Committee have no jurisdiction to entertain any application in an appeal until the petition of appeal is lodged.

In circumstances where it appeared that an inquiry was pending before the Master in the Court below, arising out of the decree, the subject of the appeal, the finding of whom might render the prosecution of the appeal unnecessary, the Judicial Committee suspended the proceedings on the appeal and enlarged the time prescribed by Rule 5 of the Order in Council of the 13th June, 1853, for prosecution thereof, until further Order.

This was an application by the Appellant for an extension of the time prescribed by the 5th Rule of the Order in Council of the 13th of June, 1853, by which the appeal stands dismissed unless steps for prosecuting the same be taken within six months from the arrival of the transcript and the registration thereof. The affidavit filed in support of the application stated, that an inquiry was then pending before the Master of the Supreme Court at Calcutta arising out of the decree appealed from, and that it was anticipated that the finding of the Master would render the prosecution of the appeal unnecessary, and that the Appellant was desirous of waiting the event of the proceedings in the Master's Office in India, before prosecuting his appeal, as he might be saved the expense attendant upon the prosecution thereof.

The transcript had arrived and was registered in [412] the Council Office on the 12th of October, 1854, but no petition of appeal had been lodged.

Mr. Leith, for the Petitioner, was stopped.

The Right Hon. T. Pemberton Leigh.—We cannot entertain this application, as we have no jurisdiction until the petition of appeal is lodged. When it is lodged you may renew the application.

A petition of appeal was afterwards lodged, and (March 24, 1855 †) Mr. Leith now renewed the motion.

The six months expire to-morrow, and unless the indulgence is granted the appeal will stand dismissed.

The Lord Justice Turner.—Enough has been shown to induce us to retain the appeal, notwithstanding the new rules, and to direct that the Petitioner be at liberty to suspend proceedings thereon until further order.

[Mews' Dig. tit. COLONY: III. APPEALS TO PRIVY COUNCIL: 6. *Practice: a. Time and Extension thereof.* Cf. *Seto Luchmeechund v. Seto Zorawur Mull*, 1854, 6 Moo. Ind. App. 204; 9 Moo. P.C. 351.]

## [413] ON APPEAL FROM THE COURT OF ERROR AND APPEAL FOR UPPER CANADA.

JOHN HOLMES,—*Appellant*; CATHERINE MATHEWS,—*Respondent* † [March 24, 1855].

A. contracted for the grant of certain lots of land from the Government in

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

† Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

‡ Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Lord Justice Turner.

Upper Canada, and paid part of the purchase-money, and being indebted to B., he assigned by deed his interest in those plots to B. in consideration of the sum of £100. B. took possession of the lots, and afterwards obtained a grant of them by Letters Patent from the Crown in fee with the privity of A. A. subsequently became Bankrupt, and B. was appointed assignee to his estate. No mention was made of any claim on the part of A. for right to redeem, or interest in the lots, in his affidavit of debts and assets, nor was any claim then made by him or his creditors. B. remained in possession until his death, and the property having greatly increased in value, A. procured the appointment of a new assignee of his estate, who filed a Bill against the devisee of B. for redemption of the lots in question, upon the ground that the original transaction was one of mortgage and not of absolute sale. The original deed of assignment was lost, and no evidence of its contents could be produced, except a memorandum of account between the parties, made by the solicitor who acted for A. and B., upon which the arrangement in the Deed was based. Parol evidence was admitted to prove the nature and terms of the transaction, but the Court of Error and Appeal in Upper Canada dismissed the Bill. Such decision affirmed on appeal by the Judicial Committee.

The Appellant in this case was the assignee in Bankruptcy of the estate of one Alfred Thomas Jones, and the Respondent was the devisee of one Edward Mathews, deceased.

The facts of the case were these:—

Alfred Thomas Jones, previously to the month of September, 1840, contracted for a grant to him from the Crown of certain freehold property in the town of London, in the Province of Upper Canada, being lots 11 and 12, on the south side of Dundas Street East, [414] and lots 11 and 12, on the north side of King Street East, but as Jones did not pay the whole of his purchase-money for these lots, no Letters Patent were made to him by the Crown. At this time Jones and Aby Bedford Jones, his brother, were indebted to Mathews in divers small sums of money, and it was agreed that Mathews should advance or pay to them a further sum amounting to £110 4s. 6d., and should also pay to the proper officer of the Crown the purchase-money then remaining unpaid for the lots 11 and 12, on the south side of Dundas Street East, and lots 11 and 12, on the north side of King Street East, amounting to the sum of £42 18s. The money so due to Mathews, together with the sums of £110 4s. 6d. and £42 18s., amounted in the whole to the sum of £300, and it was agreed that £200, part thereof, should be considered as paid or advanced to Aby Bedford Jones, in respect of certain premises, the property of Aby Bedford Jones, and that the remaining sum of £100 should be considered as paid or advanced in respect of the above loss, which Alfred Thomas Jones had contracted to purchase as hereinbefore mentioned.

The above sums of £110 4s. 6d. and £42 18s. were paid by Mathews, and in pursuance of the agreement between him and Alfred Thomas Jones, by an indenture dated the 2nd of September, 1840 (this deed was lost, and although search was made neither it nor any draft or copy could be found), Jones assigned his contract for the above lots to Mathews, who by virtue thereof, on the 20th of January, 1843, procured Letters Patent of the above lots to be made to him in fee by the Crown, and [415] Mathews entered and continued in possession of the lots until his death.

On the 22nd of August, 1844, a commission of bankruptcy was issued from the Court of Bankruptcy for the County of Middlesex, in the province of Upper Canada, against Alfred Thomas Jones, who was declared Bankrupt, and Mathews was appointed assignee of his estate. Mathews died on the 22nd of June, 1850, having by his Will devised all his real estate, and all his interest in real estate, to the Respondent, and appointed her sole executrix, and she had since the death of Mathews been in possession of the above lots of land, which had greatly increased in value.

On the 25th of June, 1851, the Appellant was appointed assignee of Jones' estate in the place of Mathews. No claim was ever made or set up on the part of Alfred Thomas Jones, or on the part of the Appellant, his assignee, to any right to



redeem those lots of land, or to have any interest therein, until the Bill hereinafter mentioned was filed by the Appellant.

On the 14th of August, 1851, the Appellant filed a Bill in the Court of Chancery of Upper Canada, against the Respondent, and thereby stated, that Jones, at the time of the issuing of the commission of bankruptcy against him on the 22nd of August, 1844, was entitled to the equity of redemption of certain freehold property in the town of London, being lots 11 and 12, on the south side of Dundas Street East, and lots 11 and 12, on the north side of King Street East, and hereinafter described as the four lots which Jones had assigned and transferred to Mathews, by an indenture or assignment under the hand and seal of him, Jones, bearing date the 2nd of September, [416] 1840, to secure to Mathews nominally the sum of £100, which was stated to be the amount of a loan then made by Mathews to Jones, but which sum of £100 was not in fact owing, but only a part thereof was owing, from Jones to Mathews, on the 2nd of September, 1840, and such part was alone in fact secured by the assignment. That the £100 was the sum then stated to be lent and advanced by Mathews to Jones, but Mathews had retained and withheld out of the sum of £100, the sum of £15, an illegal bonus on the loan, in addition to the legal rate of interest thereon, and Mathews paid to Jones the sum of £44, out of the £100, and the remaining £41 he paid to the Government of the Province for arrears due on the lots, and on the 20th of January, 1843, Mathews, as assignee of Jones, under the assignment, applied for and received Letters Patent from the Crown for the lots, and became the owner in fee thereof, subject to the equity of redemption of Jones, in the lots, on payment by Jones of the sum of £85 and interest, from the 2nd of September, 1840. That after the 2nd of September, 1840, and before the bankruptcy of Jones, Mathews became possessed of the legal estate in certain premises in the town of London, being the west part of lot 17, on the north side of Dundas Street, in that town, and hereinafter called "the Ferguson Lot," on which there was erected at the time Mathews became possessed as aforesaid a building, consisting of a shop and a dwelling-house, the property of Jones, as Mathews when he so became possessed well knew; and for a time after Mathews became possessed of the premises, Jones remained in possession of the house and shop as of his own property, and Mathews about the same time [417] made various repairs on the same, at the request of, and being employed by, Jones; that he charged Jones for such repairs, and fully admitted Jones to be the owner of the house and shop, although he, Mathews, had become possessed of all the land on which it stood: but afterwards Mathews, as owner of the land on which were erected the house and shop, ejected Jones from the house and shop, and took the same himself, and he and those under him had ever since been in possession of the same, and received the rents and profits thereof, and claimed and held the same as their own; and that the house and shop were held and claimed as her own by the Respondent, claiming under Mathews; that the house and shop were worth more than the sum of £85, and interest thereon, and that there was in fact nothing then due on the security of the premises so assigned to Mathews as aforesaid by Jones. And after stating that Mathews had by his Will devised all his real estate, and all his interest in real estate, to the Respondent, whom he appointed his sole executrix, and that the Respondent had proved the Will, and was entitled to the mortgage money; and also stating the appointment of the Appellant as assignee, and that as such he was entitled to the equity of redemption in the premises, and that by an order of the Court of Bankruptcy the Appellant was authorised and directed to take proceedings to redeem the premises for the benefit of the creditors of Jones, the Appellant, prayed that he, as such assignee, might be let in to redeem the mortgaged premises, and that the same might be conveyed to him as such assignee, upon payment of the principal money, and interest and costs due and owing, if any there should be upon such security. And, if it should appear that there was nothing due [418] on the security, that the Appellant might be so let in to redeem without costs, or that the Respondent might be ordered to pay his costs of the suit; and if the debt should appear to be overpaid, then that the Respondent might be ordered to repay to the Appellant, as such assignee, what had been so overpaid with his costs of the suit. And that for the purposes aforesaid, all proper directions might be given, and accounts taken, and that in taking the accounts the Master might be

directed to inquire and state the value of the house and shop on the "Ferguson Lot," and to give credit to the Appellant in the account for its value.

The Respondent by her answer stated, amongst other things, that she did not believe that Jones was entitled to the equity of redemption, and denied that any part of the sum of £100 was retained as a bonus on the loan. That no declaration of trust of any of the hereditaments in respect of which relief was sought by the Bill, or any contract in writing respecting the equity of redemption thereof, was signed by Mathews, or the Respondent, or any other person interested under his Will, and she relied upon the Statute of Frauds as a bar to the Plaintiff's claim. She stated also that Mathews received possession of the property not long after the date of the assignment, and that he continued in possession thereof until his death, which took place on the 22nd of June, 1850, and that the Respondent had been in possession since that time, for the benefit of the persons interested under his Will. That Jones had not made any claim to the equity of redemption in the property before or at the time of his bankruptcy, and that no claim was made under the bankruptcy until some time after the death of Mathews. That in case it should appear [419] that by the original agreement the assignment was intended merely as a security for a loan (which the Respondent believed to have been the case), the equity of redemption therein had been, the Respondent had no doubt, subsequently disposed of to Mathews, and thus put an end to by mutual agreement. And the Respondent relied upon the Statute of Limitations, the lapse of time, and the acquiescence of all parties as constituting a bar to the suit. With respect to "Ferguson's Lot," the answer stated, that Mathews bought and received a conveyance of that property on the 29th of April, 1842, from Aby Bedford Jones and his wife: Aby Bedford Jones being the owner thereof in fee, subject to a mortgage thereon to one Goodhue and another to Mathews, the latter being for the sum of £200, of which the sum of £110 4s. 6d. was received by Aby Bedford Jones, and the residue was for a debt of Alfred Thomas Jones, who was a brother of Aby Bedford Jones. That the purchase embraced, and was intended and understood to comprise, the building as well as the land; that the consideration was £350, which was the full value of the building and land together. That Alfred Thomas Jones knew of the sale, but never forbade it, and never pretended that the sale should be made subject to his claim on the building or that Mathews should be accountable to him therefor, and that neither he nor any other person ever made any claim until long after the death of Mathews. And the Respondent insisted that the claim was barred by the Statute of Limitations and the lapse of time.

To this answer a replication was filed, and the cause being at issue, witnesses were examined and documentary evidence produced.

[420] The evidence consisted of the deposition of Aby Bedford Jones, the brother of Alfred Thomas Jones, who stated that in the year 1840 his brother borrowed from Mathews, £200, and that at the time of the negotiation for the loan he heard a conversation with Mathews and his brother, who offered the lots mentioned in the bill as security for the loan to be repaid in one year at a *bonus* of 15 per cent. He stated that he was not present when any writing was executed on the subject, nor knew whether any money passed; nor did he recollect any other conversation at the time. Mr. Wilson, who had been the attorney of Mathews, deposed, that in 1840, Mathews agreed to advance to Aby Bedford Jones £200 upon the part of lot 17, called then the "Ferguson Lot," and to A. T. Jones £100 upon lots 11 and 12, south on Dundas Street, and upon lots 11 and 12 north on King Street, in the town of London, for one year to year, to each, at six per cent. per annum. There was no bonus, he was sure. That there could not have been for this reason, that a memorandum he had in his hand [the exhibit marked B (*post* [9 Moo. P.C.], p. 421)] in the handwriting of Beecher, formerly his clerk, showed the transaction, and although not dated, yet by reference to entries in his, the witness's day-book, he had no doubt it was made on the 3rd of September, 1840. That the advance was made up in this way:—A. T. Jones owed Mathews on a cognovit then in his the witness's hands for a previously existing debt, £125; Mathews had an account, exclusive of the cognovit, of £21 17s. 6d., and there was supposed to be due to the Government upon the lots 11 and 12, King Street and Dundas Street, north and south, £42 18s., and a cheque (this cheque was produced and marked [421] as an exhibit) was then



given for the balance of £110 4s. 6d. At that time no Patent had been granted for those lots. That the witness got an assignment from Alfred Thomas Jones in favour of Mathews for the four lots; on which assignment he believed the Patent was obtained. That the assignment, though absolute in its terms, was, in fact, a security only for the loan of £100, with interest at six per cent. to be repaid in one year. He knew nothing of any arrangement which might have been made between Mathews and Alfred Thomas Jones and Aby Bedford Jones, irrespective of what he stated. He did not think that, as the transaction took place, there could have been any *bonus*. He was not in the office when the memorandum (Exhibit B) was made, nor did he know of what items the £21 17s. 6d. was made up. He further deposed that, in a conversation he had (after the money was due upon the four lots) with Mathews, he said he would have Alfred Thomas Jones and Aby Bedford Jones take them for the money, and that the witness then said that he would not give the money for the lots. He also deposed that he had no knowledge of the time when Mathews took possession of the part of the lot 17.

The Exhibit B, referred to by this witness, and put in evidence, was as follows:—  
 “Memorandum of Account between Mr. Mathews and Jones.”

Cr.

|   |            |
|---|------------|
| Amount to be advanced to Mr. Mathews on the Ferguson Place . . .    | £200       |
| On lots 11 and 12, north and south on King and Dundas Streets . . . | 100        |
|   | <hr/> £300 |

[422] Dr.

|   |            |    |   |
|---|------------|----|---|
| To due Mr. Mathews on cognovit given up . . . . .                   | £125       | 0  | 0 |
| Do. on account . . . . .  | 21         | 17 | 6 |
| Due on lots 11 and 12, above which Mr. Mathews is to pay Government | 42         | 18 | 0 |
| Cash cheque to balance . . . . .                                    | 110        | 4  | 6 |
|   | <hr/> £300 | 0  | 0 |

Endorsed on which were the following memoranda: “Memorandum from A. T. and A. B. Jones,” and “£3000 loaned for one year.”

Alfred Thomas Jones was also examined by the Plaintiff. His evidence was objected to on the ground that he was interested, the suit being brought by the assignee under his Bankruptcy. He was, however, examined, subject to the opinion of the Court. He deposed that he had borrowed £100 from Mathews for twelve months at the rate of 15 per cent., and he denied that he was indebted to Mathews in the sum of £21 17s. 6d. mentioned in the Exhibit B, and he further denied that he had ever parted with the right of redemption, by word or writing, and he deposed to the increased value of the property, it being then worth £1000. Several other witnesses were examined. They were tradesmen, and deposed to the payment by A. T. Jones for repairs done to premises built on the lots in question after the assignment to Mathews. Beecher was also examined, and he verified the memorandum (Exhibit B) as being in his handwriting, and deposed that it showed the transaction between the parties, and was made out by him for that purpose. He further deposed that his impres-[423]-sion was that A. T. Jones told him of his equity of redemption in the property now claimed, but that he did not attach much importance to it, as the amount he would have to pay would then have been equal to the value of the lots. Alexander Griffiths, MacDonnell, and Morrison, witnesses for the Defendant, deposed to conversations with Alfred Thomas Jones, in which he told them, that being involved, he had sold the lots to Mr. Mathews.

The reception of a considerable part of the evidence adduced on behalf of the Appellant was objected to by the Respondent. The cause came on to be heard on the 6th of April, 1852, when the Court declared, that the full sum of £100 was the principal money secured on the premises in the pleadings mentioned, and did not include any usurious charge, and the Court ordered and decreed the same accordingly; and it was ordered that the cause should be referred to the Master, to take an account of what (if anything) was due and owing to the Respondent for principal money and interest on the mortgage security in the pleadings mentioned; and in taking such account, the Master was to make to the parties all just allowances, and in case the Master should find that anything remained due to the Respondent

at the time of filing the Appellant's bill, he was to tax to the Respondent her costs of the suit, and add the same to what should remain due for principal and interest, and upon the Appellant paying to the Respondent what should remain due for principal, interest, and costs as aforesaid, within six months after the Master should have made his report, at such time and place as the Master should appoint, it was ordered that the Respondent should re-convey the four lots comprised in the mortgage [424] security, being lots numbers 11 and 12 on the south side of Dundas Street, and lots numbers 11 and 12 on the north side of King Street, in the town of London, free and clear of all incumbrances done by her, or any claiming by, from, or under her, and deliver up all deeds and writings in her custody or power relating thereto, upon oath, to the Appellant, or to whom he should appoint, but in default of the Appellant paying to the Respondent such principal money, interest, and costs aforesaid, by the time aforesaid, it was ordered that the Appellant's bill of complaint should stand dismissed out of the Court, with costs to be paid by the Appellant to the Respondent, and it was thereby referred to the Master to tax the same: but in case the Master should find that there was nothing due to the Respondent at the time of filing the bill, then the Court reserved the consideration of further directions and costs, and the Court ordered and decreed that the Appellant's bill of complaint should stand dismissed in so far as the same related to lot number 17, on the north side of Dundas Street, in the town of London, without prejudice to the Appellant's filing a new Bill in regard thereto as he might be advised.

The Respondent appealed from the whole of this decree to the Court of error and appeal for Upper Canada.

The appeal was heard before the Chief Justice of Upper Canada, the Chancellor, the Chief Justice of the Common Pleas, Mr. Justice Draper, the Vice-Chancellor Esten, Mr. Justice Burns, and the Vice-Chancellor Spragge (*a*), (the Chancellor and the Vice-[425]-Chancellors, dissenting), on the 22nd of September, 1853, when that Court ordered and decreed that the decree of the Court of Chancery should be reversed, and the Bill of the Appellant dismissed with costs, and that the cause should be remitted back to the Court of Chancery, to do therein as should be consistent with such Order.

The present appeal was brought from this decree.

Mr. Rolt, Q.C., and Mr. Cure, for the Appellant.—It is admitted in the answer of the Respondent that the assignment of the 2nd of September, 1840, was originally a mortgage only. Such admission is binding upon her, *Cottingham v. Fletcher* (2 Atk. 155), and she cannot avoid the consequences of such admission by the further statement in her answer, that Alfred Thomas Jones had put an end to his equity of redemption by some subsequent parol agreement between her husband and himself. The parol evidence established, that this was a mortgage transaction, and intended by both the assignor and assignee to operate only as a mortgage. The Exhibit B. referred to by Wilson and Beecher in their evidence, is sufficient written evidence of the nature of the contract, to take it out of the operation of the Statute of Frauds, and to let in parol evidence to show that the assignment was by way of mortgage, and not an absolute conveyance.—[Mr. Pemberton Leigh.—Suppose the transaction had been that a grant should be made to Jones, upon the [426] advance of money by Mathews, if that money was repaid within three months, and it was not so repaid, and the grant was then made to Mathews in fee, would that constitute a mortgage so as to give Jones the equity of redemption?—Once a mortgage always a mortgage.—[Mr. Pemberton Leigh.—If the transaction was such as I assumed (for the deed of assignment, or any copy, is not in evidence), and the grant was absolute from the Government to Mathews, after the lapse of the year stipulated by the parties for payment of the mortgage-money, would not such absolute grant be a release on the part of Jones of all his equity of redemption?—No right of Jones, or his assignee in bankruptcy, to redeem has been barred by any of the grounds suggested by the answer. Assuming at the utmost that it was an absolute convey-

(*a*) This case is reported in the 5th Grants' Cases in Chancery, in Upper Canada, pp. 1, 109, where the circumstances under which parol evidence could be admitted to give an absolute deed, the operation of a mortgage, are fully considered and discussed.



ance, yet a Court of Chancery, in a case either of fraud or mistake, will relieve. *Cripps v. Jee* (4 Bro. C.C. 472), *Walker v. Walker* (2 Atk. 98), *Young v. Peachy* (2 Atk. 254), *Baruhart v. Greenshields* (9 Moore's P.C. Cases, 18), *Ferner v. Winstanley* (2 Sch. and Lef. 393), *Williams v. Owen* (5 Myl. and Cr. 303). Here the amount given as a *bonus* was usurious and illegal. Again, if a party says I will keep the estate under the Statute of Limitations, that would, in circumstances like these, be a fraud, and entitle the Plaintiff to relief in equity. No evidence has been produced by the Respondent to prove her allegation that Jones assigned or parted with his equity of redemption to Mathews in the lots in question. The decree was, moreover, wrong in not permitting Jones's assignee under the bankruptcy to redeem the lots, as it cannot be denied, after the admission in the answer, that [427] the transaction in September, 1840, was originally a mortgage transaction only.

Mr. E. J. Lloyd, Q.C., and Mr. Dickenson, for the Respondent.—There was no sufficient admissible evidence to show that the transaction was a mortgage. Our contention is that it was an absolute conveyance of all the interest Jones had in this property, and the facts are consistent with that view. *Tull v. Owen* (4 You. and Coll. 192). The possession by Mathews and the Respondent who claims under his Will was by an absolute grant in fee-simple from the Government. Here parol evidence has been improperly admitted by the Court in a bill for redemption, to qualify and vary the terms of an absolute conveyance. No authority is to be found that goes that length. There is no fraud or mistake in this case, to take it out of the operation of the Statute of Frauds; the Exhibit B. shows clearly the pecuniary dealings between Mathews and Jones; how, then, can parol evidence of a parol agreement be let in to prove that Jones was to have the right to repurchase or redeem the lots? It would be contrary to the express enactment of the Statute to let in such evidence. *Pym v. Blackburn* (3 Ves. 34; and see the authorities upon this point collected, p. 38). Even if such evidence was admissible, still it is valueless, as there is no evidence of the terms of the agreement. The cases of *Mazwell v. Montaruto* (Pres. Ch. 526) and *Walker v. Walker* (2 Atk. 98) do not apply. The only question raised by the Bill really is, whether Mathews was guilty of usury; but there [428] is no evidence to support such allegation. Again, Mathews and the Respondent were in undoubted possession from the date of the assignment till the institution of the suit, a period of eleven years; the right of the Appellant, therefore, if any such existed, was barred by lapse of time. There is every reason to infer from the uninterrupted possession, and the dealings of the parties in respect of the lots, that the equity of redemption claimed by the Appellant was either surrendered, or had been abandoned by Jones, and had ceased to exist when the Bill was filed. The continued uninterrupted possession, the dealings of the parties, and the non-production of the deed of assignment, are strong facts to show that the conveyance was absolute and unconditional in its terms.

Mr. Cure, in reply.

The consideration of the case was postponed. Judgment was now delivered (29th March, 1855) by

The Right Hon. T. Pemberton Leigh.—The bill in this case was filed by the assignee in bankruptcy of Alfred Thomas Jones for redemption of a mortgage alleged to have been made by the Bankrupt: his bill having been dismissed, the Plaintiff has appealed to Her Majesty in Council. The Defendant in the suit, and the Respondent in the appeal, is the widow, devisee, and personal representative of Edward Mathews, the supposed mortgagee.

It appears that in 1840, Jones had contracted to purchase from the Crown certain lots of building land in the town of London, in Upper Canada. A part of the purchase-money only had been paid, and [429] further payments were necessary before any grant from the Crown could be obtained. Jones, therefore, had a mere equitable title.

Mathews was a builder; and he appears, previously to the date of the transactions, out of which the present question arises, to have had various transactions in business with Alfred Thomas Jones as well as with his brother, Aby Bedford Jones. On the result of these transactions a balance was due to him from the two

brothers, who had a joint interest in some landed property, though not in that which is the subject of our consideration.

On the 2nd of September, 1840, an account having been made out showing the amount then due to Mathews, two deeds were executed, one by Aby Bedford Jones and the other by Alfred Thomas Jones, in favour of Mathews.

With the former of these deeds we have nothing to do. The latter, the deed executed by Alfred Thomas Jones, contained an assignment of Jones's interest in the lots of land already mentioned in consideration of £100 paid, or to be paid, by Mathews.

It would be of the greatest importance to see this deed; but it has been lost. No draft or copy of it is in evidence, and we must collect its terms and the contract between the parties from the evidence of Wilson, the solicitor employed by Mathews on the occasion, the fairness and accuracy of whose statement is not open to the least suspicion, and is sufficiently established by the documents to which he refers.

By this evidence it sufficiently appears, that the intention of the parties was that within some time, and upon some terms, Alfred Thomas Jones should have the power of putting an end to Mathews's interest [430] under the assignment; but what were the particular terms of this agreement is left entirely in the dark. The inference from the indorsement on the memorandum, as well as Wilson's testimony, is, that the transaction, as a loan, was to end at the expiration of one year. The probability, therefore, is, that at the end of that period some arrangement would take place between the parties, by means of which either the money would be repaid, or the property be taken in payment of the debt.

It appears from Wilson's evidence, that Mathews contemplated the probability of the latter alternative; and it is sufficiently clear, from all the evidence, that the property was of little, if at all, more value than the £100, at the time of the assignment, and for more than thirteen months afterwards.

Now, the question in this case is, whether the facts appearing in evidence are sufficient to justify a Court in holding that either by the terms of the original agreement between the parties, or by subsequent arrangement between them, such right of repurchase or redemption, whichever it might be, had been diverted from Jones at the date of this bankruptcy. The facts in favour of such presumption are very strong.

The year during which, according to Wilson's evidence, the money was to remain on loan would expire in September, 1841. Dealings had continued to take place between Jones and Mathews, in the course of which, if any arrangement was necessary, it might be made.

It is distinctly sworn both by two witnesses, McDonnell and Morrison, that in 1842 Jones told them he had sold the lots to Mathews. The evidence of Alexander Griffiths to the same effect cannot be relied on.

[431] On the 20th of January, 1843, a grant by Letters Patent of the lots in question is made by the Crown to Mathews as the absolute owner, with the privy of Jones, and from that time Mathews remains in possession of the land as owner. No claim is made for the £100, and interest, on the one hand, or any right on the part of Jones asserted on the other.

Early in 1844, Jones became a Bankrupt, and Mathews was appointed the assignee under the commission.

At this time, if the appeal is well founded, the Bankrupt was indebted in the amount of the £100 to Mathews, and the estate in question, subject to the mortgage, constituted part of his assets.

In May, 1844, he makes an affidavit stating in detail, his debts and his assets, yet no allusion is made to this debt due to Mathews, nor to this equity of redemption. Can there be stronger evidence that the transaction had been closed? That the estate had been given up in discharge of the debt? What makes the inference stronger is, that the Bankrupt in his affidavit mentions a claim for a sum of money which he says is due to him from Mathews.

The Bankrupt afterwards obtains his certificate under the commission; but it is plain that it was in or before the year 1846. After this there is no reason to suppose that he was under the control of Mathews, the assignee.



Mathews remains in possession of the property as owner, dealing with it as such up to the time of his death in 1850. Before his death the property had increased so much in value, that in 1849 it was valued by Stead, one of the witnesses, at £350. Yet during Mathews' lifetime no pretence is set up by [432] Jones that he has any right, legal or equitable, to the property, although he was aware of its increased value.

On the 22nd of June, 1850, Mathews, who alone could speak to all the transactions that had taken place between himself and Jones, died; and some time afterwards, as appears upon his own statement, Jones, the Bankrupt, suggested that a new assignee should be appointed under the commission of bankruptcy against him, for the purpose of recovering this property, which had now, by the accident of a railway being in contemplation, become of the value, as he says, of £1000. The whole of the debts under the commission appear by Jones's affidavit to have been under £300, so that Jones himself is the person on whose behalf and for whose benefit, more than for that of any other person, the suit is instituted. John Holmes, a creditor for £57, is appointed assignee. Holmes and the Bankrupt's brother, Aby Bedford Jones, who is stated to be a creditor for £59, give security to the creditors against the costs of the suit; and under these circumstances the bill is filed, and the two Joneses are brought forward as witnesses to support the case. Neither from the position in which they stand, nor from the mode in which their evidence is given, can we place any reliance on their testimony.

The case, then, comes to this; if we look only to the contents of the written instruments, and take them to be such as the witnesses represent them, we have an absolute assignment of his equitable interest by Jones to Mathews in 1840, and the legal title granted to Mathews in 1843, in conformity with the assignment, and an undisturbed possession under it till the time of his death.

[433] If, on the other hand, we take into the account the parol evidence of the circumstances which took place when the assignment was made, and subsequently, we find, on the one hand, reason to believe that the assignment was not intended to be in the first instance absolute and unconditional; but we find on the other strong evidence, that either by the effect of the original contract, or by subsequent dealings between the parties, any rights which Jones might have had were discharged before the grant from the Crown was made.

The onus is altogether upon the Appellant. It is incumbent upon him not only to show a case against written instruments, but to rebut the presumption which the conduct of the parties affords that the title as it now stands is consistent with the real intention of the parties. He has besides to satisfy us that a judgment determining that he has failed on these points is erroneous. He has not succeeded in doing so; and though we do not consider this as a clear case, and are not surprised at the difference of opinion which it has excited in the Court below, where the case has been examined and discussed by the Judges according to the different views which they took of it, with the care, learning, and ability, which the experience of former cases had led us to expect from them, we must advise Her Majesty to affirm the decree complained of.

Considering the circumstances under which the suit was instituted, we cannot but regard it as a speculation in which the Bankrupt has induced the Appellant to embark; and we shall have no hesitation in recommending that the Respondent's costs of the appeal should be paid by the Appellant.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America—Canada—Mortgage or absolute assignment*; tit. MORTGAGE, B. PARTICULAR MORTGAGES AND ENCUMBRANCES, 7. *Of Colonial Estates, c. Canada*. As to no covenant for payment, cf. *Taylor v. Emerson*, 1843, 4 Dr. and War. 117.]

## [434] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

ANONYMOUS \* [March 26, 1855].

After the sentence of the Arches Court, in a suit for separation by reason of the wife's adultery, and pending the hearing of an appeal to the Judicial Committee, new facts were alleged to have been discovered. An allegation by the wife, pleading the commission of acts of adultery by the husband, which, if proved, would entitle her to a sentence, admitted upon motion by the appellate Court, and the cause retained.

In this case, the Arches Court decreed a divorce *a mensa et thoro*, by reason of alleged adultery, in a suit promoted by the Respondent, the husband, against his wife, the Appellant. An appeal was interposed from such sentence to the Judicial Committee; but before the appeal came on for hearing, the Appellant brought into the appellate Court an allegation, which she now applied upon motion for admission. This allegation pleaded acts of adultery committed by the husband, and was supported by an affidavit of the Appellant, in which she stated that the facts alleged in the allegation had only been discovered since the sentence against her. The Respondent opposed its admission.

Mr. Rolt, Q.C., and Dr. Haggard, in support of the application.—Although no case can be found in which an allegation has been admitted in a matrimonial cause after sentence, and pending the hearing of an appeal, yet, as the appeal has suspended the sentence, such sentence must be treated as merely affecting the proceedings, and not as final and conclusive as a judgment [435] at law is. This Court must, therefore, be considered as the original Court, for the purpose of admitting new matter as the Court below could have done, where a further allegation, or new evidence, after publication passed, is by the practice of the Court admitted. *Middleton v. Middleton* (2 Hagg. Sup. 134-6, 140), *Price v. Clark* (3 Hagg. 265).—[Mr. Pemberton Leigh: We have an original jurisdiction here, and may, and do, admit additional evidence (see *Meiklejohn v. Attorney-General of Canada*, 2 Knapp's P.C. Cases, 330; *Jephson v. Rieza*, 3 Knapp's P.C. Cases, 130; *Mellin v. Mellin*, 2 Moore's P.C. Cases, 493; *Cooper v. Bockett*, 4 Moore's P.C. Cases, 433).]—That is under the Statute, 3rd and 4th Will IV., c. 41, sec. 8, but our application is rather in the nature of a cross action, and differs materially in its essence from the power of this Court to admit fresh evidence. It is undoubtedly the right of the wife to set up this defence, and that right is recognized in *Proctor v. Proctor* (2 Hagg. Consist. 299), *Astley v. Astley* (1 Hagg. 714), *Forster v. Forster* (1 Hagg. Consist. 146), *Brisco v. Brisco* (1 Add. 259), and *Beeby v. Beeby* (1 Hagg. Sup. 790), which cases determine that there is no distinction between the delinquency of the husband, whether committed before or after the wife's infidelity, as such fact, if proved, operates as a bar to his claim for a legal separation.—[Dr. Lushington: In *Jones v. Godrich* (5 Moore's P.C. Cases, 47) a further allegation was admitted by this Court, pleading facts *noviter ad notitiam perventa*, and that decision is conformable with the case of *Girdler v. Lamb* (cited in *Fletcher v. Lee Breton*, 3 Hagg. 369) before the [436] Delegates.]—They were testamentary causes similar to *Clement v. Rhodes* (3 Add. 41). We do not dispute that it is in the discretion of the Court to admit an allegation after sentence, and that the Court will be governed by the circumstances of each case, *Middleton v. Middleton* (2 Hagg. Supp. 134); but we submit that, in the present case, the allegation ought to be admitted to proof.—[Mr. Pemberton Leigh: There is, in truth, no *noviter perventa*, but a new case, which must be begun anew. Suppose this appeal was heard as it now stands, and our judgment was affirmed by Her Majesty's Order in Council, could you plead the adultery of the husband to the prejudice of the final sentence?—If the judgment was affirmed, the wife could not

\* The parties in the cause having become reconciled, and the proceedings abandoned, their names are designedly omitted.

Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir Edward Ryan.



proceed upon the adultery of the husband, as such judgment would be pleaded as *res judicata*. Such a state of things it is apparent would amount to a positive bar to justice.

Dr. Jenner and Dr. Twiss, opposed.

No authority can be found in which an allegation pleading new matter in a matrimonial cause has been admitted after sentence. All the authorities relied upon by the Appellant were either before sentence, or relate to testamentary causes. The affidavit in support of the admission states that the facts alleged came to the knowledge of the Appellant after sentence, but does not state when. In *Lawrence v. Maud* (1 Add. 48) the Court doubted if it had the power to rescind the conclusion of the cause after sentence. But it is necessary to see the effect of the admission of this allegation. The Court below had only the question of the wife's adul-[437]-tery before them: now this Court is asked to entertain two suits; the adultery of the husband as well as the adultery of the wife. The effect of admitting of the allegation is not the same as admitting new evidence in a cause, but is, in fact, a proceeding to revoke the sentence already. Testamentary causes are not analogous to matrimonial causes, and the cases of *Jones v. Godrich* [5 Moo. P.C. 47] and *Girdler v. Lamb* do not apply.

The Right Hon. Dr. Lushington.—It being distinctly sworn in the Appellant's affidavit that acts of adultery of the husband have been recently discovered, that is, since the sentence of the Arches Court, we think, under the circumstances, that the Appellant ought to be permitted to bring in her allegation. *Girdler v. Lamb*, cited in *Fletcher v. Le Breton* (3 Hagg. 370) before the Delegates, is an authority in favour of such practice. There the Delegates, on an appeal to them, rescinded the conclusion of the cause, and allowed the Appellant to give in an allegation. The cause to be retained.

[Mews' Dig. tit. HUSBAND AND WIFE, II. DIVORCE; 13. *Proceedings for*; u. *Appeal*; see note to *Jones v. Godrich*, 1844, 5 Moo. P.C. 48.]

#### [438] ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

THE BOARD OF ORPHANS, ADAM VYFHUIS, and COLIN SIMPSON,—*Appellants*; CAROLINE KRAEGELIUS,—*Respondent* \* [June 15, 16, 1855].

A deed of donation, *inter vivos*, was executed in British Guiana by the donor in favour of his illegitimate children, minors, and the donation was at the same time accepted by the donor himself, on the donees' behalf. This donation and acceptance was followed by a sentence of willing condemnation by the donor for the performance of the deed. The donor at the time of the execution of the deed was unmarried, but he afterwards married and died, leaving a widow and issue of the marriage. No steps were taken by the donor in his lifetime, or by his representatives after his death, to set aside the willing condemnation. One of the donor's illegitimate children died intestate and unmarried, and her mother, as her next of kin and heiress, *ab intestato*, claimed against the estate of the donor the amount of her deceased child's share given by the deed *donatio inter vivos*. Held, affirming the sentence of the Supreme Court of British Guiana,

First, That the donees being illegitimate minors, the acceptance by the donor on their behalf constituted a valid donation in favour of the donees [9 Moo. P.C. 448].

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

Second, That the donation was not revoked by the subsequent marriage of the donor and birth of lawful children [9 Moo. P.C. 450].

This Court will not entertain technical objections, not taken in the Court below, when they are merely of form, and do not affect the substance of the matter in controversy [9 Moo. P.C. 447].

This was an appeal from a sentence of the Supreme Court of British Guiana, in a suit instituted by the Respondent as next of kin and heiress, *ab intestato*, of her daughter, Agnes Theresia, deceased, against the representatives (in effect the *Boedel*, or estate) of John Daniel Haley, deceased, to enforce payment of a sum of 10,000 guilders, H. C., given and ceded to Agnes Theresia by a deed of *donatio inter vivos*, executed by Haley in the year 1819.

[439] The facts of the case were as follows:—

John Daniel Haley, an inhabitant of the Colony of British Guiana, for some years previously to the year 1819, cohabited with the Respondent. Of this cohabitation four children were born, of whom three, Agnes Theresia, Dirk Horatio, and Arabella Caroline Constantia, were living at the date of the execution of the *donatio inter vivos*, hereinafter mentioned. These children were all treated by Haley as his own, and bore his name.

On the 6th September, 1819, J. D. Haley personally appeared and executed before a sworn clerk and notary public of the Colony, and two witnesses, the deed, the validity and effect of which was the chief question in this appeal.

By this instrument, Haley, for reasons him thereunto moving, and out of the affection which he bore towards the three children of the Respondent, named Agnes Theresia, Dirk Horatio, and Arabella Caroline Constantia, gave, ceded, and granted, by donation, *inter vivos*, irrevocably, to each of them a capital sum of 10,000 guilders, H. C., making together the sum of 30,000 guilders, which sum of 30,000 guilders (being for each child 10,000 guilders) they, the above-named children, should respectively be at full liberty to dispose of on their respectively attaining majority, or marrying with the donator's consent; and in the event of any of them marrying without such consent, he, she, or they should forfeit the donation of 10,000 guilders each; and in case the donator should die before one or more of the aforesaid children became of age, then, and in that case, interest at the rate of six per cent on the respective sums of 10,000 guilders should be allowed for the benefit of [440] their education by the donator from the day of his demise, until such child or children should respectively attain majority, and which interest was to be regularly paid annually by the heirs of the donator out of his estate. And as security for the fulfilment of that act of donation, Haley declared to renounce from all pleas or exceptions which could tend to lessen or invalidate the deed, and to bind his person, and the property he was then possessed of, as well as that whereof he yet might be possessed of according to law. And at the same time Haley, as general and special attorney of the Respondent, mother, and natural guardian of the above-named three children, on their behalf appeared and accepted of the donation.

In pursuance of a power *in rem suam* in the deed of donation contained, a sworn clerk of the Secretary's office of the Colony, on the 8th September, 1819, appeared before two Counsellor Commissaries of the Honourable Court of Civil and Criminal Justice of Demerara and Essequibo in the Colony, and prayed the Counsellor Commissaries to condemn his constituent, Haley, in the due fulfilment and performance of the aforesaid deed of donation, *inter vivos*, Haley consenting to such condemnation. Whereupon the Counsellor Commissaries condemned the appearer in the name and behalf of his constituent in the due performance and fulfilment of the aforesaid donation, *inter vivos*.

No proceedings were taken by Haley to set aside the willing condemnation, and it remained in full force and effect at his death.

Haley afterwards married. He died in the year 1832, leaving a widow and several children him surviving. His widow adiated his estate.

[441] After the death of Haley, his representatives paid interest at six per cent on the donation of 10,000 guilders to or for the benefit of Agnes Theresia, who, on the 14th of May, 1832, attained the age of twenty-one, and died at Brussels on the 23rd of February, 1833.



By an Ordinance of the Colony, No. 12 of 1832, the age of majority, which had previously thereto been twenty-five years, was fixed at twenty-one years.

Agnes Theresia died without having been married, and intestate, leaving her mother, the Respondent, Caroline Kraegelius, who claimed to be her next of kin and heiress, *ab intestato*. As no part of the sum of 10,000 guilders was paid to Agnes Theresia, or her representatives, the Respondent, in March, 1839, filed her claim and demand in the Supreme Court of Civil Justice for the counties of Demerara and Essequibo against the executors or representatives of Haley, and after stating the donation and acceptance thereof, and the willing or voluntary condemnation, the deaths of Haley and Agnes Theresia, and the Respondent's title as such next of kin and heiress, *ab intestato*, of her daughter, Agnes Theresia, to the sum of 10,000 guilders, and the refusal of the Defendants to pay the same, demanded and concluded that the willing or voluntary condemnation, on the deed of donation, *inter vivos*, might be revived and declared executable, and that the Respondent might be permitted to proceed in execution thereof against the property or estate of Haley the donator, for that sum, interest, and costs.

The Defendants, Spooner, one of the executors, and the Appellant, Adam Vyfhuis, as substituted executor of the Will of Haley, and Spooner as [442] guardian of the minor heirs of Haley, filed their exception and answer to the claim and demand, whereby they denied the validity of the act of donation dated the 6th of September, 1819, and contended that Haley, being himself donator, could not accept the donation for the donees, or that he had any authority for that purpose; and they also denied that Agnes Theresia had departed this life, or at the time or place alleged by the Respondent; and they also denied that, if the act of donation was originally valid, Agnes Theresia departed this life, without having previously attained the age of majority; and they submitted that if the act of donation was originally valid, the same became null and void by the subsequent marriage of Haley, and the birth of several children, the fruit of such marriage; and they denied that any interest was paid to Agnes Theresia on the sum of 10,000 guilders by the executors of Haley after his death; and the Defendants, previous to answering, proposed the innominate exception of an absolution of this instance, and concluded to an admission thereof with costs, and subordinately answering, declared to reject the Respondent's claim and demand, *una cum expensis*.

The proceedings being closed, the Respondent entered into evidence to establish her case, and the Defendant, Spooner, having died, the Appellants, the Board of Orphans (as representing Spooner), and the Appellant, Colin Simpson, as attorney of Haley's widow, as having adiated the estate of her husband, were made parties to the proceedings.

On the 15th of December, 1840, the Court pronounced sentence in the cause, which was as follows:—"The Court having heard the parties, and having read and examined the documents and vouchers [443] filed and produced in this matter, declares to reject the conclusion of exception and answer filed by the Defendant, and to revive and make executable the willing or voluntary condemnation passed before Counsellor Commissaries on the 8th of September, 1819, on a certain deed of donation, *inter vivos*, of the 6th of September, 1819, with permission to the Plaintiff to proceed in execution against the property or estate of the donor for the sum of 3333 dollars and 33½ c., with interest from the 1st of March, 1833, until fully paid, with condemnation of the Defendant in the costs."

The Defendants appealed against this sentence to Her Majesty in Council.

Although the sentence of the Supreme Court was pronounced on the 15th of December, 1840, the Appellants did not present their petition of appeal until the 15th of March, 1842, nor lodge their printed case until the month of July, 1854.

The Appellants in their case (a) contended that the sentence appealed from was erroneous, for the following reasons:—

First. Because by the ancient Dutch law, as it prevails in the Colony, the act of donation was invalid, and more especially because no donation *inter vivos*, is complete until accepted by the donee; and the donees being at the time of the dona-

(a) The Appellants' case was not signed by Counsel. Their Lordships at first objected to its reception, as being irregular, but permitted the appeal to go on.

tion infants, and Haley being himself donator, could not accept the donation for the donees, and in fact, that it was not proved that he had any authority to do so; and consequently [444] there was no acceptance of such donation by the donees.

Second. Because the deed of donation, if originally valid, was revoked by the subsequent birth of the donor's lawful children.

Third. Because, even if the deed of donation was valid and remained unrevoked, the Respondent had not proved, as she had alleged, that Agnes Theresia had departed this life, having attained the age of twenty-five years and upwards (the period of legal majority according to the law of Demerara), at the time of her death.

The Respondent relied upon the following reasons in support of the sentence appealed from:—

First. Because the deed or instrument of donation of the 6th of September, 1819, was executed with all proper formalities, and followed as it was by the willing or voluntary condemnation of the 8th of September, 1819, was a valid, effectual, and irrevocable *donatio inter vivos*, of the sum of 10,000 guilders, in favour of Agnes Theresia, and because such donation having been originally valid, did not become invalid or fail by any subsequent event.

Second. Because no steps having been taken by Haley in his lifetime, or by his representatives after his death, to set aside the sentence of willing or voluntary condemnation of the 8th of September, 1819, the same must be taken and treated to be subsisting and valid, and conclusive in favour of the *donatio inter vivos*.

Third. Because Agnes Theresia attained her majority within the true construction and intent of the donation of the 6th of September, 1819, and the Ordinance [445] No. 12 of the Colony, of the year 1832; and because, even if Agnes Theresia did not so attain her majority, still upon her death, on the 23rd of February, 1833, her mother, the Respondent, as her next of kin and heiress, *ab intestato*, became entitled to the sum of 10,000 guilders.

Fourth. Because the great and unjustifiable delay of the Appellants in prosecuting this appeal was alone a sufficient ground for refusing them relief, and for dismissing the appeal with costs.

The questions discussed upon the hearing of the appeal, and the authorities cited, were:—

First. As to the form of action, whether it was the proper one. Van Der Linden, B. 3, p. 1, s. 2 and 4, was referred to.

Secondly. Whether the Respondent was entitled as sole heiress, *ab intestato*, of her deceased child to the 10,000 guilders, or whether the surviving children were not interested with her, and ought not to have joined with her in the claim. Van Der Linden, B. 3, c. 12, s. 4; c. 13, s. 3; Van Der Kessel, sec. 114, pp. 29-368 (8vo edit.).

Thirdly. The informality of the deed of donation of the 6th of September, 1819, for want of registration, Voet. B. 38, tit. 5; that the deed was void, as the donor by the Dutch Roman law in force in British Guiana could not make a donation, and at the same time accept it on behalf of the donees, who were minors and illegitimate, Colquhoun's Summary of the Roman Civil Law, p. 109; that to be valid, acceptance ought to have been by a guardian for the infants. 2 Burge's Comm. on Col. and For. Law, p. 143, citing Voet. lib. 39, tit. 5, n. 2, and authorities *ib*.

[446] And, upon the construction of the deed of the 6th of September, 1819, whether the gift of 10,000 guilders to the Respondent's deceased child vested at once, or limited the payment of the gift till the donee arrived at the age of twenty-five. *Hanson v. Graham* (6 Ves. 245) was cited.

The appeal was argued by Mr. Rolt, Q.C., and Mr. T. P. E. Thompson, for the Appellants; and Mr. Follett, Q.C., and Mr. Bowring, for the Respondent.

Judgment was delivered by

The Lord Justice Knight Bruce.—In this case, the Supreme Court of Civil Justice in British Guiana has given a sentence in favour of the Respondent for a sum of 10,000 guilders, Holland currency, and interest. This sentence was pronounced several years back, as long ago as the year 1840. The hearing of the appeal has been delayed from the date of that sentence, through the fault or choice of the parties, to the present time.

The Appellants here represent the original Defendants in the cause, and they



allege that the claim should have been dismissed as groundless, and against the sentence of the Court below numerous objections have been urged, as to many of which we did not think it necessary to trouble the Respondent's counsel. The first ground of objection was as to the form [447] of the action. It was said it was mis-conceived. The Court below was the best judge of its forms and rules upon such a point, assuming it not to be frivolous; but, whether frivolous or not, both the parties and the Court below considered it unworthy of attention. Assuming the objection was one of mere form, and did not in any sense touch the substance of the case it could not have assisted them in their defence, neither did it prejudice them in any manner. Now, it is a wholesome province of this Court to disregard points of mere form raised upon an appeal, when they do not in any manner affect the substance of the subject in controversy, and have not in any respect a tendency to mislead or prejudice the Defendant in any way. Their Lordships are of opinion, therefore, that that objection cannot be listened to, and they, therefore, dismiss it from their consideration.

The next objection was, that the Respondent's claim was as sole heiress, *ab intestato*. It is contended, and apparently here for the first time, that she was not the only heiress, and that her other two surviving children ought to have been associated with her. Their Lordships are of opinion that that ground of defence ought to have been taken before the Court below. Their Lordships are, however, not satisfied that in point of strict law there is any foundation for the objection; they are not satisfied, in the peculiar circumstances the Respondent is situated, that she was not sole heiress, but they do not give any opinion upon that point; they conceive that the matter has been so treated as to entitle her to recover the value of her deceased child's share, and leave her to settle the dispute, if any arise, with her surviving children. It is not open, in their Lordships' [448] opinion, to the Appellants in this case to contend for, and raise that point here.

It was then argued that the instrument upon which the claim arises was not regular, the requisite formalities before a notary not having been complied with, and also upon the supposed absence of witnesses, though apparently this instrument professes to be made in the presence of witnesses; and next, the absence, or supposed absence, of registration is urged.

Another ground strongly relied upon by the Appellants was, that the acceptance of the gift by the donor for the donees, who were minors, was invalid, and consequently that there was no such acceptance of the donation as was required by law; that a guardian ought to have been appointed for the children who should have accepted the donation for them, and that in the absence of such acceptance the deed was void. That is a point upon which their Lordships do not consider the Appellants are entitled to the benefit of, whatever might have been the strict rules of the Civil law upon this subject; it does not of necessity follow that they exist in their absolute form in British Guiana. The Court there is the best judge of its own law, and if such a rule existed they would have given effect to it, and the *onus* of proving that, is upon the Appellants. They ought to have pleaded it, and taken such objection in the Colony, and not at the last moment raise it here, as it does not necessarily follow that the Civil law should be entirely engrafted on the law prevailing in British Guiana. Their Lordships are of opinion, that the Appellants' contention on this point falls to the ground, and if it does not fail upon the ground we mention, we are [449] of opinion that the length of time, and the conduct of the parties, is sufficient to support the sentence.

The instrument in question was executed in the month of September, 1819; Haley lived for ten or twelve years afterwards. There was not the slightest controversy as to the validity of the instrument in his lifetime, and after his death it was expressly regarded by Haley's widow, who, after the death of the executor, as a person interested in Haley's estate, adiated the same. These are circumstances which form ample ground for presuming, in their Lordships' judgment, in favour of the validity of the instrument. Then there was the willing condemnation by Haley to carry out the instrument, which is, we think, also of perfect validity.

There remains but two other points to inquire into, namely, the applicability of the Order in Council of the year 1832, changing the period of legal majority from twenty-five to twenty-one years. Their Lordships, without deciding, assume

that point in favour of the Appellants, and assume, therefore, in every sense that the Respondent's daughter died a minor; the point which arises then, is, the construction to be put upon the instrument in question: and it was contended by the Appellants that, according to the sound construction of it, not one of the children was intended to take what in England is called a vested interest, only on attaining the age of twenty-five or marrying with the consent of the proper parties; on the other hand, this was denied by the Respondent, and they submitted that in the event that happened the deceased daughter took an absolute vested interest, subject only to be divested upon the occurrence of an event which did not happen. Their [450] Lordships have arrived at the conclusion that it was clearly an absolute and immediate donation. The instrument commences with a clear absolute gift, and fully sustains the position the Respondent contends for; it states the affection he bore to his three children, naming them; and then proceeds to "give, cede, and grant, by donation, *inter vivos*, irrevocably to each of them a capital sum of 10,000 guilders, H.C." Now, if the instrument had stopped here, there would be no room for argument, and if he intended to cut down or qualify the *prima facie* meaning of the absolute gift, that must be collected from the language which he uses; the words upon which the Appellants rely are these, "which sum of 30,000 guilders (being for each 10,000 guilders), they the said children shall respectively be at full liberty to dispose of on their respectively attaining majority or marriage, provided that such marriage or marriages should be by and with the consent of the donator; and in the event of one, any, or either of them marrying without such consent, he, she, or they should forfeit the said sum of 10,000 guilders each." It is said that this manifests an intention that there should be no vested interest. Their Lordships are not of that opinion; they think that if this part of the proviso had any meaning beyond holding out the threat of punishment, or penalty in the case of the marriage without consent, its object was merely to prevent alienation or testamentary disposition, if it could be made, by any one of the children during their minority; that is the construction which their Lordships consider the donor meant. And immediately afterwards it goes on, "And in case the donator should die before one or more of the aforesaid children became of [451] age, then and in that case interest at the rate of six per cent. per annum on the respective sums of 10,000 guilders should be allowed for the benefit of their education by the donator, from the day of his demise until such child or children should respectively attain majority, and which interest was to be regularly paid annually by the heirs of the donator out of his estate." It is remarkable that interest is nowhere else mentioned in this instrument; their Lordships are of opinion that the object of this part of the deed was merely to provide the gift and to declare his intention that it should be applied for the education of his children if he should die leaving any of them infants. It was an emphatic declaration of an intention with regard to the three children, of bringing them up, and he takes measures to secure that object, and to provide for them in the event of his death, which he did not think necessary to do while he was alive. The children were recognised by him, and it must be taken that he felt sure that during his life they would be amply provided for; they were minors, and under his superintending care. If they attained their majority they could demand their shares. Their Lordships are of opinion that no construction can qualify the clear and plain declaration of his intention contained in this instrument.

Upon the whole, their Lordships have the satisfaction of agreeing entirely with the Supreme Court, and will humbly recommend to Her Majesty that the appeal be dismissed, with costs.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*: h. *What points may be raised*.]



[452]

*In re* NORMANDY'S PATENT \* [July 16, 1855].

Patentee, formerly in partnership with J. and W., by a deed of dissolution stipulated that J. and W. should have the exclusive right of granting, in certain cases there provided, licences for manufacturing the patent article. In recommending an extension of the term of the Letters Patent, the Judicial Committee imposed a condition upon the Patentee to secure to J., in whom the interest under the deed of dissolution then vested, the same interest in the new Letters Patent as related to the granting of licences as was provided by the deed of dissolution, but refused to allow J. to substitute new licences for those granted under the original Letters Patent, in the event of the original licensees declining to renew their licences from him under the new grant.

Petition by the Patentee for extension of Letters Patent for "improvements in the manufacture of soap." The application was opposed by Jerram, a former partner of the Patentee, who had still an interest in the Patent, and claimed to be placed in the same situation, if the Patent was extended, of granting licences for Liverpool, as were secured to him by a deed of dissolution of the partnership, dated the 7th of September, 1843, and which empowered him, with one Whitaker, also a former partner, to grant to any person or persons, and to any number of persons, carrying on the soap trade in the town of Liverpool, licence to manufacture and vend soap according to the Petitioner's invention. It appeared that on the 1st of January, 1848, the surviving partnership between Jerram and Whitaker was dissolved by mutual consent, and the interest in the licences reserved by the deed of dissolution became vested in Jerram.

The Judicial Committee, on the ground of the public utility of the invention and the want of adequate remuneration, recommended an extension of the Letters Patent for three years, Jerram to be in the same position, and have the same rights and privileges as he was [453] entitled to under the deed affecting the original Letters Patent.

In consequence of the Patentee having refused to enter into the question with Jerram respecting the granting of the licences, (it being necessary to embody such condition in the new Letters Patent,) Jerram now presented (July 21, 1855 \*) a petition praying that no extension might be granted unless the Patentee in the meantime agreed to grant to him the same rights, privileges, and benefits under any new Letters Patent, as those at present enjoyed by him under the original Letters Patent, and also to enable him, if any of the original licensees under the existing Letters Patent should refuse to take licences under the new Letters Patent, to substitute other licensees.

Mr. Wigram, Q.C., and Mr. Hindmarch, for the Petitioner.

Sir Frederic Thesiger, Q.C., for the Patentee, opposed the application.

If this substitution be granted, the whole benefit of the prolongation will be lost. The application is uncalled for; as no provision is contained in the deed of dissolution of partnership for the substitution of other licensees, and it was not the intention of the Committee in granting an extension of the Letters Patent to allow of such substitution.

The Lord Justice Knight Bruce.—Their Lordships have considered this application, [454] and in doing so have thought the circumstance of Messrs. Jerram and Whitaker declining to concur in the application for the prolongation of the original Letters Patent, and not having been ordered by their Lordships to contribute to the costs of the application, all of which have been alone borne by Dr. Normandy, deserving attention; and, upon the whole, they do not consider there is enough in

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. Sir Edward Ryan.

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the case to warrant their Lordships departing from the language of the deed of partnership. Whatever, therefore, the deed gives with reference to the terms there subsisting, will be given, and is conceded, with regard to the extended term. If persons to whom licences have been granted, or any of them, will renew their licences, the Petitioner (Jerram) will be entitled to that benefit, but we do not see any reason for giving the right or power of substitution beyond that which is given by the deed of partnership. In point of form, probably, there should be an undertaking by Dr. Normandy to concur in granting the licences to such persons to whom licences have already been granted, as will renew them. There will be no costs of the present application.

The following Order in Council was made upon the Committee's report:—

"It is hereby ordered, that the Right Honourable the Lord Chancellor upon receipt hereof, do cause new Letters Patent, according to the term and effect of this Order, to be made and sealed, for such parts of the United Kingdom of Great Britain and Ireland, as the said original Letters Patent extended to and were available in, viz. for England, Wales, and the town of Berwick-upon-Tweed, for 'certain improvements in the manufacture of soap,' as described in the [455] Letters Patent granted to the said Alphonso René Le Mire de Normandy, for the further term of three years, from and after the expiration of the term granted in the said original Letters Patent, provided that application be made to fix the seal to such new Letters Patent within three months from the date of this Order, and provided also that an undertaking be given by the said Alphonse René Le Mire de Normandy to George Turner Jerram in the said new Letters Patent, all the terms, rights, and privileges to which the said George Turner Jerram and William Whitaker were entitled under the original Letters Patent by the deed of dissolution of partnership of the 7th of September, 1843, the partnership then subsisting between the said George Turner Jerram and William Whitaker having been dissolved by mutual consent on the 1st of January, 1848, whereof the Lord Chancellor and all other persons whom it may concern are to govern themselves accordingly."

[Mews' Dig. tit. PATENT; F. CONFIRMATION, RENEWAL, AND EXTENSION OF LETTERS PATENT; a. *Generally—As to Partner.*]

#### [456] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE OF JAMAICA.

ALEXANDER LINDO, ABRAHAM LINDO, and HENRY LINDO,—*Appellants*;  
EDWARD MOULTON BARRETT,—*Respondent* \* [Feb. 7. 1856].

Construction of the Jamaica Act, 7th Victoria, c. 57. Held not to exempt an absentee owner of a public wharf at Jamaica from liability to be sued as a public wharfinger, for negligence of his agent in the conduct of the wharf.

Although the subject in dispute was under the appealable value prescribed by the Royal Instructions, regulating appeals from Jamaica, yet the Judicial Committee from the fact of the public importance of the question at issue, allowed an appeal [9 Moo. P.C. 456, 457].

Rule 1 of the Order in Council of the 13th of June, 1853 [Stat. R. and O. Rev. iv. 305], allowing the Appellant costs upon a successful appeal, is discretionary in the Court, and only to be allowed in special circumstances.

Upon a reversal, the Order in Council contained no direction as to costs. Upon petition by Appellant for a Supplemental Order allowing costs, the Judicial Committee refused to interfere.

To entitle an Appellant to costs, application ought to be made at the hearing.

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.



In this case a nonsuit was entered by the Supreme Court of Jamaica in an action brought by the Appellants against the Respondent for negligence, who, in the first instance, had obtained a verdict against him for £80 1s. The question resolved itself into one of construction of the Jamaica Act, 7 Vict., c. 57, entitled "An Act of construction to regulate wharves and the rate of wharfage," etc. The facts are fully stated in the joint special case hereinafter set forth. The Supreme Court allowed an appeal to England, upon security being given for £500, but as the amount of the verdict was under £300, the appealable value prescribed by the 48 No. of the Royal Instructions, [457] a petition was presented to Her Majesty in Council praying for leave to appeal, notwithstanding the amount was under the appealable value.

Mr. M'Mahon, in support of the petition.—The Court below was favourable to the appeal (June 21, 1855 \*): the question as to the operation of the Island Statute, 7th Vict., c. 57, being the first which had been brought before that Court for decision. Although the Court below had no power to grant leave to appeal, the subject-matter involved being under the prescribed value, yet this Court has jurisdiction to admit it under Statute, 3rd and 4th Will. IV., c. 41. *Spooner v. Juddoo* (6 Moore's P.C. Cases, 257) was referred to.

Mr. G. Barrett opposed, and cited *In re Harvey* (3 Moore's P.C. Cases, 148).

The Lord Justice Knight Bruce.—This appeal has received the sanction of the Supreme Court in the Island. The question involved is one of importance to the whole of the community of the Island of Jamaica. Leave will be granted, and adhering to the general practice, security for costs in the usual amount, namely, £300, must be entered into.

A joint special case (this was the first case under the Order in Council, dated the 13th of June, 1853 [Stat. R. and O. Rev. 305], in which a special case was agreed upon and stated for the opinion of the Judicial Committee) was submitted by the parties [458] for the opinion of their Lordships, and was in substance as follows:—

The Respondent, before and during the period of the accrual of the cause of action hereinafter mentioned, was, and still is, the owner of a wharf called the Trelawney wharf, situate in the town and harbour of Falmouth, in the County of Cornwall, in the Island of Jamaica. This wharf was a public one, within the meaning of the Statute 7th Vict., c. 57. The Respondent before and during the period aforesaid resided, and had continued to reside, in England, and did not perform in person any of the duties required by the above Act, but managed, carried on, and conducted the business of the said wharf by an agent, who was paid by salary, and who performed, either by himself or by assistants, all the duties required of a "wharfinger" under that Act or otherwise; engaged and dismissed the clerks, labourers, and other persons employed in and about the wharf; and, in brief, transacted, as the known and recognised agent of the Respondent, all the business of the wharf, and accounted for and paid over to him all the profits and proceeds.

The Appellants are merchants at Falmouth aforesaid, and on the 7th of July, 1853, several casks of brandy belonging to them were warehoused at the wharf, in the ordinary way of business, and remained there until the 1st of May, 1854, when they were removed; and it was alleged by the Appellants that several of the casks, while warehoused at the said wharf as aforesaid, had been broached in several places, and had lost a large portion of their contents, through the negligence of the Respondent's agent.

For this alleged loss the Appellants commenced against the Respondent an action on the case as for [459] negligence as a public wharfinger; the declaration contained also a count in trover; and the general issue being pleaded, and issue joined thereon, a verdict was found for the Appellants for the value of the brandy alleged to be lost, leave being reserved to the Defendant (the Respondent) to move to enter a nonsuit, on the ground that he, being an absentee owner of a wharf, could

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\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir John Patteson.

not be sued as a public wharfinger for alleged negligence in the conduct of his agent acting in this Island as wharfinger.

In the October term, 1854, a rule *nisi* to enter a nonsuit on the above ground, or for a new trial, was obtained in the Supreme Court, and after argument, so much of it as related to entering the nonsuit was made absolute.

The reasons assigned by the Supreme Court for this judgment were as follows:—  
“In this case a rule was obtained to enter a nonsuit on a point raised at the trial, viz. that under the Island Act of the 7th Vict., c. 57, the Defendant, being an absentee, could not be a public wharfinger, in which capacity alone it is contended the liability sought to be fixed on the Defendant will arise, or for a new trial, on the improper receipt of a certificate of gauging given by one Borland, who, before his death, was employed on the wharf. The action is brought to recover the value of forty gallons of brandy found deficient in quarter casks and octaves which had been warehoused on the wharf of the Defendant, who is the proprietor, situated in Falmouth, the acting wharfinger being Mr. Wilson.

“The rule for a nonsuit was supported on the provisions of the Act to which I have referred, which defines what shall be a public wharf, prescribing the [460] duties which the wharfinger is to perform, and the object for which those duties are to be performed: and as they can only be done by him in person, it was contended that an absentee proprietor cannot be sued for any neglect of duty on his wharf, and therefore the Plaintiff should be nonsuited.

“On the pleadings it is clear, that if the Defendant be not a public wharfinger, or within the meaning of an Island Act, this action cannot be maintained, for there is no evidence to show a bailment to support the second count; and it is clear, on the authority of *Ross v. Johnson*, that the trover, which is the third and last count, cannot be maintained.

“The second section of the Act defines what shall be a public wharf; and it declares, when the owner or person acting under him shall receive payment for any goods landed on it, such wharf shall be taken to be a public wharf, to which all the provisions of this Act shall apply. The seventh section imposes on every wharfinger the duty of four times each year, on days specified, to make declaration that the accounts entered in his wharf book ‘are true and just,’ and the entries so declared ‘shall be received, deemed, and taken as good valid evidence in all and every of the several courts of law and equity.’

“Those surely are personal duties which can alone be performed by him on whom the law has imposed them, and he can be no other than the wharfinger in the actual possession and management of the wharf. This would appear to be clear from the portion of the section which requires the declaration to be taken before a Justice of the peace of the parish wherein the wharf is situated; but when we see what the Statute declares shall be the effect of the declaration, [461] viz. that the books and accounts so verified shall be evidence without further proof in all Courts, and consider to what an extent the rights and interests of third parties may be bound by the acts of the wharfinger, it is surely giving a safe and reasonable interpretation to this Statute to hold that he only can be a public wharfinger who resides in the Island and conducts the wharf, and he only can be responsible for neglect of duty, and answerable for the penal provisions of this law, of which there are many, and I would refer to the 3rd, 11th, and 12th sections. This being our opinion, it is unnecessary to consider the points on which the rule was granted, in the alternative, for a new trial; yet we feel it would be carrying the responsibility of the principal to a dangerous extent to hold that the relation of master and servant existed between the Defendant and Borland, so as to fix the former by an act of the latter in the performance of a duty which the Wharf Act has imposed by the 4th section on the wharfinger only, on request of the owner of the goods to be weighed or gauged. We are not insensible of the difficulties pointed out as likely to arise from the interpretation we have given to this Act, but those are questions for the Legislature and not for us to deal with.”

The question stated for the decision of the Judicial Committee was—

Whether, having reference to the provisions of the above Act, the Respondent, being such an absentee owner and manager as aforesaid, was liable in law to be sued



as a public wharfinger for the alleged negligence of his agent in the conduct of the wharf.

If the Judicial Committee should be of opinion that he was so liable, the judgment of nonsuit was to be set [462] aside. If it should be of opinion that he was not, the appeal was to be dismissed.

Mr. Keating, Q.C., and Mr. McMahon, in support of the appeal.—The Island Statute, 7th Vict., c. 57, does not deprive the Appellants of their common law right of action for negligence occasioned by the Respondent's agent, he being a public wharfinger. This is apparent from the 11th and 16th sections of that Statute.

The Court stopped them, and called upon the Respondent to support the judgment of the Court below.

Mr. Montagu Smith, Q.C., and Mr. G. Barrett, for the Respondent.—The judgment was well founded, as by the Island Statute, 7th Vict., c. 57, the Respondent could only be liable as a wharfinger to an action for negligence when in the actual possession and management of the wharf. Here, it is not disputed that he was an absentee.—[Sir W. H. Maule: The action is brought for not performing a duty imposed on the wharfinger, who is represented by his agent.]—The agent is acting only as a keeper of a public wharf.—[Sir W. H. Maule: I cannot find that the Island Statute relied upon, relieves the principal or his agent of his liability at common law.]—They referred to *Metcalf v. Hetherington* (24 Law Rep., 314).

The Right Hon. T. Pemberton Leigh.—Their Lordships are of opinion, having regard to the provisions of the Island Statute [7 Vict. c. 57 (Jamaica)] that the judge [463]—ment of the Court below cannot be sustained, and must be reversed, as they consider the Respondent liable to be sued, and, therefore, will order the judgment of nonsuit to be set aside. They fully approve of the mode in which the special case has been prepared and presented to them.

By the Order in Council made upon the appeal, it was ordered and directed that the judgment of nonsuit entered against the Appellants in the Supreme Court of Judicature of Jamaica in the October term, 1854, be set aside; but no directions were given as to costs of appeal. The Order in Council was transmitted to Jamaica by the Appellants' agent in due course.

A petition was afterwards presented (9th July, 1856 \*) by the Appellants, praying that the judgment might be amended by ordering the Appellants their costs, or that an independent or supplemental Order for the costs of the appeal might be granted to them. This petition alleged that no direction was contained in the Order in Council with respect to costs, and that absence of such direction arose from the Appellants' impression that their Lordships did not mean to interfere with their right to costs as given by the Order in Council of the 13th of June, 1853 (Rule I. 7 Moore's P.C. Cases, p. ix. [See Stat. R. and O. Rev. vol. iv. p. 306]), they having succeeded in their appeal; that there was no intimation at the hearing to deprive them of their costs, and that they were as of right entitled to them under [464] such Order without any special application for the same. That the Order reversing the judgment was delivered from the Council Office to the office of the Appellants' solicitor on the evening of the 26th of February, 1856, during their absence from town, and was on the following day transmitted to Jamaica for service, and had not yet been returned; and they insisted that they were entitled to costs as of right, independent of any supplemental Order, submitting that it would be contrary to the letter and spirit of the Order in Council of the 13th of June, 1853, not to allow costs.

Mr. McMahon, for the Petitioners.—This application is founded upon the first rule of the Order in Council of the 13th of June, 1853, which directs that if the Appellant succeeds in reversing a decree, or judgment, he shall be entitled to recover his costs of appeal against the Respondent, unless the Committee otherwise direct. Here there was no direction against allowing costs, and, therefore, costs ought to have been allowed by the Order in Council as of right. So it is at common law, costs would be allowed.—[He was stopped, the Court calling upon the Respondent to show cause why the Appellants should not have their costs.]

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir William H. Maule.

Mr. Montagu Smith, Q.C., and Mr. G. Barrett, for the Respondent, argued, that the Court had now no jurisdiction to award costs, and that to entitle a successful Appellant to costs as against the Respondent, he must apply at the hearing, it being a matter of discretion in the Committee to allow or not costs. Moreover, [465] they urged that the Order in Council upon the appeal had been acted upon in Jamaica.

The Right Hon. T. Pemberton Leigh:—Their Lordships will make no Order upon this petition. The rule which has been referred to is merely a regulation describing the course of practice which is to form the guidance of the Lords of the Committee, in giving or refusing costs. The effect of that rule is, that if the judgment of the Court below is reversed, the Appellant is to have his costs, but then he must ask for those costs; and if he does not ask for them, the Order in Council is merely to reverse.

In this case, their Lordships are not at all satisfied that costs ought not to have been given, and that if asked for, they would not have given them. Although, however, the rule is general, there must be special circumstances, and that would be a matter to be discussed at the time; it is impossible now, after the matter has been disposed of, and the Order in Council acted upon, to grant costs.

Upon the whole, their Lordships are of opinion, that they can make no Order.

[Mews' Dig. tit. COLONY: III. APPEALS TO PRIVY COUNCIL: 3 *Leave to Appeal*,—*Importance of Question*,—*Sum involved below appealable Amount*, 6 *Practice*, n. *Costs*: tit. WAREHOUSEMEN, WHARFINGER AND WHARF, 1. WHARF—*Public Wharfs*. On point as to (i.) costs of *Chotayloll v. Manickchand and Kaisreechund*, 1856, 10 Moo. P.C. 139; (ii.) special leave to appeal in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125. As to appeals from Jamaica, see O. in C. of 14th April, 1851 (Stat. R. and O. Rev. iv. 334).]

[466] ON APPEAL FROM THE SUPREME CIVIL COURT OF APPEAL  
OF THE ISLAND OF SAINT LUCIA.

CHARLES DE BRETTEs,—*Appellant*; JOHN GOODMAN, HENRY PRYCE, and CHARLES MURRAY PALMER, *Respondents* \* [18th and 19th June, 1855].

Under a judicial sale of real estate in St. Lucia, L. professing to act as attorney for W. and wife, resident in France, purchased the estate on their behalf. The purchase-money was to be paid, according to the Ordinance of the 22nd of January, 1833, by instalments, and D. became surety, *in solido*, for payment of the second instalment. The deed of arrangement for the purchase, and the notarial deed was executed by one of the trustees, who was resident in the Colony, and by such deed it was stipulated that the sale should be confirmed and ratified by his two trustees resident in England within six months. By a deed poll, the sale to W. and his wife was confirmed and ratified by the trustees in England. Default was made in payment of the second instalment, when the trustees brought an action against D. as surety for the amount of the second instalment. It was afterwards discovered that the power of attorney to L. was confined to W. alone, and contained no authority from his wife, when the trustees discharged the wife from the contract. Held, that D. was not liable as surety, as the sale professed to be to W. and wife by the three trustees, while in fact the sale was to W. only, and as such was an ineffectual and void sale.

*Quaere*, Whether by the French law in force in St. Lucia, D's liability as surety being *in solido*, was not effectual as against W.'s acts, *quoad* the wife?

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.



This appeal arose out of an action brought in the Royal Court of St. Lucia by the Respondents, as trustees under the marriage settlement of Melcher Garner Todd and Marianne Emilia Frances Pryce, his wife, to recover from the Defendants, Edward Lumley Woodyear and Theresa Adèle Clara de Bosse de Bonrecueil, his wife, and the Appellant, Charles de Brettes, the former as principal and the latter as surety, the [467] amount of principal and interest of the second instalment of the purchase-money or price of the Union estate, situate in the Island, sold under a judicial sale by the Respondent, Goodman, for and on behalf of himself and his co-trustees to Woodyear and his wife, by a notarial deed executed and registered according to the law in force in the Colony, bearing date the 7th of January, 1852, with interest on the principal sum of £1220, since the 18th of December, 1852, when the instalment became due and payable with interest on the balance of the gross sum so sued for, namely, on £61, from the day of the service of the petition.

The substantial question raised by the action and at issue by the appeal, was, whether by the French law in force in St. Lucia, the Appellant having, by the above notarial deed, become surety for both Woodyear and his wife, through the agency of one François Loustau, acting as their attorney, was discharged from the whole of his obligation as such surety, by reason of the power of attorney under which Loustau acted being confined to the husband alone, such procuration containing no authority from his wife. The Supreme Civil Court of Appeal was of opinion, that the want of authority on the part of the wife, whilst it at once freed her from all obligation as principal, and, consequently, the surety from any liability on her behalf, did not discharge the suretyship, which had been lawfully and *bonâ fide* contracted for Woodyear, and decreed the Appellant in the amount sued for.

The facts of the case, which gave rise to the appeal, were as follows:—

By an indenture, dated the 6th of October, 1845, [468] between Melcher Garner Todd, of the first part, Marianne Emilia Frances Pryce, of the second part, and John William Todd, Henry Pryce, and Charles Murray Palmer, of the third part, Melcher Garner Todd, in consideration of the marriage then intended and shortly after solemnized between him and Marianne Emilia Frances Pryce, charged all his property, present and to come, and in particular a freehold plantation in the Island of St. Lucia, called "The Union," with the payment of the sum of £6000, and interest, payable in the meantime, to be raised and received by John William Todd, Henry Pryce, and Charles Murray Palmer, or the trustees or trustee for the time being, and upon the solemnization of the intended marriage paid and applied upon the trusts therein mentioned.

By a letter of attorney, dated the 28th of December, 1850, Pryce and Palmer, as such trustees, constituted and appointed the Respondent, Goodman, their attorney in the Island; and in the year 1851, John William Todd having resigned his office of trustee, Goodman was, by a deed of appointment, appointed trustee in his place, with like powers and authority.

The above sum of £6000, not having been paid by Melcher Garner Todd, and the interest being in arrear, the Respondent, Goodman, as such attorney and trustee, and on behalf of his co-trustees, brought an action at law for the same in the Royal Court of St. Lucia, and on the 18th of March, 1841, obtained a decree of that Court against Melcher Garner Todd, ordering and adjudging him to pay the sum of £6000 with five years' interest. This judgment not being satisfied, Goodman caused the Union estate to be levied upon, in order to a sale thereof by judicial auction.

[469] Previous to these proceedings being taken by the trustees to bring the Union estate to a judicial sale, Todd had endeavoured to sell the estate by private contract, an offer having been made in November, 1850, by Loustau, as attorney, on behalf of Edward Lumley Woodyear, then resident in France, to purchase the estate for his client at the sum of £5500 sterling; but as the estate had been put in settlement, and Todd had no power to sell by private auction, he was advised to apply to the trustees, to cause the estate to be levied and judicially sold by the Royal Court, provided he could obtain a guarantee from Woodyear that he would bid £5500, at least, for the estate; which Loustau, on behalf of his client Wood-

year, agreed to; and it appeared that it was this offer and suggestion which induced the trustees to institute the suit, in order to obtain a judicial sale of the estate to Woodyear. Loustau had received from Woodyear a power of attorney, bearing date the 4th of March, 1850, registered at Aix, in France, which was formally deposited in the office of Jean Paul Leugar, Notary-royal, in the Island, on the 5th of August, 1850, as a record. On which occasion Leugar intimated that as Woodyear intended to secure the Union estate to his wife, *titulo repletionis*, the estate would be bought in the joint names of Woodyear and wife, which course was assented to.

On the 6th of August, 1851, the Union estate was sold, and adjudged by the Royal Court to Woodyear and his wife as purchasers, for the sum of £5500 sterling, payable by five equal instalments, with interest at five per cent. per annum. On this occasion Loustau appeared before the Royal Court and produced the Appellant, De Brettes, at the registry of the [470] Court, as surety for the payment of the second instalment of the purchase-money, in compliance with the sixth clause of the Ordinance of the 2nd of January, 1833 (a).

Woodyear and his wife failed to pay the first instalment of the purchase-money, and the Union estate was in consequence re-entered upon by the Provost-marshal, and ordered by the Royal Court to be sold by judicial auction on the 18th of December, 1851, for the account and risk of Woodyear and his wife, in manner and form as prescribed by the before-mentioned Ordinance of the 2nd of January, 1833; but in consequence of no sufficient sum having been bid, the estate was bought in by Goodman on behalf of himself and the other trustees of the marriage settlement, and was accordingly sold and adjudged to the trustees by the Court for the sum of £2200, payable by five instalments. Previous, however, to this last-mentioned sale, a new offer was made by Loustau on behalf of Woodyear and wife to Goodman for the purchase of the Union estate from the trustees, for the sum of £6100 sterling. This offer was reduced into writing, the memorandum of agreement bearing date the 18th of December, 1851, and made between Goodman, on behalf of himself and the other trustees of the marriage settlement of the one part, and Loustau as attorney and on behalf of Woodyear [471] and wife, of the other part; whereby it was agreed that should the trustees buy in the Union estate, they should be bound to sell and transfer the estate to Woodyear and wife, who on their part should be bound to purchase the same for £6100 sterling, payable by five equal instalments. And it was further agreed that the trustees should retain their lien, privileged hypothec of vendors on the Union estate, until the entire and final payment of the purchase-money and interest therein agreed should be paid; and that the purchasers should, in addition, for further guarantee of the payment of the first and second instalments of the purchase-money, procure the personal guarantee and caution of Loustau for the first instalment, and that of the Appellant for the second instalment. And, it was further provided, that as doubts might exist as to the powers granted to the Respondent Goodman by his co-trustees to sell the estate, that his co-trustees, Pryce and Palmer, should confirm and ratify Goodman's acts within six months of the date thereof.

In pursuance of this agreement and arrangement, a deed of sale, dated the 7th of January, 1852, was passed by the trustees of the marriage settlement of Todd, represented by Goodman, to Woodyear and wife, resident in France, represented by Loustau, before Jean Paul Leugar and his colleague, Notaries-royal in the Island. By this deed Loustau covenanted, on behalf of Woodyear and wife, to pay the sum of £6100 with interest at the rate of five per cent., payable by five equal instalments of £1220 each, at certain times therein specified: and for better securing payment of the principal sum of £6100, Loustau, on behalf of his constituents, mortgaged and hypothecated, [472] with the privilege and special lien

(a) This clause is as follows:—"The payments to be by five equal instalments; the first to be paid down, and the others annually, with interest at the rate of £5 per cent. to be charged from the day of sale till the whole is paid: full and sufficient security to be given for the payment of the second instalment, and in the case of the non-payment of the second instalment when due, the whole property may, after a simple notice, be re-entered upon, and sold anew at the purchaser's risk."



of the vendor, the estate unto the trustees of Todd's settlement: and for further securing the payment of the sum of £620 sterling, the balance of the first instalment of the consideration money for the purchase payable to the trustees, Loustau, acting in that behalf in his own and private name, did voluntarily constitute himself personal security and caution for Woodyear and wife to the trustees for the time being, in the same manner as if he himself was the debtor and sole obligor, with the express exception that such security was not to have the effect of a mortgage upon his real property. The deed then proceeded to state as follows:—"And to these presents personally appeared and intervened Charles de Brettes, who, after having taken communication and perusal of these presents, and especially of the clause relating to the payment of the principal sum of £1220 sterling, with that of £61, for one year's interest thereon, making together the sum of £1281 sterling, and being the full amount of the second instalment of the consideration money of the present sale, and payable on the 18th day of December, 1852, by Edward Lumley Woodyear and wife, unto the trustees or trustee for the time being, of the marriage settlement aforesaid, did voluntarily constitute himself, and by these presents doth constitute himself, as personal security and caution, for Edward Lumley Woodyear and wife towards the trustees or trustee for the time being, of the marriage settlement aforesaid, for the payment of the total sum of £1281 sterling, being the full amount of the second instalment of the consideration money of this present sale, and payable on the 18th day of December, 1852, covenanting and agreeing that the security shall be [473] good and valid against him, Charles de Brettes, in the same way and like manner as if he was himself the debtor and sole obligor, under the express proviso and condition especially reserved, that the security hereby given by Charles de Brettes shall not be considered as, and shall not have the effect of, a mortgage upon his real property, John Goodman, acting as aforesaid, being satisfied with his personal security."

To carry out this agreement, a deed poll, dated the 12th of May, 1852, was executed in England by Pryce and Palmer, which, after reciting the sale to Mr. and Mrs. Woodyear for £6100, ratified, as such trustees, the deed of sale of the 7th of January, 1852, to Mr. and Mrs. Woodyear, and authorised Goodman, as trustee and as their attorney, in their names, to do all necessary acts for confirming the sale to Mr. and Mrs. Woodyear.

The purchasers having only paid part of the first instalment of the purchase-money, the trustees of the settlement instituted proceedings against Woodyear and wife in the Island, and on the 5th of October, 1852, obtained a decree of the Royal Court, adjudging and condemning Woodyear and his wife to pay to them, first, the sum of £400 for balance remaining due on the sum of £600, part of the first instalment of the purchase-money with interest thereon; and secondly, the sum of £635 10s., for balance in principal and interest of the same instalment, with interest thereon, and the costs of the suit, with full reservation of all the other rights and actions of the Plaintiffs, and especially of their lien or privileged mortgage on the Union estate, appurtenances and dependencies, as resulting from the nature of the debt and the stipulations contained in the deed of the 7th [474] of January, 1852. This decree was served and notified without the Defendants satisfying the same, when the Plaintiffs caused, on the 10th of November, 1852, the Union estate to be levied upon, in order to the sale thereof by public auction, and the estate was accordingly sold on the 21st of April, 1853, Mr. Joseph Goodman, of the Union Vale estate of the Island, becoming the purchaser thereof for the sum of £2600, payable by five yearly instalments, in the manner prescribed by the Ordinance of 1833.

On the 18th of December, 1852, the second instalment of the purchase-money due by the deed of sale of the 7th of January, 1852, became exigible, but default was also made in payment. As, however, Woodyear had repeatedly promised that funds would be provided in a short time for payment, not only of the condemnations already obtained, but also of this last-mentioned instalment, and that negotiations were pending for the raising of such funds, and that they would be immediately remitted, the trustees thought it prudent to afford him the time he asked for liquidation of his debt, and in consequence abstained from all legal proceedings during that time, but the ultimate period fixed upon by Woodyear for fulfilling his promise having arrived, namely, the 21st of April, 1853, it then happened that only

£600 was remitted, and that even that sum, in consideration of which the trustees would have granted further delay, was diverted from its destination by the agents of Woodyear and appropriated to other purposes, so that no alternative remained to the trustees but to enforce by legal means the payment of their claim.

After further delay had been granted to Woodyear by the trustees for payment, but without suc-[475]-cess, Goodman, on the 3rd of May, 1853, as one of the trustees, and as attorney in the Island of his co-trustees, filed a petition in the Royal Court against Woodyear and his wife as principals, and the Appellant, Charles de Brettes, as surety. The petition set forth the facts above stated, and alleged that, under the covenant before-mentioned, the Appellant stood to the Plaintiffs as debtor and sole obligor for the sum of £1281, being in terms and meaning tantamount to a covenant of "*solidarite*" in a French deed; and that as the security had been granted moreover *ad-instar* of that precedently given in Court by him for the second instalment of the judicial sale of the 6th of August, 1851, it necessarily followed that the obligation of the surety was intended in this case as a joint one with that of the principal debtors, and to have the same force and effect as a judicial cautionary bond granted in terms of the 6th clause of the Ordinance of the 2nd of January, 1833, and in conclusion prayed that the Court would summons, first, Woodyear and his wife, both represented in the Island of St. Lucia by Oscar Lafitte by substitution from Loustau, then absent from the Island; secondly, the Appellant, as security and caution of Woodyear and wife; that they might be adjudged and condemned jointly and severally, *in solidum*, and pay the Plaintiffs the sum of £1281 sterling, amount in principal and interest of the second instalment of the purchase-money or price of the Union estate, together with legal interest on the principal sum of £1220, and on the sum of £61, and costs of suit, but without prejudice to the Plaintiffs' lien created by the deed of the 7th of January, 1852.

To this petition the Appellant alone appeared, Mr. [476] and Mrs. Woodyear being absent from the Island, and by his pleas and answers contended, that his security was not intended to be a solidary one; and he pleaded, first, that as there was no representation of the principal debtors before the Court, he, as an accessory and not a solidary obligor, could not have sued without them; secondly, that there was a latent nullity in the deed of sale of the 7th of January, 1852, which operated as a perfect bar to the action, that deed reciting that Loustau was the mandatory of both Mr. and Mrs. Woodyear, whereas Mrs. Woodyear was no party to the power of attorney to Loustau to act for her, and who, therefore, was never that principal obligor whom he meant to give security for; thirdly, that as the cautioner or surety was bound for a principal debtor, he would not be bound when the principal debtor never was so, or had ceased to be so; citing, in support of this plea, Dig. lib. 46, tit. i., l. 17; Pothier, *Traité des Obligations*, Pt. II., ch. vi., cl. 366; and fourthly, that his security for the second instalment in the deed of 7th of January, 1852, had been cancelled by the fact of the vendor's having taken back the subject sold before the maturity or exigibility of such security.

After this plea the Respondents discontinued the suit as against Mrs. Woodyear, retaining Mr. Woodyear and the Appellant as Defendants.

A replication was filed by the Respondents to the pleas and answer of the Appellant, in which they insisted that as the existence and validity of Woodyear's obligation was not impeached by the Appellant, his liability still subsisted as the surety of Woodyear, although it ceased to exist as an accessory to the liability of his wife.

[477] The Appellant, on the 6th of June, 1853, filed additional pleas and defences in answer to the relinquishment of the suit against Mrs. Woodyear by the Respondents, in which he urged (*inter alia*), that the Respondents, by abandoning their right of action against Mrs. Woodyear, had put him in a worse position, as there were no longer two persons cumulatively guaranteed by him, consequently he was discharged from the deed and from the obligation in it.

The case was argued and considered by the Royal Court. Judgment was delivered on the 18th of October, 1852, by his Honor, John Porter Athill, who, after stating his reasons at large, and that there had been misrepresentation and fraud by the false averment that Mrs. Woodyear had appointed Loustau her attorney,



and also that the "Act of *desistment*" against Mrs. Woodyear, by depriving the Appellant of his remedy against her, relieved him; and that by the judicial sale of the Union estate, after the nonpayment of the first instalment of the purchase-money, the Plaintiffs had lost and forfeited their remedy against the Appellant as surety; gave judgment for the Appellant, for setting aside and discharging him from the suretyship which he entered into under the deed of the 7th of January, 1852, and all liability, or alleged liability, in respect to or resulting therefrom. And as regards the principal Defendant, Edward Lumley Woodyear, the Court gave judgment against him in the manner and form prayed for, condemning him, according to the practice of the Court, to pay all costs of suit whatsoever without prejudice to the rights of the Plaintiffs, as privileged hypothecary creditors of the Union estate, reserving also to them all personal recourse against the Defendant, [478] Woodyear, for the balance due by him of the price of the estate, and all rights and remedies whatever, whether in the Colony or elsewhere, against all and any parties not then before the Court, by whom or through whose acts or agency the Respondents might have sustained any wrong or injury in the premises.

The Respondents appealed to the Supreme Civil Court in the Island from so much of the decree as discharged the Appellant for his liability as surety.

The appeal was fully argued and considered by the appellate Court. The judgment of the Court was pronounced by the Chief Justice, Sir Robert Boucher Clarke, the presiding Judge, on the 5th of November, 1853, and he reversed so much of the decree of the Court below as relieved and exonerated the Appellant from his covenant as surety. The material part of this judgment was in these terms:—"The principal objections taken in argument, and the ground relied on by the Court below for this decision, is the fact that De Brettes became surety for Edward Lumley Woodyear and wife, through the agency of Loustau, while the power of attorney to him was from Edward Lumley Woodyear alone, and contained no authority on behalf of the wife.

"The first and simple question then to consider is, whether by the French law, where a person at the instance of a third party, and believing that that party has power from both husband and wife, becomes security for both, has a right, upon its appearing that there was no authority from the wife, to be discharged from the whole of his obligations; and I am of opinion that the want of authority on the part of the wife, while it at once frees her from all obligation as principal, and consequently the surety from liability [479] on her behalf, does not discharge the suretyship which has lawfully and *bona fide* been contracted by the husband.

"But the decision of the question before me cannot be properly made on this single point of law. The obligations which De Brettes contracted when he became surety must be determined by the terms of the covenant he entered into for that purpose, and the motives and considerations which led to it. On looking to the words of the covenant, it will be found that he voluntarily offers and binds himself to be a good and valid surety, not merely for Mr. and Mrs. Woodyear, and only to answer for their joint default, but he contracts 'in the same way and like manner as if he was himself the debtor and sole obligor.' Those are the words he uses, and they cannot be permitted to become inoperative, nor can they be considered otherwise than pregnant with meaning: for it is to be remembered that by giving this security he procured a release from an obligation of the like nature, and very nearly of the same amount, which he had contracted for the very same parties under the judicial sale of the 6th of August, 1851.

"It is, however, to be collected from the tenor of the decree of the Court below, that, in its opinion, De Brettes ought to be exonerated from the liabilities of the deed of 7th of January, 1852, because of the fraud practised upon him—the fraudulent misrepresentation, as it is termed, of the parties. I certainly think it much to be regretted that, in accordance with what I learn from the Registrar was formerly the practice of the Royal Court, Loustau, when he appeared before it so far back as the 6th of August, 1851, and was permitted to become the purchaser of the Union [480] estate for Woodyear and wife, as their duly authorised agent, was not called upon to produce his power of attorney. Had this been done, much litigation might have been prevented; and I cannot too strongly express my hope that a return to that wholesome practice, under the authority of a Rule of Court,

may very speedily take place, and that no one shall in future be allowed to bid at judicial sales for absent parties who does not at the time produce and authenticate a sufficient authority to do so.

But I confess I have not been able to discover any fraud in these transactions, and it was not even insinuated in argument before me. I believe that the account given of the whole transaction in the petition of appeal is correct; and although I cannot refrain from adding that I think the Notary was to blame in describing the power of attorney otherwise than exactly according to its tenor, I do not discover any fraud in the omission. If there had been any fraud practised, it can only have been by Loustau on De Brettes, and I think the evidence negatives even this. De Brettes on both occasions comes forward solely for Loustau. He only knew him in the matter, and Woodyear and wife only through him. He would have been equally ready at Loustau's instance to have been surety for the one as for both; and if he omitted for his own safety to look into Loustau's authority under the power of attorney to bind both husband and wife, and blindly relied on his statement, the consequences cannot damnify the trustees, who were not responsible for the mode in which De Brettes became surety, who had the authority of the Royal Court for dealing with Loustau as attorney for both husband and wife, and whose only duty when De Brettes voluntarily, as the deed avers, came forward to guarantee them the payment of the second instalment on obtaining a release of their claims against him under the judicial sale, was that he should be effectually bound. It is, unfortunately for him, too late now to plead ignorance of the power of attorney after becoming a party to the deed of the 7th of January, 1852. That document was in the office of the notary before whom he signed the deed, and he had only to ask for its production to satisfy himself of its contents. Having omitted to do so, he cannot on any principle be allowed to take advantage, to the injury of innocent parties, of his own wilful omission, and say that because Loustau had not authority from the wife he is absolved from liability on his own undertaking to the trustees, which is not only for the husband but himself individually, also on a valuable consideration moving from the trustees to him, viz. their release of his liability under the judicial sale of the 6th of August, 1851. I consider the deed of the 7th of January in full force and effect, and that so much of the judgment of the Court below as relieves and exonerates De Brettes from his covenant in that deed should be reversed; and I reverse the same accordingly, and grant to the Appellants their costs of appeal."

The present appeal was brought from this judgment.

Mr. E. J. Lloyd, Q.C., and Mr. Rennalls, for the Appellant.—This judgment cannot stand. Our first contention is, that the Appellant became a surety for the performance of a contract which never came into operation. A contract of sale and purchase is, in its nature, synallagmatic and unilateral, and it is competent to each party to make special stipulations for his security or advantage. Pothier, *Traité des Obligations*, Pt. I., ch. i., Art. II., cl. 9. Now, in this case, the contract was subject to a qualified confirmation. By the terms of the deed of sale to Mr. and Mrs. Woodyear of the 7th of January, 1852, the perfection of the contract was made to depend on the condition that the sale should be confirmed by the two absent trustees of Todd's settlement, such confirmation to be produced in St. Lucia to the purchasers. But the deed poll of the 12th of May, 1852, was not such as satisfies the condition. It cannot be disputed that the sale now insisted on, is to Mr. Woodyear alone, and did not receive any absolute or sufficient confirmation by the absent trustees within the terms of the agreement of the 18th of December, 1851, and the notarial deed of the 7th of January. The deed poll contemplated no other sale than one to Mr. and Mrs. Woodyear, and not to Mr. Woodyear alone. Then as there was no contract of sale to Mr. Woodyear, so perfected by the trustees as to have enabled him to enforce the same against them, it was contrary to the principle of reciprocity and mutuality that the contract should be enforced by the trustees against him; much less, then, could they have any right against the Appellant, as the surety for Mr. Woodyear under that contract. His liability was in respect of two persons, but one only being liable, he is discharged as surety. Pothier, *Traité des Obligations*, Pt. I., ch. i., Art. III., s. 1, cl. 17. If the parties stood as they were originally represented, we do not dispute that he was liable. Neither



can the Appellant be prejudiced by the decree obtained against Mr. Woodyear in the name of the trustees, [483] more especially as that decree was obtained in a suit instituted and prosecuted against Mr. Woodyear when he was not in St. Lucia, nor represented there by attorney. *Buchanan v. Rucker* (9 East. 192). Although Goodman purchased the estate at the judicial sale of the 18th of December, 1851, for the trustees of Todd's settlement, in order to acquire to them a valid title to enable them to convey the estate by private sale to Mr. and Mrs. Woodyear, yet, in fact, a good title has never been completed in the trustees under the judicial sale, such as would enable them to transfer the estate by private sale to Mr. and Mrs. Woodyear as purchasers.

Again, as the Appellant entered into the contract of the 7th of January, 1852, for the payment of the second instalment upon the faith of the representations contained in that instrument as a notarial act, and it appears that those representations were false and unfounded, the Appellant is therefore not bound by such a contract. So again, the Appellant's liability was discharged by the sum realised by the sale of the whole estate, upon the default in payment of the second instalment. If the Appellant was ever under any obligation to the Respondents under the deed of the 7th of January, 1852, that obligation was entered into by him as surety for Mr. and Mrs. Woodyear, and the action could only be a joint one against Mr. and Mrs. Woodyear as principals, and the Appellant as their surety; and as the Respondents desisted from their suit against Mrs. Woodyear, one of the principals, and released her, they by so doing at once released the Appellant. Pothier, *Traité des Obligations*, Pt. II., ch. vi., Art. II., etc.

[484] Mr. J. Anderson, Q.C., and Mr. Edmund F. Moore, for the Respondents.—The ground now insisted upon, that the perfection of the contract being dependent upon the condition that the sale was to be confirmed by the two absent trustees of Todd's settlement within a certain time, and that there was no confirmation by them within the time, or at least not such a confirmation as satisfied the condition, cannot be entertained by the appellate Court, it was not pleaded or argued in the Courts below. The question must be decided by the French law in force in St. Lucia, which governs the rights of the parties. By that law, the Appellant, by the notarial deed of the 7th of January, 1852, is liable as surety for the amount claimed by the action, for although the contract of sale to Woodyear and wife was void, *quoad* the wife, yet the contract subsists, and is in full force against Woodyear, and the Appellant's obligation as surety being *in solido*, is indivisible, he is not exonerated or discharged from his surety for Woodyear for the performance of his obligation, namely, the payment of the second instalment of the purchase-money. If the purchase was by two persons, and one is discharged, the other is still bound. Troullier, *Droit Civil Français*, No. 713. Domat, *Lois Civiles*, B. i. tit. 2, s. 1, No. 9, *ib.* B. iii. tit. 4, s. 2, § 7. Pothier, *Traité des Obligations*, Pt. II., ch. vi. s. 6, cls. 409, 413. Independently of the obligatory effect of the deed of sale upon the Appellant as surety, he voluntarily bound himself to answer their default in payment of the second instalment, the amount sued for, in the same manner as if he himself was the sole debtor and obligor, and we submit that upon that ground he would be liable for the amount of the instalment. The sale of the [485] Union estate was a judicial act of the Royal Court, Loustau purchasing the estate in Court as attorney for Woodyear and wife; even though Loustau did act without the authority of Mrs. Woodyear, yet the Appellant cannot, on that account, as against the Respondents, to whom it was indifferent whether there were one or two purchasers, repudiate his liability, on the ground that Loustau deceived him. There was no fraud which could furnish ground for impeaching this contract. Pothier, *Traité des Obligations*, Pt. I., ch. i., Art. III., s. 3, pl. 31, 32. *Stone v. Compton* (5 Bing. N.C. 142, 156), shows what kind of fraud it is that avoids a surety's liability. Here the power of attorney was believed and acted upon as if it came from Woodyear and his wife to Loustau, and was registered by the official officer of the Court. Indeed it made no difference, for by the law of St. Lucia, which is the *Coutume de Paris*, the wife was incapacitated from entering in fact into contracts or other acts by which she might incur obligations or liabilities without her husband's authority. Pothier, *Traité de la Puissance du Mari*, Pt. I., n. 33. Ord. 1731, Art. 9. *Code Civil*, Art. 934. 1 Burges' Comm. on Col. and For. Law, p. 213. It was the duty of the Appellant

before he became surety to have satisfied himself as to the sufficiency of the authority; he cannot now take advantage of his own laches.

The Lord Justice Knight Bruce.—This appeal has arisen upon a suit instituted in the Royal Court of St. Lucia by the Respondents for the recovery against the Appellant of a sum of money which they allege to be due from him to them. He [486] denied the debt, and defended the suit, which the Royal Court determined in his favour. The Respondents appealed to the Supreme Court of Civil Justice of the Island, and the Supreme Court, differing from the Royal Court, decided for the present Respondents, which brought the Appellant here; and the point to be decided is one of debt or no debt, from the Appellant to the Respondents.

The controversy arose thus:—A gentleman of the name of Todd was the proprietor of an estate in the Island of St. Lucia called the Union estate, and on his marriage, in the year 1845, he charged it in favour of the trustees of his marriage settlement for the benefit of his wife and children, with the sum of £6000 payable at a certain time. The time arrived, the money was not paid, and the trustees considered it their duty to institute proceedings in the Island against the estate for the recovery of the sum charged upon it. The suit for the purpose ended—if that term may be used—in a decree or sentence for sale, and a sale accordingly took place, judicially, in the month of August, 1851. At that sale the estate was bought by a gentleman of the Island of the name of Loustau, not in his own name, nor on his own behalf, but in the name and on behalf of an English gentleman and his wife, a French lady, both resident and probably domiciled in the south of France. The purchase-money amounted to £5500, and according to a course which seems usual and recognised in the Island, was to be paid by five instalments in five years, and for the second of these instalments, according to a course which seems also to be usual, a surety was required. It seems probable that Loustau had to find the security, and probably, therefore, at his in-[487]-stance it was that De Brettes, a gentleman of the Island, the Appellant here, became surety on that occasion for the payment of the second instalment.

The time for paying that second instalment however never arrived, for there was default in payment of the first, in consequence of which default the Provost Marshal entered, and a re-sale was directed at the risk of the defaulting purchasers, or alleged purchasers, namely, Mr. and Mrs. Woodyear.

After this course had been taken, a negotiation was entered into which produced two documents, which I shall immediately have occasion to mention. Before doing which it may, however, be right to notice the position in which the trustees of the settlement, who are in fact the Respondents here, and who have procured the sale in the Island for the purpose of raising the £6000, stood. The trustees, the Respondents, are Mr. Goodman, Captain Pryce, and Mr. Palmer. Of these three, Captain Pryce and Mr. Palmer, two of the original trustees, have, so far as appears, uniformly been resident in England; it does not seem that either of them was at any time at St. Lucia. The third trustee was originally a gentleman named Todd, a relation, probably, of the husband, for whom was substituted the Respondent, Goodman, now forming with Palmer and Captain Pryce the body of the trustees. Goodman was resident in the Island, and held a power of attorney from the other trustees, which power of attorney he had held indeed before he became a trustee, and, after he was appointed, continued to hold.

In this state of things, Goodman being the only person acting for the trustees in the Island, and Loustau being the only person there acting, or professing [488] to act, for Mr. and Mrs. Woodyear, a re-sale having been directed, two instruments were entered into. To the first, De Brettes, who had become a surety for the payment of the second instalment upon the purchase, was not a party. It would appear, however, that he became associated with such second instalment in a manner that I shall presently have occasion to state.

The agreement, to which De Brettes was not a party, was dated the 18th of December, 1851, between Goodman, for himself as one of the trustees of the marriage settlement and for the other two trustees, of the one part, and Loustau, for and on behalf and as attorney of Woodyear and wife, of the other part. It is in these words:—"First. It is agreed that should the above-mentioned trustees buy in the



Union estate, the property of Melcher Garner Todd, now about to be resold in presence of the Royal Court [having been re-entered upon by the Provost Marshal in default of payment of the first instalment of the purchase-money by Mr. and Mrs. Woodyear], Goodman, for himself and his co-trustees, binds himself, and they shall be bound, to sell and transfer the estate to Woodyear and wife, who shall be bound to purchase the same as it then stands for the sum or price of £6100 sterling, payable by five equal instalments." This sum, it will be observed, exceeded the price obtained at the first and ineffectual sale. "Second. Of the amount of the first instalment above-mentioned, the purchasers pay down £600 sterling immediately, or in such manner and at such time as would satisfy the privileged creditors for legal costs, and other liens, which might take precedence and priority over the claim of the trustees, according to the scheme of ranking to be made in that behalf, and so that the [489] trustees be kept harmless by such creditors; and if there shall be any balance due on the aforesaid £600 sterling after paying the creditors, such balance shall be paid within six months. Third. The balance of the first instalment, amounting to £620, shall be paid with interest from the 18th day of December instant, within six months from that date; and the four other instalments, each of the sum of £1220 sterling, shall be paid respectively in one, two, three, and four years, from the aforesaid day of December instant, with interest on each instalment, as provided by the Ordinance of the 2nd day of January, 1833. Provided always, that the purchaser shall not be required to pay any other sum except that of £600 sterling hereinbefore mentioned, before the sale hereinbefore mentioned shall have been ratified and confirmed as is hereinafter agreed. Fourth. The trustees shall have and retain their lien, privileged hypothec of vendors on the Union estate, until the entire and final payment of the purchase-money and interest as hereinbefore agreed to be paid, and the purchaser shall, in addition, grant, for further guarantee of such payment, securities for the first and second instalments of the said price of sale: that is to say, the purchaser shall procure the personal guarantee and caution of F. Loustau, Esq., for the first instalment, and that of Charles de Brettes, Esq., for the second instalment; and this last-mentioned security having been already granted by Mr. De Brettes on a former purchase, since rescinded, of the said estate, his security shall be confirmed, and extended so as to meet the exigencies of the present agreement according to the true intent and meaning thereof." And then follows a clause which, in the judgment of their Lordships, is [490] of great weight and importance in this controversy. "Fifth. Doubts being entertained as to the sufficiency of the powers granted to the said John Goodman, Esq., by his co-trustees, in respect of the intended sale, it is agreed that steps shall be taken towards obtaining within six months from the date hereof the ratification and confirmation of such sale by the two other trustees; and should the said trustees, or either of them, refuse or neglect to grant or send out such ratification and confirmation, it is agreed that the said John Goodman shall in nowise be responsible for such refusal or neglect; but as there are reasonable grounds for expecting that one, at least, of the two aforesaid trustees will readily consent to and concur in the present agreement, it is hereby agreed that the said John Goodman, jointly with the consenting and concurring trustee, shall make such application to the Royal Court of this Island as may become necessary for obtaining a Judge's order dispensing with the consent and concurrence of the third trustee in the premises. Sixth. And if, contrary to just expectation, the sale cannot be confirmed either by or without the consent and concurrence of both the absent trustees, the purchasers shall retain a lien on the Union estate not only for the £600 paid down, but also for their lawful expenses in carrying on the cultivation of the said estate."

The re-sale took place on the very same day as the date of this agreement, namely, the 18th of December, 1851.

At that re-sale Goodman, on behalf of the three trustees, bought in, as it is called, or bought the Union estate, for a sum of £2200, a circumstance which, of course, immediately brought into operation [491] this agreement, so far as it could be operative. That sale, I should say it is hardly necessary to observe, was at the risk, or professed to be at the risk, of the alleged purchasers who had made default.

Within somewhat less than a month afterwards a deed was executed in the Island for the purpose of carrying into effect that agreement, to which deed the Appellant

was a party. It begins thus: "Personally appeared John Goodman, acting for himself as one of the trustees nominated and appointed in or pursuant to the marriage settlement made on the 6th day of October, 1845, between Melcher Garner Todd of Castries, in the said Island of St. Lucia, Esq., and Marianne Emelia Frances Pryce, now the wife of Melcher Garner Todd, and for and on behalf and as attorney lawfully constituted by certain letter or power of attorney, dated the 28th day of December, 1850, of Henry Pryce, of Clifton, in the city and county of Bristol, in England, a Captain in her Majesty's Royal Navy, and Knight of the Order of the Tower and Sword, and Charles Murray Palmer, heretofore of the Island of St. Lucia, but now of Clifton aforesaid, Esq., the other trustees of the marriage settlement, John Goodman acting as aforesaid of the one part, and François Loustau, of the town of Castries, in the Island of St. Lucia, Esq., acting for and on behalf and as the attorney lawfully constituted of Edward Lumley Woodyear, of the town of Aix, 'département des Bouches du Rhone,' in France, Esq., and Knight of the Royal and eminent Order of Charles the Third of Spain, and of Dame Theresa Adele Clara de Bosse de Bourecueil, the wife duly authorised of Edward Lumley Woodyear, under a special and general letter or power of attorney, bearing date the 4th day of March, 1850, and [492] deposited in the office of Jean Paul Leugar, one of the undersigned notaries, on the 5th day of August, 1851, of the other part." Then Goodman, acting as aforesaid, sells, assigns, conveys, and confirms to Mr. Woodyear and his wife, "both herein represented, and accepting by François Loustau, acting as aforesaid," the plantation with its members and appurtenances herein described, to hold to the said "Edward Lumley Woodyear and wife, and as property to them lawfully appertaining and belonging, the said John Goodman acting as aforesaid, divesting and disseising himself, as one of the trustees of the marriage settlement aforesaid, and divesting and disseising Henry Pryce and Charles Murray Palmer, his co-trustees, of the sugar plantation or estate," etc., etc. It then goes on, "The present sale is granted as aforesaid for and in consideration of the principal sum of £6100 sterling, lawful money of Great Britain, with interest at the usual and lawful rate of £5 per cent. per annum, payable by five equal instalments of £1220 sterling each, at the several terms and periods aftermentioned, and in the following manner: first, on account and in part payment of the first instalment the sum of £600 sterling shall be paid immediately," etc., etc., "and if there be any balance, such balance shall be paid on the 18th of July next," which was the time fixed for the payment. And then provision is made for payment of the other instalments in the years 1853, 1854, and 1855. Then, after some other provisions, there is this one: "Provided always, and it is hereby specially agreed and stipulated by and between the said parties hereto, that none of the hereinbefore-mentioned instalments, except the aforesaid sum of £600 sterling, part of the first instalment, [493] shall become payable and exigible unless the present sale and conveyance shall have been first ratified and confirmed by the said Henry Pryce and Charles Murray Palmer in their capacity as trustees as aforesaid, and proof in writing of such ratification and confirmation shall have been produced by the said John Goodman, their co-trustee, to the said purchasers in this Island of St. Lucia, according to the agreement made in this behalf, and contained in a memorandum signed in duplicate by the parties to these presents on the 18th day of December last past, the said parties hereby approving and confirming all and singular the covenants, agreements, clauses, conditions, and stipulations in the said memorandum contained, and reserving respectively the full and entire effect and operation thereof as thereby provided." Then provision is made for making Loustau surety for the first instalment, and then, for the first time, as far as this instrument is concerned, De Brettes becomes surety. "And to these presents personally appeared and intervened Charles de Brettes, of the Quarter of Gros Islet, in this Island of St. Lucia, Esq., who, after having taken communication and perusal of these presents, and especially of the clause relating to the payment of the principal sum of £1200 sterling, with that of £61 for one year's interest thereon, making together the sum of £1281 sterling, and being the full amount of the second instalment of the consideration money of the present sale, and payable on the 18th day of December, 1852, by the said C. L. Woodyear and wife unto the trustees or trustee for the time being of the marriage settlement aforesaid, did voluntarily



constitute himself, and by these presents doth constitute himself, as personal security and caution [494] for the said E. L. Woodyear and wife towards the trustees or trustee for the time being of the marriage settlement aforesaid for the payment of the total sum of £1281 sterling, being the full amount of the second instalment of the consideration money of this present sale, and payable on the 18th day of December, 1852, covenanting and agreeing that the said security shall be good and valid against him, the said Charles de Brettes, in the same way and like manner as if he was himself the debtor and sole obligor, under the express proviso and condition especially reserved, that the said security hereby given by the said Charles de Brettes shall not be considered as, and shall not have the effect of, a mortgage upon his real property."

In pursuance, or supposed or alleged pursuance, of the condition contained in these instruments as to the ratification of the trustees resident in England, a deed was executed in England by Captain Pryce and Mr. Palmer in the month of May, 1852. It contains recitals of sufficient length and particularity, and among them, as it happens, a recital of certain allegations made by Paret, an advocate of St. Lucia, in advices from the Island as to the circumstances which had taken place there, including the substance of what I have before referred to, and mentioning the sale to Mr. and Mrs. Woodyear, the default, the resale, the purchase by Goodman for the £2200, the new purchase, the agreement, and the deed of the 7th of January, 1852. It then recites, that Captain Pryce and Mr. Palmer, "being resident in England, have no personal knowledge of the several sales, purchases, agreement, or deed of sale so alleged and stated as aforesaid," etc., etc., "but upon the faith of the [495] correctness of the said several allegations and statements they are willing, so far as they lawfully and equitably can, and as such trustees as aforesaid properly ought, to ratify and confirm in manner thereafter mentioned, and subject to the several provisos thereafter contained, the said alleged sale of the estate called the Union estate to the said E. L. Woodyear and Theresa Adele Clara de Bosse du Bourecueil, his wife, for the aforesaid sum of £6100 sterling, and upon the terms in regard thereto thereinbefore mentioned or referred to," etc. "Now, be it known, that they, Henry Pryce and Charles Murray Palmer, as far as they lawfully and equitably can, approve, ratify, and confirm the aforesaid instrument or alleged deed of sale and conveyance of the 7th day of January, 1852, and they authorise all proper instruments to give effect to it as fully and effectually in every respect as if the conveyance of the estate to Mr. and Mrs. Woodyear had been originally signed and executed by them, H. Pryce and C. M. Palmer, and it was hereby expressly declared by Captain Pryce and Mr. Palmer, that they would not be responsible for or in respect of the purchase, nor for any money which may have been paid, in case any money should have been paid."

Now, on looking at the very anxious and minute and particular guards and fences contained in this instrument, which equal in minuteness almost anything of the kind I have ever read, and looking at the provisions, so far as they are known to us of the marriage settlement, of which these gentlemen are the trustees, it is not clear to their Lordships that this very singular instrument amounted in any sense to any ratification at all. If it did not, there is of course [496] an end of the case, but their Lordships do not wish the case should be decided upon that point. They are willing to consider in favour of the Respondents, that these guards and fences were out of the case, or amounted to nothing, and that this was a ratification of the sale to Mr. and Mrs. Woodyear.

It is now necessary to look back to the agreement of December, 1851, and to the fifth clause of that agreement which I have already mentioned. Their Lordships have had under their careful consideration that clause, and they are of opinion, that the true construction and effect of it was, and is, that the transaction should be confirmed by the trustees, and effectually confirmed within six months, although the expressions are "steps shall be taken towards obtaining within six months from the date thereof the ratification and confirmation of the sale." They are of opinion that the sale was required by this clause to be ratified and confirmed within six months, and that the meaning of that clause was not merely a formal, not merely a verbal ratification, but that the true meaning of the clause, as a clause

to be construed in this instrument and with the rest of the contents of the instrument, was, that within six months the sale should become to all intents and purposes a binding sale upon the three trustees, absent as well as present, and that it should be as effectual against them as if they themselves had made it effectual against them, and effectual in favour of Mr. and Mrs. Woodyear, as well as against them both in respect of the liability which by the law of France each of them, the husband and wife, purported to be placed under, and would be placed under, as purchasers.

[497] It remains to be considered whether the sale did in this manner become binding on the three trustees. For that purpose it is necessary now to look at some facts which I have not hitherto noticed. It seems (it is difficult to account for such a course of conduct, not intended, I dare say, but whether or not intended, it is difficult to account for the existence of such facts as those, in the existence of which we are compelled by the evidence to believe,) that the power of attorney under which Loustau acted, was a power of attorney, not from Mr. and Mrs. Woodyear, nor professing to be so, but a power of attorney from Mr. Woodyear alone, and there seems to have been no other ground or reason for associating Mrs. Woodyear with the power, as far as the allegations and proceedings in St. Lucia went, than this, that she and her dotal property happened to be mentioned in a part of the instrument, that there seems extra the instrument to have been at some time some intention on the part of Mr. Woodyear to settle this property, if he should buy it, upon his wife, and perhaps to pay for it out of her property. So it was, however, that Loustau, representing this as a power enabling him on behalf of the husband and of the wife (persons whom we must take to have been domiciled in France, and subject to the law of France as well as subject in respect of this moveable property to the law of St. Lucia), professes to act on it, professes to buy for them, in all the proceedings that take place in the Island, on the footing of the purchase having been a joint purchase, and, therefore, upon that footing, he knew there was that liability to which, under the law I have mentioned, a married woman may by certain means become subjected to: [498] the liability on the part of Mrs. Woodyear and her property for the unpaid purchase-money, which would follow from such a state of circumstances if they really existed.

This is the state of things communicated to the English trustees. They state their belief of the representations made to them, in which, of course, they include this, and upon the faith of those representations they execute the deed, and this condition of things remains not only to the end of the six months mentioned in the agreement, but long after. Upon looking then to the end of the six months and to the period immediately preceding it, was Mrs. Woodyear bound by the sale? No man can say, no man pretends to say, she was. Mr. Woodyear may probably have been bound. It is however immaterial to consider whether he was so or not. His wife clearly was not bound; and, therefore, clearly was not liable for any portion of the unpaid purchase-money. Did the trustees in England ever sanction such a transaction? Never. It was never for a moment brought under their attention; they intended to confirm a sale to which Mrs. Woodyear should be one of the parties, and in which the liability of herself and of her property should be engaged, and they intended to confirm nothing else. They, therefore, at the end of that six months were not in any respect or sense bound by that transaction, and at the end of the six months, the sale, instead of having been an effectual sale by three to two, was an ineffectual and a void sale by one to one. The effect of that, therefore, was, that the express conditions under which De Brettes made himself liable were not performed, and in the judgment of their Lordships he did not in effect be-[499]-come responsible for a single shilling of this demand. He agreed only to become conditionally liable. That condition was not fulfilled, and he became absolutely not liable at all.

This view of the matter renders it wholly unnecessary to give any opinion upon certain important questions which with propriety have been raised in the argument, and which their Lordships intend to leave wholly unnoticed, so far as they are concerned, resting their determination in this case, resting their advice to Her Majesty, upon the single and, as they think, plain and clear point that I have mentioned. The result is, that the humble advice which their Lordships will



tender to Her Majesty will be to restore the judgment of the Royal Court, to dismiss the petition of appeal to the Supreme Civil Court of appeal with costs, and to give no costs of the appeal to this country on either side. Of course if costs have been paid, they must be refunded.

[Mews' Dig. tit. COLONY. II. PARTICULAR COLONIES. 22. *West Indies. Judicial Sale—Purchase Money—Surety.* Tit. PRINCIPAL AND SURETY. A. *Nature of Contract.* 4. *When concluded.*]

# REPORT OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, 1855-57. By EDMUND F. MOORE, Barrister-at-Law. Vol. X.

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ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

WILLIAM JAMES LE FEUVRE,—*Appellant*; JOHN SULLIVAN and ANNE SULLIVAN, otherwise ANNE LE SUEUR,—*Respondents* \* [July 16 and 17, 1855].

In 1833, A., domiciled in Jersey, deposited with B., domiciled in England, a policy of Insurance effected in Jersey, upon A.'s life, for the sum of £499, as security for the sum of £210, advanced by B. to him. This transaction took place in England. No notice of the deposit was given to the Insurance office, who afterwards, upon a false representation of the loss of the policy, delivered to A. a duplicate of the policy, which, in 1853, he by deed assigned to his wife, (from whom he had obtained a judicial sentence of *separation de biens*.) in consideration of the sum of £400, alleged to have been paid by her to him. Notice of this assignment was given to the Insurance Office. A., or his wife, paid the premiums till A.'s death. In 1838, A. became insolvent, and made a *cessio bonorum* of his property, but no proof of B.'s debt was registered by him under A.'s insolvency. In an action brought in Jersey by A.'s wife against the Insurance office to recover the amount of the policy, B. intervened and claimed a lien under the deposit with him by A. of the original policy. Held:

First, That as B.'s domicile was English, and the contract made in England, B. had by the English law a lien upon the policy [10 Moo. P.C. 13].

Second. That the *cessio bonorum* made by A. in Jersey, did not affect such lien [10 Moo. P.C. 13]. But,

Thirdly. In the absence of evidence, whether the assignment to A.'s wife was *bona fide*, and for a valuable consideration without notice of the deposit of the original policy to B., the Judicial Committee reversed the finding of the Royal Court of Jersey in her favour, and remitted the cause back to that Court for further proof upon those points, with a declaration, that if the evidence established the title of A.'s wife, then that she had a preferential title to B., but, if otherwise, her title was to be considered as subsequent to B.'s charge on the policy for the principal and interest of his debt [10 Moo. P.C. 15].

Costs in the appellate Court, and in the Court below, directed, in the event of the Appellant establishing his claim, to be added to his charge upon the policy [10 Moo. P.C. 17].

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\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.



In the year 1833, George Francis Sullivan, of the Island of Jersey, being indebted to persons resident [2] in England in a sum of about £270, and having been arrested there, applied to the Appellant, with whom he had had business transactions, to become bail for him, which he consented to do on Sullivan's depositing with him, as collateral security, the register of a ship called the "*Wyvern*," belonging to Sullivan, and then lying at Southampton. It becoming afterwards necessary to perfect special bail, the Appellant and another became jointly bail for Sullivan. Further proceedings were had in the action, and in the end the Plaintiffs agreed to reduce their demand against Sullivan to the sum of £210, for the debt and costs, and for this amount the Appellant gave his acceptance. The bill, however, did not appear to have been presented to the acceptor for payment until after the expiration of the period allowed by law, nor was any notice of the dishonour given to the drawer. The amount being still due to the Appellant, Sullivan requested that the register of the "*Wyvern*," which he was desirous of selling, should be returned to him; and he offered to substitute for such register a policy of Insurance on his life effected with the Norwich [3] Union Life Insurance Society for the sum of £499. The Appellant consented to this proposal, and received from Sullivan the policy and the receipts for premiums paid, which were deposited with the Appellant, as security for the debt of £210, and interest; and he returned him the register. No notice was given to the Norwich Union Life Insurance Society of this deposit.

In August, 1834, the Appellant applied by letter to Sullivan, then in the Island of Jersey, requesting a remittance. On the 4th of September following, Sullivan wrote an answer excusing his delay, and promising payment, and at the same time asked to have the policy of Insurance returned to him. The Appellant, however, refused to comply with this request.

In the previous month of June in that year, Sullivan obtained a *separation de biens*, from his wife. This separation was voluntary, and granted, as a matter of course, by the Court at Jersey, on the joint application of the husband and wife. Shortly after this separation, Sullivan made a false representation to the agents of the Norwich Union Insurance Society in Jersey, of having lost the policy, and requested that a fresh policy might be issued to him. No inquiry into the truth of Sullivan's assertion as to this pretended loss was made by the Society, but a duplicate policy, of the same date, was delivered to him. This duplicate, Sullivan, by a deed dated the 21st of September, 1835, assigned to his wife. The deed was as follows:— "Know all men by these presents, that I, George Francis Sullivan, of St. Helier's, Jersey, in consideration of the sum of £400, of lawful money of Great Britain in hand, well and truly paid by Mrs. Anne Sullivan, otherwise Anne Le Sueur, [4] my wife (separated from me as to property), at or before the sealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have assigned, transferred, and set over, and by these presents do assign, transfer, and set over unto the said Anne Sullivan, otherwise Anne Le Sueur, her executors, administrators, and assigns, a certain instrument, or policy of assurance, under the hands and seals of three of the directors for the Norwich Union Life Insurance Society, numbered 9837, and bearing date the 26th day of April, 1824, and all interest, benefit, and advantage to be had by me thereby, in as full, ample, and beneficial manner as I might or could have had by the same; together with all powers, remedies, and means requisite for setting over, recovering, and giving effectual releases and discharges for the sum of £400, assured by the said policy, or any part thereof." This deed was witnessed by two witnesses, but there was no receipt clause. Notice of this assignment was given to the Norwich Union Insurance Society. The premiums were afterwards paid either by Sullivan or his wife, until Sullivan's death.

In 1837, the Appellant being in Jersey, called at the office of the agent of the Norwich Life Insurance Society to ascertain if the policy on Sullivan's life was kept on foot by payment of the premiums; he was informed that it was, but the agent did not acquaint him with the alleged loss of the policy, or of the issuing of the duplicate to Sullivan, nor of the assignment.

In 1838, Sullivan, being a prisoner for debt in Jersey, made a *cessio bonorum*, which was followed up by an assignment, or "*Décret*," and the property of the insolvent was made over to one Nicolle, as "*Tenant* [5] *après Décret*," or assignee.

No notice of these proceedings was given to the Appellant, who was resident in England.

In September, 1842, Sullivan died, the debt of £210, with arrears of interest, still remaining due to the Appellant.

In the month of June, 1843, the Respondent, Anne Le Sueur, commenced proceedings against the Norwich Union Insurance Society, represented by the Respondent, John Sullivan, their agent, in the Royal Court of the Island of Jersey, to recover from them the sum of £499, the amount of the policy on the life of her deceased husband. The Plaintiff founded her claim on the above assignment, and on the payment by her of the annual premiums which had accrued since the date of such assignment. The Appellant afterwards put in a claim, and was allowed by the Court to intervene in the suit. The Insurance Society offered to pay the amount of the policy to such of the parties as should eventually be found entitled thereto.

On the 4th of November, 1843, the cause came on, when the Appellant alleged, that Sullivan had deposited with him the policy for £499, as also the receipts for premiums, as a security for his debt of £210, and interest, and that such policy had continued ever since in his possession, and he claimed to be paid the amount so due to him, with arrears of interest. The Court, consisting of the President and two Jurats, the inferior number of the Royal Court, pronounced judgment in the following terms:—"Considering; First, that Le Feuvre alleges that the policy of Insurance was deposited in his hands as pledge and security for his claim against Sul-[6]-livan. Second, that the aforesaid debt of £210 sterling, was contracted at Southampton, in England, and that the laws of that country recognise and admit the deposit of a title deed, or contract, or title to property, or other similar document, as constituting an hypothecation or equitable mortgage, even when such deposit is unaccompanied by any written documents, and that the funds from which the sum of £499 sterling (the amount of the policy of Insurance) is payable, are invested in England. Third, that although the right to the amount of the policy of Insurance may have been ceded or transferred to Anne Le Sueur by means of a written document, that cession or transfer took place previously to the '*Décret*' made against the property of her deceased husband. Fourth, that the tenant to the '*Décret*' has put forward no claim and commenced no proceeding to recover the amount of the policy of Insurance, and that neither Le Feuvre, nor Anne Le Sueur, has made any claim in the '*Décret*' to recover the amount of their respective debts. Fifth, that Anne Le Sueur, in accepting the policy of Insurance, could not invalidate or weaken the rights or hypothecations previously acquired by other creditors of Sullivan in such policy, and that she, not having declared herself tenant to the '*Décret*' brought against the property of her deceased husband, cannot allege the existence of the '*Décret*' to demand the nullity of the claim of Le Feuvre. Sixth, that moreover the policy placed in the hands of Le Sueur is only a duplicate, which cannot have the same force and value as the original document, which has always remained in the possession of Le Feuvre. Seventh, that, lastly, it appears that Sullivan only obtained the duplicate from the di-[7]-rectors of the Norwich Union Life Insurance Office by means of false representations. The Court has allowed Le Feuvre to prove the facts set forth in his allegation." The effect of this decision was to allow the claim of the Appellant, subject to his establishing the facts upon which he founded his claim.

The Plaintiff appealed from this sentence to the superior number of the Royal Court.

The inferior number of the Royal Court in the meantime proceeded with the evidence. In taking the depositions of the witnesses, an objection was made to the admission of the evidence of a witness named Newman, on the ground that the order for taking his examination before the officer of the Court was irregular. The judgment of the Court on this point was as follows:—"Upon the objection of the Plaintiff to the admission in the proceedings of the deposition of Newman, witness of Le Feuvre, taken before the Vicomte, by virtue of an Act of the Court obtained at the instance of Le Feuvre, inasmuch as Newman was not in the country when the demand was made to the Court, and never had come there. Inasmuch as by our practice there exist but two cases wherein the Court delegates to the Vicomte the authority to take the deposition of a witness, the case of approaching departure from the island, and that of illness preventing the witness appearing before the Court. In-



asmuch as the Act of the Court by virtue of which the Vicomte was authorised to take the deposition of Newman, was obtained in his absence from the country, who, it is admitted, had never been in it: and that, moreover, it was in the power of the party who called this witness to have made the demand [8] to the Court during his residence in this country. The Court, by the casting vote of the chief magistrate, has decided that his deposition, taken and written down before the Vicomte, cannot form part of the proceedings" (a).

From this sentence, Le Feuvre appealed to the superior number of the Royal Court, and at the request of all parties the suit was at once referred to the superior number of the Royal Court, and was heard by that Court on the 12th of November, 1851, and then stood over to the 19th of the same month, when the Court gave judgment confirming the sentence of the inferior number, which had allowed the intervenor to go into proof of the facts alleged in his claim, and proceeded to hear the arguments on the merits "*sur le fond*." At the hearing, the Plaintiff relied on the assignment to her of the duplicate policy of insurance. She gave in evidence the deed of assignment of the policy of Insurance to herself, in consideration of a sum of £400, but the attesting witnesses were neither of them called, nor was their absence explained, neither was there any receipt or proof adduced of the payment of the consideration money, other than the recital in the body of the deed. The Act of the Court, granting to her separation as regards property from her husband, was produced, by which it appeared that the separation was accorded on the joint [9] application of the husband and wife, and without their cohabitation ceasing. The proceedings on the insolvency of Sullivan were also put in, by which it appeared that he had made *cessio bonorum* in 1838, and that Nicolle became the "*Tenant après Décret*," or assignee, of the insolvent's property under the Jersey law, which allowed the last registered creditor, or, if he declines, such one prior in date as elects to do so, to declare himself tenant, and to take possession of the debtors' estate and effects on his undertaking to discharge the prior incumbrances and claims duly inserted and registered against the insolvent. No claim was made by Nicolle, as such "*Tenant après Décret*" in the suit.

On the 26th of November, the Court pronounced the following sentence:—"Considering, that Le Feuvre has failed in the proof of the facts set forth in his allegation or claim; that the Plaintiff is in possession of the policy of Insurance by virtue of a regular transfer, and, that it is in consequence of the payments made by her to the Insurance Society that the policy has been kept on foot until the decease of her husband: The Court has disallowed the claim of Le Feuvre, and has decided that the Plaintiff is entitled to the amount insured by the policy. Lastly, the Court has received Sullivan, as agent of the Insurance Company, to bind himself to the payment of the sum of £499 sterling, with the profits which may have accrued upon the sum insured, and has condemned Le Feuvre to the costs." The Court on the same occasion confirmed the decision of the inferior number, rejecting the evidence of the witness Newman.

From this sentence the present appeal was brought, and now came on for hearing.

[10] Mr. G. M. Giffard, and Mr. Le Breton, for the Appellant.—Newman's evidence was improperly rejected by the Court.—[The Respondent's Counsel intimated that they offered no objection to its reception.]—Upon the main question at issue, the Royal Court has held that the Appellant was not entitled to recover the amount claimed by him, as he had not established the facts set forth in his allegation. We contend, that the finding of the Court is erroneous, as the Appellant satisfactorily established his right to be paid the sum of £210, with interest, out of the sum payable under the policy of Insurance effected on the life of Sullivan, which he deposited with him for the amount advanced by him. Notice to the Society of the deposit will be presumed, *Gale v. Lewis* (9 Q.B. Rep. 730). In no circumstances can the priority of the Respondent, Anne Le Sueur, under the alleged assignment, prevail against the

(a) The practice of the Court upon this point has since been altered by an Act of the States of Jersey, of the 25th of May, 1852, Art. 6. The admission of Newman's evidence was not objected to by the Respondents at the hearing of the appeal (see *post* [10 Moo. P.C.], p. 10): but in the view their Lordships took of the case, his testimony was of no importance.

Appellant's lien. In the first place, she has entirely failed to establish by evidence in the Court below that the transaction was *bona fide*. No evidence was given to prove that the assignment was duly executed, the attesting witnesses were not called, nor is there any receipt for the consideration money endorsed on the deed, or any payment by her to Sullivan proved; and there is no evidence that this Respondent had any separate estate out of which she could have paid the alleged consideration money; but, secondly, if the assignment was established, she could only claim the amount of the policy of Insurance, subject to the lien of the Appellant, which, by the law of England, where the contract was made, is a charge that has priority over her title, and which law must govern the rights of the parties.

[11] Mr. R. Palmer, Q.C., and Mr. Mackeson, for the Respondents.—No notice was given of the pledge of the Policy of Insurance by the Appellant to the Norwich Union Insurance Society, or to the Respondent, Anne Le Sueur; nothing was known of it by either of them until after Sullivan's death; nor did the Appellant ever register his debt, or the alleged contract of deposit of the policy, under the decree of insolvency of Sullivan. Moreover, the debt and contract of deposit became, by his laches, in not presenting the bill of exchange in due time, and not giving notice of dishonour, renounced and of no effect, by the 40th Art. of the Law of Decree of the 19th January, 1832; the law of England is similar upon this point. *Camidge v. Allenby* (6 Bar. and Cr. 373). A Bankrupt is discharged by his certificate from debts contracted before the bankruptcy, *Edwards v. Rowland* (1 Knapp's P.C. Cases, 265); *Smith v. Buchanan* (1 East, 6). The Respondent's, Anne Le Sueur's, title is complete. The assignment to her of a *chose in action* passed the legal right, 3 Burge's Comm. on For. and Col. Law, p. 547, 551; Terrien's Commentaries, p. 258 (2nd Edit.); the Society was bound by such assignment, *Gale v. Lewis* (9 Q.B. Rep. 730), and did not require registry under the decree of insolvency. By the law of Jersey, after an act of *separation de biens*, a wife is competent to purchase property from her husband, and generally to act as a *feme sole*; they being individually liable for their civil contracts one to another, and to third parties, Terrien's Commentaries, p. 19. Her title was preferable by the civil law. The *dolus* [12] of the cedent does not bind cessionary, 3 Burge's Comm. on Col. and For. Law, p. 549. She gave notice to the Insurance office of the assignment to her of the Policy, and thereby obtained priority over the deposit of the original Policy to the Appellant. That instrument is binding whether the transaction is governed by the law of Jersey or of England. Even if the deposit with the Appellant was proved as required by the law of Jersey, yet it was incomplete for want of notice to the Insurance Society.—[The Lord Justice Knight Bruce: Is there any mode of bringing money into Court in Jersey? The consequence of its not being done in this case has been a loss of upwards of £200, for interest alone.]—The Respondents are in possession of two judgments, and this Court will not reverse them without showing that they are erroneous in law, *Thorn-ton v. Robin* (1 Moore's P.C. Cases, 456).

Mr. Giffard replied.

Their Lordships suggested that the case should be compromised, and intimated that the judgment would be postponed for ten days for that purpose, but if an arrangement was not come to in the meantime, that they would then be prepared to give judgment. The parties not having come to terms, judgment was now delivered by

The Lord Justice Knight Bruce (27th Nov. 1855).—The question in this case is of the right to the benefit of an Insurance effected in the year 1824, by Sullivan, formerly of Jersey, for the sum of £499, on his own life, with the Norwich Union Life Insurance Society. The Policy was, after that year, but before [13] the year 1835, deposited by him with the Appellant, and appears to have continued ever since in the Appellant's possession. It was so deposited by way of security for the principal and interest of a debt due to the Appellant from Sullivan, contracted in England, for a valuable consideration. The deposit was made in England, in which country the Appellant must be taken to have been domiciled when the debt was contracted, and when the deposit was made, and to have been ever since domiciled. The Policy too must be taken in every sense as an English instrument, forming or evidencing an English contract, and it is manifest that as against Sullivan, and all



persons claiming under him with notice of the Appellant's title or claim, or without valuable consideration, the Appellant acquired a lien and charge on the policy and its proceeds for the principal and interest of his debt; a right not displaced nor affected by the suggestion, if true, that notice of the dishonour of the Bill of Exchange, for £210, dated 3rd of February, 1834, was not given to Sullivan, it being impossible to believe that the Bill was accepted by the drawee, John Sullivan, otherwise than merely as the surety of Sullivan for his accommodation. Nor are the *décret* and proceedings of 1838 and 1839, concerning the insolvency of Sullivan, of any materiality. A debtor's person and his general estate before and after his death, may, by bankruptcy, or judicial insolvency, or lapse of time, be effectually discharged or protected from a debt to which property specifically pledged for it, specifically charged for it, or specifically made a security for it, may yet remain liable; and there being no pretence for saying that the Appellant's debt has ever been satisfied, or that he ever [14] agreed or intended to relinquish his charge on the policy, it is clear, that at the death of Sullivan, in the year 1842, the Appellant had an effectual and available lien on the policy and its proceeds for the debt, subject only to the question whether as against him the Respondent, Anne Sullivan, called also Anne Le Sueur, had the title asserted by her under the instrument of the 21st of September, 1835, that she sets up, and that I am about particularly to mention, subject to which question the Appellant has the lien still, and his being the earlier title must prevail, unless she acquired hers *bona fide*, for valuable consideration, and without notice of his title; for if she did, there appears enough in the proved circumstances of the case to render her title preferable. The point for decision, therefore, is, at present, or ultimately must be, this: did she, or did she not, by the instrument of the 21st of September, 1835, become *bona fide* a purchaser of the benefit of the Policy of Insurance for valuable consideration without notice of the Appellant's title? As to which the matter stands thus. She was the wife of Sullivan, but in the year 1834 a judicial separation between them, so far as regarded property, appears to have taken place in Jersey, and in the following year, as there seems reason to believe, he untruly represented to the Insurance Society that he had lost, or mislaid, the Policy, and upon such representation obtained from the Society an instrument which is termed in these proceedings a duplicate, which was possibly intended to be substantially a duplicate, which duplicate he seems, in the year 1835, to have delivered to the Respondent, his wife, or allowed her to take into her custody, and she probably has ever since had, and now has, possession of it. She produces [15] also, and relies on, the instrument of the 21st of September, 1835, already mentioned, which is alleged, and may for the present be assumed, to have been signed, sealed, and delivered by George Francis Sullivan, and is thus expressed—[His Lordship here read the assignment (*ante*. [10 Moo. P.C. 3] p. 3)].—The description in this instrument of the policy purporting to be assigned by it, fits equally the original policy in dispute, and the so-called duplicate, one of which two documents was, doubtless, intended to be designated by it. There does not appear to have been any receipt given for the alleged £400, except that purporting to be contained in the body of the alleged assignment. Nor does there seem to be, as against the Appellant, any proof either of the payment of that sum, or that there was any valuable consideration whatever for the assignment; and, on the other hand, he has not proved that the Respondent, Anne Le Sueur, took it with notice of his title. The premiums on the Policy seem to have been paid by Sullivan down to the year 1834 inclusive, and after that time until his death by him or by his wife, or by both of them. But whether by both, or by which if not by both, I cannot say that my mind is satisfied; while, however, the materials before us render it impossible in our opinion to conclude judicially against the Appellant, that the wife took the assignment *bona fide* without notice of the Appellant's right, and paid or gave a *bona fide* valuable consideration for it. The pleadings and proceedings in this litigation appear to us to have taken such a course in Jersey that it would be unsafe and improper to assume or decide those points at present in her favour, and we conceive that both the Appellant and Anne Le Sueur ought to be afforded [16] an opportunity of going into further proof upon them before the Royal Court. Some such Order, therefore, their Lordships think, should be made as the following:—

Declare that if the alleged instrument of assignment of 21st of September, 1835,

alleged to have been executed by George Francis Sullivan, in favour of the Respondent, Anne Le Sueur, was, in fact, executed by him *bona fide*, and for a valuable consideration, and she took such assignment without notice of the Appellant's title, or claim, under the deposit of the original Policy of Insurance of the 26th of April, 1824, previously made with him by George Francis Sullivan, that her title under the assignment is preferable to that of the Appellant under the deposit, and ought to have effect accordingly; but otherwise her title, or alleged title, ought to be considered as subsequent, and to be postponed to the right of the Appellant to a security by virtue of the deposit upon the proceeds and benefit of the Insurance in question, for the sum of £210, advanced by the Appellant to or for George Francis Sullivan in the year 1834, and the interest thereon.

Declare that the evidence as to the matters of fact upon which the priority or postponement of the Respondent, Anne Le Sueur, depends, is at present defective, and that the Appellant and the Respondent, Anne Le Sueur, respectively, ought to have the opportunity of adducing further proof in respect thereof before the Royal Court of the Island of Jersey. With the above declarations reverse the judgments of the 19th and 26th of November, 1851, and remit the case to the Royal Court to be proceeded with conformably to the said declarations. Let there be no costs of the [17] appeal to Her Majesty in Council, except that if the Appellant's security shall ultimately prevail over the alleged title of the Respondent, Anne Le Sueur, the costs before the Judicial Committee, together with his costs already incurred in the Royal Court, to be added to his security.

Declare that if her title shall ultimately be adjudged preferable to the Appellant's security, her costs hitherto incurred in the Royal Court, by reason of the Appellant's claim, are to be paid by the Appellant.

[Mews' Dig. tit. INSURANCE, A. LIFE, viii. *Mortgage, Assignment and Sale*—  
a. *Validity generally.*]

#### ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Sir THOMAS LE BRETON, Knt., President of the Prison Board of Jersey.—*Appellant*; FRANCIS AUBIN,—*Respondent* \* [July 17, 18, 1855].

The Prison Board of Jersey, constituted by the Order in Council of the 11th of December, 1837, is upon the same footing as Visiting Justices in England, and is not liable to a detaining creditor in damages, for the escape of a prisoner in custody on mesne process for debt, by reason of the negligence of the gaoler, although such gaoler was appointed by the Board, as incident to the management of the gaol.

The question in this case was the liability of the Prison Board in Jersey, to a detaining creditor in damages, for the escape of a prisoner confined for debt in the gaol of Jersey.

[18] The facts of the case were these:—

On the 3rd of May, 1847, one Wake was arrested under a provisional Order for payment of £89 9s. 6d., at the instance of William Gaudin, the administrator of John Wiblin, then absent from the Island of Jersey, and on the 14th of that month he was lodged in the Public Prison of the Island, at the suit of Gaudin. On the 22nd of June following, he was liberated on bail. On the 3rd of August, the bail was withdrawn, and he was taken back to prison. On the 14th of October in the same year, Wake effected his escape from prison through the negligence of one of the turnkeys. Kandich, the gaoler of the prison, crossed over from Jersey to France in pursuit of Wake, but he was not retaken, and the debt for which he was detained

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.



was never paid. The expenses attending Kandich's journey to France were paid by the Prison Board of Jersey.

On the 8th of April, 1848, Gaudin, as such administrator, issued a writ, called an "*Ordre de Justice*," against Kandich, and Edward Leonard Bisson, Lieutenant Bailiff of the Island, then *virtute officii*, President of the Prison Board, for and in the name of the Prison Board, to pay him £89 9s. 6d., with £6 9s. 2½d. costs of the arrest, incarceration, and maintenance of Wake, and £40 for damages for his escape by the fault and negligence of the gaoler. Kandich put in a plea acknowledging that he filled the office of gaoler of the public prison of Jersey, to which he had been appointed by the Prison Board, and alleged that, if Gaudin had a right to the indemnity he claimed, he could not claim it from him, who, in his office of gaoler, acted only as an officer of the Prison Board, which Board was represented in the [19] action by its President, and demanded to be discharged from the action. The President of the Prison Board pleaded that he was not responsible, as the Prison Board could not legally apply the revenue of the prison, the administration of which was entrusted to it, to indemnify the Plaintiff, that revenue being applied by the law to special purposes.

The inferior number of the Royal Court of Jersey, on the 20th of May, 1848, gave judgment as follows:—With regard to the plea of the President of the Prison Board, that "inasmuch as by the Order of Council (11th December, 1837) which constitutes the Board of Management, the government, administration, discipline, and general surveillance of the prison are expressly and particularly committed to it. That consequently it appoints the Governor, as also the turnkeys and other persons employed in the prison, and requires from the gaoler, when he takes the oaths of office, two sureties for the true and faithful discharge of the duties attached thereto. That if the gaoler is thus responsible to the Board of Management, it is this Board which is primarily responsible." With regard to the plea of Kandich, that "inasmuch as the Court, in the actual state of the action, cannot determine whether the wrong complained of by the Plaintiff is, or is not, the result of the fault or negligence of Kandich, nor how far he is responsible to the Board of Management in this matter, the Court rejected the plea."

On the 20th of May, 1848, the Court, at the request of the President of the Prison Board, ordered Hugh Godfrey and James Hammond, the sureties of Kandich for the discharge of his duties as gaoler, to be convened as parties.

[20] The Appellant, Sir Thomas Le Breton, Knt., having become President of the Prison Board, his name was substituted for that of Bisson.

Godfrey and Hammond pleaded that it was too late for them to be made parties to the cause, the same having been commenced in their absence, and judgment pronounced on the merits, and demanded to be discharged from the action. The Appellant pleaded that it was not too late, the Court not having proceeded on the merits of the suit, and not having given any other decision except that which retained in the cause the parties actioned by the Plaintiff.

On the 7th of November, 1848, the Court gave judgment on this point, that "inasmuch as it appears from the proceedings that on the 13th of May last, the question of responsibility was raised and debated: inasmuch as a similar question which affected the merits of the case ought to have been discussed and debated in the presence of all the parties interested, and that in proceeding thus, without previously asking that Messieurs Godfrey and Hammond: Kandich's sureties, should be convened in the cause, the President of the Prison Board has lost and is debarred from the right of guarantee which he might have had against the sureties; the Court, by the casting vote of the Deputy Judge, has released the Messieurs Godfrey and Hammond from the action."

The Defendant, Kandich, then pleaded, that he had not by any fault or negligence afforded grounds for any claims against him for indemnity or damages, either on the part of the Plaintiff or the Prison Board. The Appellant also pleaded, that although Wake was put in prison at the suit of the Plaintiff, on the 14th of May, 1847, for a debt of £89 9s. 6d. sterling, [21] he was afterwards liberated on bail. The Plaintiff replied that he was not bound to answer Kandich's plea, the only cause which could justify a prisoner's escape being superior force used by a public enemy; and by his replication to the plea of the Appellant, alleged that Wake

was lodged in prison on the 14th of May, 1847, at his suit; that Wake was allowed to leave the prison for a short time on bail, but that he was taken back to the public prison by the officer who had first arrested him, and that he was still detained in the public prison at the Plaintiff's suit, when he escaped from the public prison on or about the 14th of October, 1847; in support of which plea he produced the account and receipt of Kandich, for the maintenance of Wake, for the month of October, 1847.

The Court pronounced judgment upon these pleas as follows:—"Inasmuch as it is admitted by the Plaintiff that Wake was in fact liberated on bail, as the President of the Prison Board alleges; that nevertheless, the Plaintiff alleges that Wake was recommitted to the custody of the gaoler previously to the month of October, 1847, by virtue of the first Order issued at the suit of the Plaintiff, and so remained until the time of his escape. Inasmuch as a person detained for debt at the suit of the creditor only pays once for his entry and discharge at the time of his imprisonment though he may perhaps during his detention have been permitted to leave the gaol several times on bail; inasmuch as Kandich's receipt, produced by the Plaintiff, shows that the charges for the maintenance of Wake from the 1st to the 31st of October, 1847, have been demanded and paid, a fact which proves that Wake was still detained in prison at his suit. And inasmuch as even if the gaoler has omitted to [22] enter in the prison registry the re-admission of Wake, this omission cannot prejudice the detaining creditor; the Court has rejected the plea put forward by the President of the Prison Board. And the President having denied the facts alleged in the Order of Justice, and pleaded, that, even if they were true, the detention of Wake was illegal, as Wake could not legally be detained in prison five months under a Provisional Order and without the arrest of his person having been confirmed by the Court; that, therefore, the Plaintiff could have no claim to indemnity; and, having likewise pleaded that, in the event of the facts alleged by the Plaintiff being proved, Kandich is responsible: the Court, without, at this time, pronouncing any decision as to the plea put in by the Plaintiff, that he was not bound to discuss Kandich's plea, ordered that all who had any knowledge of the differences between the parties should be summoned; and that the President should produce whenever called upon, during the pleadings in the cause, both the registry of the debtors confined in the prison, and the book containing the resolutions of the Prison Board."

Evidence was entered into to prove the above facts, the substance of which is mentioned in the judgment of the Royal Court. The Plaintiff however did not produce the Order under which Wake was arrested, or give any evidence of damages.

On the 28th of November, 1850, the Court gave judgment as follows:—"Inasmuch as it appears from the evidence that, at the time of the escape of Wake from prison, he was kept there at the suit of the Plaintiff to enforce payment of the sum of £89 9s. 6d. sterling, which he claimed from him. That the escape of Wake [23] took place on the 14th of October, through want of proper caution. That, according to the regulations of the prison, the gaoler is bound to take all necessary precautions to prevent the escape of the prisoners. That Wake was brought up to the Court on the 5th of June, 1847, to see the confirmation of the arrest of his person, at the suit of the Plaintiff, but the case could not then be called, and he was sent back to prison. That Wake acknowledged the Plaintiff's demand for which he was imprisoned, and declared that he would pay it. That it does not appear that he has at any time requested to be brought before the Court, or that he contested the legality of the claim, or of the arrest and imprisonment of the person, and that it is admitted that, some time before his escape, he was in a bad state of health, and that it was impossible to conduct him to Court; and considering the Act of the 20th of May, 1848, by which the Court has pronounced on the responsibility of the Defendants, and determined the extent of this responsibility. The Court has condemned the President of the Prison Board, for and in the name of the Prison Board, to pay to the Plaintiff the aforesaid sum of £89 9s. 6d., together with £6 9s. 2½d. sterling amount of expenses, for the arrest and imprisonment of Wake, and the costs; and Kandich to guarantee and discharge the Prison Board from the judgment."

From these judgments of the Royal Court of Jersey of the inferior number, the Appellant and Kandich appealed to the Royal Court of Jersey of the greater number.



The Respondent, Aubin, was afterwards appointed administrator of Wiblin, and carried on the suit.

The appeal before the superior number of the Royal [24] Court was fully heard, and on the 10th of December, 1852, that Court delivered judgment, whereby they confirmed the judgment of the inferior number, pronounced on the 20th of May, 1848, on the pleas of the Defendants; and on the appeal against the judgment of the 7th of November, 1848, releasing from the action the sureties of Kandich, the Court "considering that the Appellant had taken no steps to retain those sureties in the cause, and that they were not summoned before the Court to see the Court reject the appeal, were unanimously of opinion there was no ground for entertaining the demand of the said Appellant." And, as regards the merits of the cause upon the main question, the judgment of the Court was as follows:—"In what relates to the Prison Board, considering that it is proved that at the time of the escape of Wake from prison he was detained there at the instance of the Plaintiff, to compel the payment of a sum of £89 9s. 6d., which he claimed from him; that the escape of Wake took place on the 14th of October, 1847, through the means of a want of proper foresight on the part of a man named Diggan, appointed by one of the members of the present Board to perform provisionally the functions of turnkey; that Wake was taken to the Court on the 5th of June, 1847, to see the confirmation of the arrest of his person at the instance of the Plaintiff, but the cause was not then called on, and he was taken back to prison; that Wake admitted the Plaintiff's claim for which he was detained, and declared that he would pay it; that it did not appear that he had since at any time demanded to be presented in Court, or had denied the lawfulness of the demand, or arrest, or detention of his person; and that it was proved that [25] some time before his escape he was in a bad state of health, and that it was impossible to take him to Court. And, considering that the Act of the 20th of May, 1848, confirmed by an Act of the full Court, by which judgment was given determining the responsibility of the Defendants, the Court confirmed the judgment, and rejected the appeal, as far as related to the President of the Prison Board. Therefore the President, for and in the name of the Prison Board, is hereby condemned to pay the Plaintiff the sum of £89 9s. 6d. with that of £6 9s. 2½d. as the costs. And as regards Kandich, considering that he was a stranger to the nomination of the turnkeys, and that it did not appear that there was on his part any negligence or want of foresight, the Court on reconsidering on his behalf the judgment of the inferior number, reversed their decision, and confirmed the appeal; therefore, Kandich was discharged from the action."

From this final judgment of the Royal Court, Sir Thomas Le Breton brought the present appeal, which now came on for hearing.

Sir Frederic Thesiger, Q.C., and Mr. Le Breton, for the Appellant.—The judgment of the Court below is wrong. It cannot be warranted by the customary law of the Island, by any Act of the States, or Order in Council in force there. The Prison Board cannot be held responsible for the safe custody of persons confined for debt. Its duties are defined by the Order in Council, of the 11th of December, 1837, creating the Board, namely, to visit the gaol, to enforce good order and discipline, and control the expenditure. Debtors arrested on mesne process are not committed to the custody of the Prison [26] Board, the members of which are in no way responsible to the parties at whose suit such debtors may be detained. Wake had been arrested by the *Vicomte*, or his Officer, on a provisional Order, and such arrest has never been confirmed. Here the Court below has held the President of the Board civilly liable in a proceeding for negligence, a tortuous act. As a general principle, a master is liable for the neglect of his servant, but not for wilful wrong, as when a gaoler suffers an escape wilfully, *Jones v. Hart* (2 Salk. 441). *Whitfield v. Lord Le Despencer* (2 Cowp. 754). How can the President be indemnified if ordered to pay? What funds has the Prison Board to meet the liability? The Board is not entitled by the Order in Council to any private emolument. The true question was, therefore, in fact not submitted to the Court below. Supposing the gaoler is the servant of the Prison Board, how can that Board be liable in damages for his acts? The Prison Board are like Visiting Justices, or Commissioners in this country: and are in a similar position to trustees under an Act of Parliament, who are not liable for the negligence of those employed under their authority. *Duncan*

v. *Findlater* (6 Clk. and Fin. 894), *Hall v. Smith* (2 Bing. 156), *Boulton v. Crouther* (4 Dowl. and Ry. 195), *Humphres v. Méars* (Man. and Ry. 187), *Harris v. Baker* (4 Mau. and Sel. 27), *Thomson v. Mitchell* (7 Clk. and Fin. 564). By the Jersey Code it is clear that in 1687 the gaoler was the servant of the Crown. The action if well founded should have been brought against the *Vicomte*, who acts as a Sheriff in England does, Le Geyt, "*Sur la Constitution*," etc., Tome IV. p. 119; and [27] was formerly visitor of the gaol, Terrien's Comms., Liv. XII. Ch. V. p. 466 (2nd Edit., Paris). The Court has confounded the distinction between the liability of the Prison Board and that of a Sheriff; the two offices are widely different. In England, the custody of a prisoner is given to the Sheriff by the 14th Edw. II., c. 10; and 19th Hen. VII., c. 10; and he is liable for an escape, and the reason of his liability is, because he is not bound to take a prisoner for debt to gaol, he may keep him in any place of safe custody. By the 4th Geo. IV., c. 64, the Sheriff has the appointment of the gaoler, and as the custody of the gaoler is the custody of the Sheriff, an action at law lies only against him for the escape. *Plummer v. Whichcott* (2 Lev. 159). Moreover, if any such general liability of the Prison Board exists, the Respondent has failed to prove facts essentially necessary to support his case. He has not proved by legal evidence, which was necessary, *Blatch v. Archer* (1 Cowp. 53), the lawful arrest of Wake, his detention, or that at the time of the escape he was in the lawful custody of the Prison Board, or that by reason of the escape he had sustained damages to the amount awarded. Neither has he shown that the Appellant represents the Prison Board.

Mr. Rolt, Q.C., and Mr. Shaw, for the Respondent.—The objection now urged for the first time, that the Appellant does not represent the Prison Board, is too late to be taken advantage of, even if tenable. He is President, *ex officio*, and has been allowed to represent the Board throughout the whole proceedings. Neither was the question of his liability argued in the [28] Courts below. All that is pleaded is, that the Board applies the revenue according to law to special purposes, and that it has not funds to indemnify the Plaintiff, which is similar to the answer of a trustee admitting assets. It is not open for the Appellant now to raise the question of liability. The question then really is confined to this. Is the Prison Board liable for the escape? We submit that the Appellant as representing the Prison Board is liable to indemnify the creditor at whose suit a debtor is confined in the prison against the damage arising from his escape. The Board are managers of the Prison, it has the custody of the prisoners, and receives the fees for their maintenance; having a duty to perform, it is responsible for the escape. The gaoler is appointed by that Board, and the escape by his negligence is the escape by the negligence of the Prison Board. The liability of the Prison Board is similar to that of the Sheriff in England. If the Sheriff has the custody, and the debtor escapes, an action on the case lies against him. *Plummer v. Whichcott* (2 Lev. 158); Comyn's Dig., tit. "Escape" (B. 2), all the authorities are there collected; Atkinson's Sheriff Law, p. 29. In England the Sheriff has the duty of arresting and detaining prisoners, but in Jersey the duty of the *Vicomte*, an office similar in some respects to the Sheriff, is now confined to arresting (1st Rep. of the Jersey Com. p. 170). Le Geyt, "*Sur la Constitution*," etc., Tome IV. p. 118; Terrien's, Comms. Liv. XII. Ch. V. p. 465-6, on the office of "*Gaolier*," shows his duties to be distinct from the *Vicomte*. The cases relating to public trusts cited by the Appellant, do not apply, the rule at common law being, that he who has the custody of a prisoner when an escape takes place is liable.

[29] Judgment was delivered by

The Right Hon. The Lord Justice Turner (July 20, 1855).—This appeal arises out of an action brought in the Island of Jersey, by the representative of Mr. Wilbin, against the gaoler of the Public Prison at Jersey and the then Lieutenant-Bailiff of the Island, now represented by the Appellant, the present Bailiff, who is, *ex officio*, President of the Prison Board there, and the action seeks to recover a debt alleged to have been lost by the escape of Wake, a debtor, together with the sums paid for his maintenance while in prison, and other damages. The Royal Court of Jersey condemned the President of the Prison Board to pay the amount of the debt, with the expenses of the maintenance and the costs of the action, but discharged the



gaoler from the action. The Appellant, as President of the Prison Board, appealed from that decree.

It appears that the Prison Board is constituted by an Act of the States, dated the 27th of December, 1837, passed in pursuance of an Order in Council, of the 11th of December, 1837, which was duly registered in the Island. By the first section of the Act, the Board is constituted of six members, three of whom are members *ex officio*, chosen from the States of Jersey, and the Board elects one of its members to act as Treasurer of the trust funds committed to its charge. The second section provides that the Board is to perform similar duties to those discharged by Visiting Justices in England. Now, looking at all the provisions of the Order in Council, is it not a reasonable inference that the Board thus constituted was to be in a position of Visiting Magistrates in England? They [30] are not liable for the escape of a debtor. There are however other considerations which appear to their Lordships to be decisive of the question. It could not be intended by the Order in Council to cast upon the Board a liability not necessarily arising from any default on their part, without providing them with funds to meet that liability: but no part of the funds can be applied to indemnify the Board against a liability such as the Respondent has contended for. It was argued by the Respondent that an action for escape lies against those who had the custody of a debtor: and here the debtor was in the custody of the Prison Board; for that the appointment of the officers of the gaol being vested in the Prison Board, that Board was liable for the defaults of those whom they had appointed, the more especially so as they appeared to receive the fees and allowances for the maintenance of the debtors, and to have taken security of the gaolers; but whatever may be the general principles of law applicable in ordinary cases, their Lordships do not think that they apply to a case like the present, in which the appointment of the officers of the gaol was vested in the Board merely as an incident of the management of the gaol. The judgment of the Court below, therefore, so far as affected the Appellant, Sir Thomas Le Breton, and the Prison Board, must be reversed. Their Lordships will make no order as to the costs of the appeal, the justice of the case will be satisfied by throwing upon the Respondent the costs incurred in the Island.

[Mews' Dig. tit. COLONY: II. PARTICULAR COLONIES: 13. *Jersey and Guernsey*; b. *Constitution*. As to costs, cf. *Fraser v. Birch*, 1835, 3 Knapp, 380; and see now O. in C. of 13th June, 1853, s. 1 (Stat. R. and O. Rev. iv. 306).]

### [31] ON PETITION FROM THE ISLAND OF JAMAICA.

IN RE SIDNEY LEVIEN \* [Nov. 27, 1855].

A bill of indictment for libel was found at the assizes held for the County of Cornwall, in the Island of Jamaica. The prosecution was a private one. The indictment was afterwards removed by *certiorari* to the Supreme Court of the Island, and tried on the civil side of that Court, when a verdict of guilty was found. Upon motion for arrest of judgment, the Supreme Court suspended judgment, pending an application to the Queen in Council upon certain grounds raised: Upon a Petition for leave to appeal, their Lordships dismissed the petition, declining to interfere or give any opinion on the merits of the case [10 Moo. P.C. 36].

*Quære*—Whether, upon a record so framed, in the absence of a final judgment, an appeal will lie? [10 Moo. P.C. 35, 36].

At the assizes held for the County of Cornwall, in the Island of Jamaica, in the month of July, the Petitioner, Sidney Levien, was indicted for a libel upon the

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

Honourable William Frederick Lewis, the Chairman of Quarter Sessions of the parish of St. James, in that county. The Court which found the bill consisted of the prosecutor and the Honourable Charles Farquharson, and a motion was made at the instance of the prosecutor to remove the indictment by *Certiorari* to the Supreme Court, and for change of the *venue*, on the ground, that a fair and impartial trial and an unbiassed verdict could not be obtained in the county of Cornwall; but the rule for such purpose was, after argument, discharged; and the indictment carried down to the Assize Court of Cornwall for trial. At the instance of the prosecutor, an order was obtained *ex-parte* for a special jury. The Petitioner afterwards protested against the award of a [32] special jury, as being unauthorised by the laws of the Island, and also protested against the striking of such jury, and when struck and impanelled the Petitioner formally challenged the array, and the prosecutor's counsel having demurred to such challenge, judgment was pronounced against the Petitioner, and he was forced to proceed to trial before the jury so impanelled. The indictment and the issues joined therein were tried on the Civil and not on the Crown side of the Court, before the Honourable Charles M. Farquharson, the presiding Judge. At the close of the Judge's charge the Petitioner tendered exceptions, but the Judge adhered to his original directions to the jury, and the jury, under such directions upon the question of law, found a verdict of guilty against the Petitioner. The Petitioner moved the Supreme Court for a rule *nisi* for a new trial, stating special grounds. The motion was made before the Supreme Court, composed of the Honourable Sir Joshua Rowe, the Chief Justice, and the Honourable Charles Miller Farquharson, before whom the indictment had been tried. The Chief Justice delivered the judgment of the Court, refusing the rule on all the grounds insisted on, except that of impanelling a special jury, which, after argument, was held to have been legal, and within the authority of the Court, and the rule was wholly discharged.

Application was then made to amend the record on arrest of judgment, and a motion for that purpose was made before the Supreme Court upon four distinct grounds. First, that the caption of the indictment was defective, and showed the Court improperly constituted before whom the indictment was found; second, for the omission of the allegation that the [33] libel was published falsely and maliciously; third, for that there was no offence charged upon the indictment; and fourthly, that the issues were undisposed of by the jury, a verdict of guilty on the first issue having been returned, and no verdict pronounced on the second issue raised on the plea of justification. Judgment was reserved, and the prosecutor having obtained leave, amended the caption of the record in respect to the ground excepted to on the arrest of judgment. The Supreme Court afterwards gave judgment as follows:—"With regard to the objection raised respecting the caption of the indictment, that has been met by the Court permitting the caption to be amended: there remains, then, three other objections to be disposed of: first, the omission of the words 'falsely and maliciously'; second, that there was no offence charged specifically upon the indictment; and third, that the finding of guilty was only applicable to the first issue, whereby the record was incomplete. The first ground is met by the Jamaica Act, 14th Vict., c. 44, s. 4, which permits these words to be amended at the trial, inasmuch as they need not be proved at the trial; the second objection was not so easily disposed of; no Statute applying: the word 'in,' which creates the difficulty, might be rejected as 'surplusage,' it renders the count nonsensical, ungrammatical, and repugnant to common sense. Now, if this is so, the Court might strike out the word 'in,' or strike out the words 'in a certain part of which newspaper is contained:;' on the authority of *The King v. Stephens*, and the remarks of Lord Ellenborough in that case, and *Wyatt v. Aland* (1 Salk. 324), we think the Court has that power. The count will then be good. The error [34] was clearly a misprision of the clerk; and considering that the Courts of law have hitherto endeavoured to further the ends of justice by doing away with objections merely technical, we think that as the amendment might be made, the objection in arrest of judgment is not tenable. As to the third ground, we think that the verdict is a general verdict, and covers the whole record. The rule in arrest of judgment must, therefore, be discharged."

The Petitioner applied for leave to appeal from this judgment to Her Majesty in Council, and the sentence was by the Court suspended until Her Majesty's judgment in the premises should have been pronounced.



The Petition to the Queen in Council, after setting forth the above facts, alleged that the costs of the prosecution, which by the laws of the Island attach to private prosecutions, had not yet been taxed as against the Petitioner; that the Attorney-General had taken no direct or active part in the prosecution of the indictment, but that the same had been conducted wholly and entirely by private Counsel retained and paid by the private prosecutor in this case; that no writ of *procedendo* had issued transferring the indictment and the record from the jurisdiction of the Supreme Court, and since the removal thereof by writ of *certiorari* into the Supreme Court in the October term, 1854, the same had remained a record of the civil side of the Supreme Court, and had been dealt with by that Court as a record on the civil side of the Court; and the Petitioner prayed that Her Majesty would take his case into Her consideration, and award him such relief as by the laws of Great Britain and of Her Majesty's dependency of Jamaica [35] the Petitioner was entitled to, and that he might be allowed the liberty of appealing to the Judicial Committee, where he was advised that he would be enabled to make manifest that the fundamental principles of law had been wholly disregarded in the Island of Jamaica, in the ruling of the presiding Judge to the jury before whom the indictment was tried, and also in the several judgments, interlocutory and final, that had been pronounced by the Supreme Court, and the several motions made on behalf of the Petitioner in the matter of the indictment and the record of conviction.

Mr. McMahon, for the Petitioner.—The Court below has suspended judgment, which is a substantial admission that the proceedings are erroneous. In such a case an appeal of this nature ought to be allowed. The Royal Instructions, No. 48, provide for appeals in cases of misdemeanor, when the fine imposed amounts to £200. *In re Harvey* (3 Moore's P.C. Cases, 148), *In re Ames* (3 Moore's P.C. Cases, 409), *The Queen v. Alloo Paroo* (5 Moore's P.C. Cases, 296), *The Queen v. Eduljee Byramjee* (5 Moore's P.C. Cases, 276).—[Sir John Patteson: There is no judgment here, and there can be no appeal to the Court of Error in the island upon a criminal case of oyer and terminer. If it was made a record, then by *certiorari* it might go to the Court of Error in the Island.]—The refusal of the *venire de novo* is a judgment. The Statute, 7th and 8th Vict., c. 69, allows any appeal direct, *The Attorney-General of Jamaica v. Manderson* (6 Moore's P.C. Cases, 240), without going to a Court of Error in the Island. There is error in not allowing [36] the challenge of the jury. *Gray v. The Queen* (11 Clk. and Fin. 427). As there is apparent error upon the record, the Petitioner might, in England, by petition of right, bring up the record to Parliament. 4 Inst. p. 21.

The Right Hon. Sir John Patteson.—I cannot see how you are to get rid of the Court of Error in the Island; the Statute, 7th and 8th Vict., c. 69, applies only to Nisi Prius cases. Are you asking any more than the opinion of this Court upon the proceedings taken in this case? How can their Lordships give any opinion? It may be, for aught we know, that judgment has been given in your favour. At any rate you can only bring error upon final judgment. The Court below, if it thought fit, might have given judgment and suspended execution. Again, how can you ask to appeal from all the proceedings if the record is not made up? As at present advised, we can make no order upon this petition—we cannot interfere.

The following Order in Council was made upon the petition:—"The Lords of the Committee, in obedience to your Majesty's Order of Reference, have taken the petition into consideration; and having heard Counsel on behalf of the Petitioner, their Lordships do agree humbly to report to your Majesty that this petition ought to be dismissed."

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to Appeal*. As to special leave to appeal in criminal cases see note to *In re Ames*, 1841, 3 Moo. P.C. 413.]

## [37] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

CHARLES NORTHCOTE,—*Appellant*: The Honourable CAPTAIN GEORGE HENRY DOUGLAS, and FRANCIS HART DYKE, Her Majesty's Procurator-General,—*Respondents* \* [July 26, 27, 30, and 31, and August 1, 1855].

## THE "FRANCISKA." (a)

Where doubts exist with respect to matter which does not appear upon evidence furnished by the ship itself, namely, the papers on board, or the examination of the master and crew, as the existence or non-existence, the sufficiency or insufficiency, of a blockade, a Prize Court will allow further proof, and such further proof is not limited to the claimant, but may be granted to the captor also [10 Moo. P.C. 43].

Whatever may be the demerits of a ship, she cannot be condemned for a breach of blockade, unless, at the time when she committed the alleged offence, the port for which she was sailing was legally in a state of blockade, and was known to be so, by the master or owner [10 Moo. P.C. 44].

The Admiral of the Fleet must be presumed to have carried with him from England, sufficient authority to blockade such of the enemy's ports as he might deem advisable [10 Moo. P.C. 46].

Principles which regulate the right of a belligerent to exclude neutrals from a blockaded port explained.

Relaxation of blockade in favour of belligerents, to the exclusion of neutrals, is illegal [10 Moo. P.C. 48].

*Semble*.—It would not be valid if the same indulgence was extended to neutrals [10 Moo. P.C. 52].

Notice of a blockade must not be more extensive than the blockade itself [10 Moo. P.C. 59].

The existence and extent of a blockade may be so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and such knowledge may supply the place of a direct communication from a blockading squadron, yet the fact, with notice of which an individual is so to be fixed, must be one which admits of no reasonable doubt [10 Moo. P.C. 58].

On the 15th of April, 1854, the Commander of the Baltic fleet blockaded, *de facto*, the coast of Courland but his notice to the British Ministers, including the British Minister at Copenhagen, was of that character, that the impression was, that all the Russian ports in the Baltic were blockaded. The English Government also on that date issued an Order in Council, giving permission up to the 15th of May, for Russian vessels to discharge their cargoes from Russian ports in the Baltic and White Sea to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French Government. And the Russian government by a Ukase allowed the same indulgence to English and French ships. On the 14th of May, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen for Riga, and was captured off Riga by an English ship of war on the 22nd of that month, for a breach of the blockade of that port.

\* Present: The Lord President of the Council (The Earl Granville), the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

(a) This was one of a class of cases, consisting of *The Johanna Maria* [10 Moo. P.C. 70], *Union* [10 Moo. P.C. 73], *Annechina Jantina*, *Steen Bille*, *Vrouw Alida*, *Jeanne Maria*, and *Norren*, taken as prizes for a breach of the blockade of the Coast of Courland. *The Franciska* was selected to try the question of ingress, and *The Johanna Maria* of egress, of the port of Riga. The cases of *The Franciska* and *The Johanna Maria* were argued together.



Held:—First, that the vessel was improperly seized, as there was no legal blockade at the time of the seizure [10 Moo. P.C. 54].

Second, that as the Order in Council must be taken to have extended to British and French ships, and as it relaxed the blockade in favour of the belligerents to the exclusion of neutrals, the blockade was illegal [10 Moo. P.C. 68].

Third, that assuming the blockade to be legal, yet the master of the ship must be fixed with personal knowledge of all that was publicly known at Copenhagen on the 14th of May, and that as the general notoriety, so far as it existed at that time and place, was, that all the Russian ports in the Baltic were blockaded, which was not the fact, the notice, therefore, of the blockade being more extensive than the blockade itself, it was of no effect against a neutral [10 Moo. P.C. 66].

In such circumstances the sentence of condemnation was reversed, and simple restitution decreed, but without costs [10 Moo. P.C. 69].

The *Franciska*, a neutral ship, under Danish colours, was captured on the 22nd of May, 1854, off Lsyer [Lyser] Ort, at the entrance of the Gulf of Riga, for a breach of the blockade of that port.

[38] This ship sailed in March, 1854, from Tarragona, in Spain, with a cargo of wine and salt, the property of subjects of Her Majesty the Queen of Spain, bound for Elsinore for orders, and thence for Lubeck, or some other safe port in the Baltic, not further north than [39] Stockholm or Revel. On the 13th of May, she left Elsinore, and passed the Sound, where she cleared for the Baltic generally, without naming any port, and was captured on the 22nd of the same month, off the entrance of the Gulf of Riga, by Her Majesty's ship *Cruiser*, under the command of the Respondent, Captain Douglas, for a breach of the blockade of Riga, and sent to England for adjudication.

A claim was entered by the Appellant, a ship-broker, in London, on behalf of Jorgen Peter Arboe, of Copenhagen, the sole owner, for restitution of the ship and freight. It was alleged by him that the Master had orders to proceed to Riga, if it was not in a state of blockade; that to ascertain whether it was so or not, he made inquiries at Copenhagen, and also of Her Majesty's ship *Rosamond*, but without effect, and that upon deservying *The Cruiser*, *The Franciska* sailed towards her, with a view of making the same inquiry, when she was captured.

The case was heard on this claim on the 6th of October, 1854, when the learned Judge of the High Court of Admiralty (The Right Hon. Dr. Lushington) admitted the claim, but allowed both the captor and the claimant to bring in further proof, which he directed to be confined to the fact of the blockade only. Further proof was brought in, and evidence entered into at great length by both parties, the material parts of which are mentioned and referred to in the judgment of their Lordships.

On the 27th of January, 1855, the Judge of the Admiralty Court delivered judgment (see judgment reported, *nom. The Franciska and The Johanna*, 1 Spink's Prize Cases, p. 111, where the Orders in Council, etc., are set out), condemning the ship and freight for a breach of blockade; on the [40] grounds, first, that the blockade was notorious at Elsinore on the 14th of May, the day *The Franciska* sailed; and secondly, that the Master had deposed falsely, as in the opinion of the Court he was proceeding to violate the blockade with a full knowledge of the same, and that, under such circumstances, the owner could derive no benefit from the Treaty of Great Britain with Denmark, made in the year 1670.

From this sentence of condemnation the present appeal was brought by the claimant.

The arguments at the hearing of the appeal were chiefly upon these two points:—

First, whether at the hearing of the claim, further proof as to the time at which the port of Riga was put in a state of blockade, ought to have been allowed to the captor. The cases cited upon this question were, *The Henrick and Maria* (1 Rob. 148), *The Haabet* (6 Rob. 54), *The Apollo* (5 Rob. 286).

Secondly, whether upon the further proof there was sufficient evidence that the Port of Riga, if at all in a state of blockade at the time of the capture of *The Franciska*, was in a state of blockade, and so known to be by those in charge of the ship, and if the conduct imputed to them constituted such a breach of blockade which

made the ship liable to condemnation. Upon this point the evidence in the cause was referred to, and the following cases and authorities were cited: *The Courier* (1 Edw. 249, 251), *The Adriana* (1 Rob. 313), *The Vrouw* [41] *Judith* (1 Rob. 150-4), *The Columbia* (1 Rob. 154-6), *The Henrick and Maria* (1 Rob. 146), *The Betsey* (1 Rob. 93), *The Christina Margaretha* (6 Rob. 62-4), *The Frederick Molke* (1 Rob. 86-8), *The Apollo* (5 Rob. 286), *The Tutela* (6 Rob. 177), *The Juffrow Maria Schroeder* (3 Rob. 147), *The Jonge Petronella* (2 Rob. 131), *The Neptunus* (2 Rob. 110), *The Rolla* (6 Rob. 364), *The Charlotte* (1 Edw. 262), *The Hoffnung* (6 Rob. 112), *The Triheten* (6 Rob. 65-7), *The Adelaide* (3 Rob. 281), *The Flad Oyen* (1 Rob. 135), *The Welvaart Van Pillar* (2 Rob. 128), *The Hurtige Hane* (3 Rob. 324-6), *The Nancy* (1 Acton, 64), *Naylor v. Taylor* (1 Moo. and Mal. 207), *The Fox* (1 Edw. 311), 1 Kent's "Comm." p. 147; 1 Kent's "Law of Nations," p. 113; 2 Wheaton's "Elem. of Inter. Law," 238 (3rd Edit.). *Traité de Prize Maritime*, p. 378. Annual Reg. 1793; State Papers, p. 174.

The appeal was argued by Dr. Addams and Dr. Twiss, for the Appellant; and The Queen's Advocate (Sir John Harding), and Dr. Jenner, for the Respondents.

The case, with that of the *Johanna Maria* (post [10 Moo. P.C.], p. 70), involving a similar question of a breach of the block-[42]-ade of the port of Riga, stood over for consideration. Judgment was now delivered by

The Right Hon. T. Pemberton Leigh (Nov. 30, 1855).—In the month of March, 1854, the Danish schooner *Franciska*, Mechelsen, master, was lying in the port of Barcelona in Spain. On the 4th of that month, a charter-party was signed by the master and certain merchants at Barcelona, whereby the ship was hired for a voyage with a cargo of wine and salt, "to Elsinore for orders, and thence for Lubeck or some other safe port in the Baltic, not further north than Stockholm or Revel." Twenty-four hours were allowed for receiving orders at Elsinore, and the captain was to consign his ship, on the passage of the Sound, to Messrs. Ahman and Lindberg, at Elsinore.

On the 14th of March, the master took on board a quantity of wines at Tarragona, and having completed her cargo with salt at Torrevieja, on the 13th of April sailed from that port for Elsinore. On the 13th of May, the ship passed the Sound, where she cleared "for the Baltic" generally, without naming any port. On the 22nd of May, she was seized near the entrance to the Gulf of Riga by Her Majesty's steam-frigate, *Cruizer*, under the command of Captain Douglas, for an alleged breach of the blockade of Riga, and sent home for adjudication. On the 3rd of August, a claim was entered for the ship by Northcote, a shipbroker in London, on behalf of Jorgen Peter Arboe, of Copenhagen, as the sole owner.

On the 6th of October, the case was heard on the claim: when the Judge admitted the claim, but allowed the Proctors on both sides "to bring in further proofs, but only as to the blockade."

[43] Further proofs were accordingly brought in, and on the 27th of January, 1855, the Judge condemned the ship and freight. From this sentence of condemnation the present appeal is brought.

At the hearing of the appeal it was contended by the Appellant:

First. That the ship ought to have been restored on hearing the claim, or that, at all events, further proof ought not to have been allowed to the captors.

Second. That upon the further proof (if properly received) restitution ought to have been decreed with costs and damages.

As to the first point, the course of proceeding to be observed on the original hearing is very clear. In everything that regards the ship and cargo the case is to be considered, in the first instance, exclusively upon the evidence furnished by the ship itself, namely, the papers on board and the examination on the standing interrogatories, of the master and some of the crew. If the case be clear upon this evidence, restitution or condemnation is decreed at once. If upon such evidence the case be left in doubt, further proof is usually allowed to the claimant only, but it may also be allowed to the captors, if, in the opinion of the Judge who hears the case, such a course appears to be required. With respect to matters which cannot appear upon evidence furnished by the ship, as the existence or non-existence, the sufficiency or insufficiency, of a blockade, the Court must necessarily resort



to other means of information. In this case, the ship was labouring under the utmost suspicion. She had no Latin pass, which the Danish Government provides for a ship of that country; she had no paper whatever on board showing the port for which she was bound; she did [44] not appear to have had any communication with the firm of Alham and Lindberg at Elsinore, from which, by the terms of her charter-party, she was to receive orders as to her further destination. The master stated that he had received his orders from Arboe, the owner of the ship, at Copenhagen (who, as far as appeared, had no authority to give any), and that his orders were to proceed to Memel; but if there was no blockade, and if the English war ships would permit him, to proceed to Riga; and that before he was captured he was sailing for Memel. Yet it clearly appeared that he had never steered for Memel at all, but had passed that port without approaching it, and had been captured at the Lyser Ort, at the mouth of the Gulf of Riga.

There was every reason, therefore, to suspect, if Riga was at this time in a state of blockade, that the master had notice of it, and intended to break it; but the existence of the blockade and its legality, as well as the master's knowledge of it, were disputed by the claimant. On reference to the "London Gazette," there appeared to be some confusion as to the time when the blockade had commenced, and under these circumstances the learned Judge allowed "further proof, but only with respect to the blockade, to both parties." Their Lordships are of opinion that he was perfectly right in taking this course.

The second question is, what is the effect of the whole evidence ultimately before the Court?

Whatever may be the demerits of the ship, she cannot be condemned unless at the time when she committed the alleged offence the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner.

[45] The offence imputed to the ship in the affidavit of Captain Douglas, the captor, is, that she was sailing for Riga. "and the Deponent had reason to believe that the fact of the blockade of the Gulf of Riga was known at Copenhagen on the 13th day of May, the day of her departure from that port."

The grounds of the condemnation are thus stated in the judgment: "I condemn this ship, first, because I hold that the blockade was notorious at Elsinore on May the 14th, the day this vessel sailed. Secondly, because the master has deposed falsely, and was proceeding to violate the blockade with a full knowledge thereof. Under such circumstances, he can derive no benefit from the Treaty with Denmark."

It is not contended by the captors that, after the ship sailed from Copenhagen, she received any notice to affect her with knowledge of the blockade, and the questions, therefore, are:—

First. Was the port of Riga on the 14th of May, legally in a state of blockade?

Second. If so, had the master or owner at that time such notice of the fact as to subject his ship to condemnation?

With respect to the evidence on the first point, it is established that on the 15th or 17th of April, (on which of those days it is not material to determine, and there is some discrepancy in the affidavits,) the Admiral did establish, by a competent force properly stationed for the purpose, an effective blockade of the ports of Libau, Windau, and the Gulf of Riga; that, with the exception of the 3rd and 4th of May, on which days all the blockading ships were absent from their stations, the blockade was maintained to a time [46] subsequent to that at which *The Franciska* was seized, and their Lordships agree with the learned Judge in the Court below in thinking, that the Admiral must be presumed to have carried with him from England, authority from Her Majesty's Government to institute such blockade of the Russian ports as he might deem advisable.

But while the Admiral was taking these measures in the Baltic, the English and French Governments were taking measures at home of which he was ignorant, and which it is contended seriously affect the validity of the blockade in point of law.

By an Order of Her Majesty in Council, issued on the breaking out of the war, and dated the 29th of March, 1854, provision had been made for the case of Russian merchant-vessels which at the date of the Order should be in British ports, or which, prior to the date of the Order, should have sailed for any foreign port, bound for any port or place in Her Majesty's dominions; and by another Order

dated the 15th of April, after reciting the former Order as far as regarded the last-mentioned class of vessels, and that Her Majesty, with the advice of Her Privy Council, was now pleased to alter and extend it, it was ordered, by and with such advice as aforesaid, as follows: "That any Russian merchant-vessel which, prior to the 15th day of May, 1854, shall have sailed from any port of Russia situated either in or upon the shore or coasts of the Baltic Sea, or of the White Sea, bound for any port or place in Her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo, and afterwards forthwith to depart, without molesta-[47]-tion; and that any such vessel if met at sea by any of Her Majesty's ships, should be permitted to continue her voyage to any port not blockaded."

It has been held, and in their Lordships' opinion properly held, in the Court below, that the permission given by this Order to export goods from Russian ports in the Baltic and the White Sea, would authorize such exports from places which might at the time be in a state of blockade. Indeed, as it appears to have been the intention of the Allied Powers, as soon as possible after the commencement of the war, to blockade all the Russian ports in the Baltic, any other construction would make the Order almost nugatory. The same construction must, in their Lordships' opinion, be put upon the corresponding *Ordonnance* of the French Government, issued on the same 15th of April, by which Russian vessels bound for any place in France or Algeria were to be at liberty to leave any Russian ports in the Baltic and White Sea before the 15th of May, and pursue their voyage and return to any port not blockaded.

By a Russian *Ukase* issued on the ground of the Orders made by the Allied Powers, six weeks from the 25th of April were allowed to English and French vessels in Russian ports in the Baltic "for taking on board their cargoes, and for an unobstructed departure for foreign ports."

The English Order in Council of the 15th of April had provided only for Russian vessels bound to British ports, and the French *Ordonnance* of the same date for Russian vessels bound to French ports, but by a further French *Ordonnance* dated the 26th of April (containing instructions to French cruisers), free passage was ordered to be given to all Russian vessels loaded in Rus-[48]-sian ports on French account for French ports, or on English account for English ports, up to the 15th of May.

As regards export, therefore, from the Baltic ports, by the effect of these several Ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general Law of Nations, be liable to confiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the Orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the Law of Nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral Powers are entitled to avail themselves of the objection.

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review:—"The argument stands thus: By the Law of Nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of States not engaged in the war. The foundation of the principle is [49] clear, and rooted in justice: for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede; and I should regret to think if any authority could be cited from the decisions of any British Court administering the Law of Nations, which could be with truth asserted to maintain a contrary doctrine."



The learned Judge, after discussing the question how far licences to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades according to the ordinary Law of Nations, and the blockades introduced during the last war by the Berlin and Milan Decrees on the one hand, and the British Orders in Council on the other, and between special licences granted for a particular occasion and licences granted indiscriminately, proceeds, "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case, in these words: "With respect to the present question I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral States ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance." The learned Judge holds that such [50] relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

Grotius expresses himself upon the subject in these terms:—"Si juris mei executionem rerum subrectio impedit, idque scire potuerit, qui advenit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpâ dato."—*De Jure Belli ac Pacis*, lib. iii. c. i. sec. v.

Bynkershoek's commentary on this passage is to the effect that it is unlawful to carry anything, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessities. "*Sola obsidio in causâ est, cur nihil obsessis subvehere liceat, sive contrabandum sit, sive* [51] *non sit, nam obsessi non tantum vi coguntur ad deditioem, sed et fame, et alia aliarum rerum penuria.*"—*Quæ. Jur. Pub.*, lib. i. c. 11.

Wheaton in his "Elements of International Law," vol. ii. p. 228-30, justly observes that this passage in Bynkershoek goes too far, and that a blockade is not confined to the case where there is a siege or blockade with a view to the capture of a place or the expectation of peace. But these passages seem to point to the reason on which this interference with the ordinary rights of neutrals was originally justified.

Vattel lays down the same doctrine:—"Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empêcher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer sans ma permission, ou d'y porter quoi que ce soit: car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par là me faire tomber dans tous les maux d'une guerre malheureuse."—B. iii. c. vii. s. l. 17.

These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In *The Frederick Molke* (1 Rob. 87), he says:—"What is the object of a blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place." In *The Betsey* (1 Rob.

93)—“After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the [52] exportation of the property of the enemy.” In *The Vrouw Judith* (1 Rob. 151)—“A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation.” In *The Rolla* (6 Rob. 372)—“What is a blockade but a uniform universal exclusion of all vessels not privileged by law?” In *The Success* (1 Dods. 134)—“The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded.”

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the Court it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a per-[53]-mission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The Counsel on both sides at their Lordships' bar understood that the learned Judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment: yet if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again, it is not easy to answer the objections which a neutral might make, that the condition of things which alone authorises any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

But the ambiguity in which all these questions are left by the Order in Council of the 15th of April: the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of [54] the blockade in this case. If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral States, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty, whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port; for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de*



*facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence.

Their Lordships have considered the objections to the blockade only as it is affected by the Orders in Council of the 15th of April, which relate to egress from Russian ports, and to this view of the case the argument at the Bar was confined, both before the Judge below and before their Lordships. But it may not be immaterial to advert to the position in which Russian vessels at this time stood with respect to ingress into the Baltic ports, and to consider whether a certain class of such vessels, namely, those which at the breaking out of the war were in British or French [55] ports, were not at liberty to sail with their cargoes for the ports to which they were bound, although such ports might be blockaded.

By the Order in Council of the 29th March, already referred to, it was ordered "that Russian merchant-vessels, in any ports or places of Her Majesty's dominions should be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant-vessels, if met at sea by any of Her Majesty's ships, should be permitted to continue their voyage, if on examination of their papers it should appear that their cargoes were taken on board before the expiration of the above term. Provided, that nothing therein contained should extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited, or contraband of war, or any despatch of or to the Russian Government."

There is here an enumeration of the several particulars which are to exempt a vessel from the Order, and to leave her of course subject to capture as enemies' property. But the attempt to enter a blockaded port is not amongst the exceptions, nor is there any prohibition against entering such port. An enemy's ship commits no offence against the Law of Nations by attempting to elude a hostile squadron and enter a blockaded port; she has a perfect right to do so if she can. She is already subject to seizure in another character, but does not incur any penalty by breach of blockade. If, therefore, her liability to seizure as an enemy is to be removed, but her liberty to sail in security to her port of destination is to be restricted to [56] such ports as may not be in a state of blockade, it should seem that such restriction ought to be specified.

Accordingly, in the next paragraph of this Order, which applies to a different class of vessels, the restriction is specified. Russian merchant-ships which at the date of the Order are on their voyage from foreign to British ports, are to be permitted to unload their cargoes, and forthwith to depart and continue their voyage to any port not blockaded.

By the corresponding Ordonnance of the French Government of the 27th of March, permission is granted to Russian vessels in French ports for six weeks, "*de se rendre directement au port de destination sans qu'ils soient dans l'intervalle susceptibles d'être capturés.*" There is no exception of blockaded ports. By subsequent Orders of both Governments, the period for leaving certain distant ports was extended to six weeks after promulgation of the Order. The same observation which has been made with respect to the cases of egress may be repeated with respect to ingress, namely, that if all the Russian ports were to be blockaded, and if a permission to a Russian vessel to sail to her port of destination was to be subject to a tacit exception of blockaded ports, such permission would be delusive, and hardly consistent with good faith towards the enemy.

No doubt, ships of one belligerent, at the outbreak of war, found in the ports of another, into which they have entered for peaceful purposes, with the expectation of the continuance of peace, form an exceptional class which has a strong claim to an indulgent exercise of the right of capture; and an express permission to such ships to enter their port of destination, though [57] blockaded, might, perhaps, not affect the validity of the blockade. It might fall within the class of cases alluded to by the learned Judge of the Court below, of license granted in particular cases upon special grounds. Such a case is very distinguishable from one where a belligerent, with a view to the interests of his own commerce, permits enemies' ships to bring to him cargoes from their own ports, though he at the same time insists on a blockade of such ports against neutrals.

Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed to the claimant in the Court below from the alleged notoriety of the blockade on the 14th of May, at Elsinore, where the ship touched, and at Copenhagen, where the owner resided.

It is contended by the Appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their Lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt—the mode in which the knowledge has been acquired by the offender, if it [58] be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned Judge of the Court below in this case, and the language of Lord Stowell in *The Adelaide*, reported in the note to *The Neptuneus* (2 Rob. 111), and *The Hurtig Hane* (3 Rob. 324) are conclusive upon this point.

But while their Lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell in *The Rolla* (6 Rob. 367), "in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by distinct intimation from a competent authority it would have been binding; the notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belli-[59]-gerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one: such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

This was distinctly laid down by Lord Stowell in the case of *The Heinrich and Maria* (1 Rob. 148), where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: "The notice is, I think, in point of authority, illegal; at the time when it was given, there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty; and a Commander of a King's ship is not to extend it. The notice is also, I think, as illegal in effect as in authority: it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of [60] Holland



he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion, that if a neutral had contravened the notice, he would not have been subject to condemnation."

The authority of this case is fully recognised by Dr. Lushington in the present case, who observes that such an administration of the law, in protecting the party misled, was most just.

Applying these principles to the evidence before them, their Lordships can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on the 14th of May, on the subject of the blockade; that it was known there that merchant-vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers, which has been already alluded to, and the absence, on the further proof, of any affidavit on the part of the owner denying knowledge of the blockade.

But it is contended by the Appellant that the impression which thus prevailed at Copenhagen (if, in fact, there existed any general impression) on the 14th of May, was, and of necessity from the acts of the belligerent Powers must have been, not that the ports of Libau, Windau, and the Gulf of Riga were blockaded (which they really were), but that all the Russian ports in the Baltic were blockaded, which they certainly were not; and that a notice to be [61] gathered from such erroneous impressions, was, on the principles already referred to, of no effect.

In order to determine the question of fact upon this point, it is necessary to examine with some minuteness the details of the evidence as it applies to Copenhagen at the time when this ship left that city. On the 11th of April, 1854, the Admiral made the following communication to Mr. Buchanan, Her Majesty's Envoy Extraordinary at the Court of Denmark:—

"Duke of Wellington, in Kiøge Bay,  
"April 11, 1854.

"Sir.—I have the honour to acquaint your Excellency, for the information of the Foreign Ministers, Consuls, Vice-Consuls, and Consular Agents residing in the Kingdom of Denmark, that Her Britannic Majesty's fleet will sail this day for the Gulf of Finland, to place in a state of blockade the whole of the Russian ports in the Baltic and in the Gulfs of Finland and Bothnia.—I have, etc.

(Signed) "Chas. Napier,  
"Vice-Admiral and Commander-in-Chief."

On the following day, the 12th of April, Mr. Buchanan published the following circular at Copenhagen: "To Ministers, *Chargés d'Affaires*, and Consuls of all Nations—The undersigned, Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of Denmark, has the honour to inform you that Her Majesty's fleet, under the command of Vice-Admiral Sir Charles Napier, sailed this morning from Kiøge Bay to take measures for placing in a state of blockade all the Russian [62] ports in the Baltic and in the Gulfs of Finland and Bothnia.

(Signed) Andrew Buchanan."

On the 15th of April, a notification of the official communications thus received was published by the Danish Government in the public newspapers.

A letter in the same terms with that to Mr. Buchanan was at the same time sent by the Admiral to Her Majesty's Ministers at Berlin and Stockholm, and the Hanse Towns.

The effect of this letter was communicated on the 14th of April, by Mr. Lloyd Hodges, Her Majesty's *Chargé d'Affaires* to the Hanse Towns, to the Governments of Hamburg, Lübeck and Bremen, and by the Minister at Stockholm to the Swedish Government.

On the 15th of April Lord Bloomfield, the British Minister at Berlin, made a similar communication to Her Majesty's Consuls at Dantzic, Stettin, Königsberg, Memel, Pillau, and Swinemunde.

The effect of these communications was, that the Admiral had sailed with the

British fleet up the Baltic for the purpose of immediately placing in a state of blockade all the Russian ports in that sea, not that he had actually blockaded any.

But by a most unfortunate mistake, Mr. Hertslet, the British Vice-Consul at Memel, announced, not merely that such a blockade had been actually instituted, but that he was ordered by the British Minister at Berlin to make such an announcement.

On the 17th April, he published at Memel in the German language a notice to the following effect: "Memel, April 17th, 1854.—I hereby most respectfully inform the Honourable Corporation of Merchants at this place, that I am ordered by the Royal [63] British Ambassador at Berlin, to make known—That Admiral Sir C. Napier has placed the whole of the Russian ports in the East Sea in a state of blockade.—W. J. Hertslet, Her Britannic Majesty's Vice-Consul."

On the 18th of April, this notice was posted by the authority of the Corporation of Merchants at Memel, on the Royal Exchange of that city, and remained there the two following days.

There is nowhere to be found any public correction or qualification of this most important error. Indeed it does not appear by anybody to have been considered an error as regard d the fact of the blockade. The Admiral himself seems to have considered that he had both established and notified a general blockade. The officers of his fleet might naturally share the impression. Captain Foote and Lieutenant Hall, as is observed in the judgment below, had been in communication with Mr. Hertslet, and he probably made public the impression which he had received from them. There is not the least reason for imputing to him any intentional misrepresentation.

But the important point for consideration is, what impression would these proceedings create on the public mind, and what reports on the subject would be likely, in consequence of them, to circulate through the ports of the Baltic? The belief which they would occasion, as it appears to their Lordships, must necessarily be, that whatever the blockade might be, it was general, and extended to all the Russian ports in the Baltic, and was not confined to a few ports, or to a particular division of the coast.

There is evidence that this actually was the belief created.

[64] On the 21st of April, the Lubeck newspapers contained the following notice: "The closing of the Russian ports, which has now taken place through the blockade of them ordered by the English Government, cannot fail to exercise great influence on the value of Russian produce." On the same day, the Gottenburgh newspaper contained the following notice: "Stockholm, April 21.—It has already been made known at the different places, by the official paper of last Tuesday's post, that the British fleet has proceeded up the Gulf of Finland, and that all Russian and Finland ports have been declared in a state of blockade."

Nothing appears to have taken place which could have been known at Copenhagen, on the 14th of May, calculated to correct this impression. That ships had been warned off from Libau, Windau, and the Gulf of Riga, would in no degree tend to raise a belief that the blockade was confined to those ports, unless the masters of the vessels had been informed that they might proceed to other Russian ports, which does not appear to have been the case. One ship, indeed, *The Frithiof*, appears, by Captain Key's affidavit, to have been permitted, on the 1st of May, "to proceed on her voyage to the Gulf of Bothnia, because that gulf was not then blockaded;" but the ship could not have returned from her voyage, or have made that fact public at Copenhagen, by the 14th. That ships, coming out of the blockaded ports, were warned of the existence of the blockade, was quite consistent with the existence of a blockade of other ports. The earliest document, in point of date, which refers to the blockade of the particular ports, as distinct from the supposed general blockade, is Captain Key's letter [65] of the 12th of May, to Mr. Hertslet, at Memel; but that letter, if its contents had been more material than they are to the point now under consideration, could not have been generally known at Copenhagen on the 14th, the communication between those places, as appears by Mr. Hertslet's affidavit, occupying five days.

But there is conclusive evidence that, long after this period, the individual at Copenhagen, who might be supposed to be best acquainted with the blockade, and



whose authority must carry the greatest weight at that place, namely, the British Minister, supposed the blockade to extend to all the Russian ports in the Baltic, and a letter of Sir Charles Napier, of the 27th May, 1854, seems to show that he was under the same impression.

On the 27th May, the Admiral addressed, from Hango Bay, the following letter to Mr. Buchanan: "Sir.—Many Danish and Swedish vessels have been warned off the coast of Courland, attempting to enter the blockaded ports, pretending that no blockade has been notified. My letter, notifying the blockade, was addressed to Her Majesty's Ministers at Copenhagen, Berlin, Hamburg, and *Chargé d'Affaires* at Stockholm." (It does not appear that any such notification had been made by the Admiral, except by his letter of the 11th of April.) "I have, therefore, to request that you will take steps to make it known, that all vessels, in future, will be seized attempting to break blockade."

On receipt of this letter, Mr. Buchanan, on the 3rd of June, addressed the following note to the Danish Minister for Foreign Affairs:

[66]

"Copenhagen, June 3, 1854.

"*M. le Ministre*,—I have the honour to acquaint you with respect to my note to your Excellency of the 12th April last, that Sir C. Napier, the Commander-in-chief of Her Majesty's naval forces in the Baltic, having established a blockade of all the ports of Russia in that sea and the gulfs of Finland and Bothnia, has reported to me that he has already had occasion to warn off Danish vessels attempting to proceed to some of these ports, and that his Excellency has notified to me, for the information of the subjects of His Majesty the King of Denmark, that vessels attempting in future to violate the blockade which he has established will be seized by Her Majesty's cruisers."

Yet from the Gazette of the 14th of August, it appears that the blockade of the coast of Courland commenced on the 17th of April, that of Helsingfors and some other ports on the 26th of April, that of Revel and other ports on the 20th of May, and that of Cronstadt and others in the Gulf of Finland on the 26th of June, above three weeks after the date of Mr. Buchanan's letter.

It is clear, therefore, that the real state of the blockade could not have been known at Copenhagen on the 14th of May, and that the only notice which the master could receive at that port, at that time, would be, that he must not sail for any of the Russian ports; a notice which, if he had received it from a British officer, he could not, on the principles already stated, be punished for disregarding.

If this view had been presented to the Judge in the argument in the Court below, it is probable that it would have commanded his assent, since he entirely [67] approves of the principles on which it is founded. But unfortunately the argument before him took a different direction. The contention then appears rather to have been, that there had been no blockade of any Russian ports which could have been known at Copenhagen on the 14th of May; and that if any knowledge, however accurate, had been acquired by the master, through the channel of notoriety, it would not have formed a legal ground of condemnation for an attempt to enter a blockaded port. At all events their Lordships have the satisfaction of believing that the conclusion at which they have arrived upon this point is not opposed to the authority of the eminent Judge whose decision they have to review.

But further, although the Government and commercial classes of Denmark could hardly have been ignorant on the 14th of May, that the commerce of neutrals had been subject to interruption, and that Captains of British ships of war had interfered with their vessels, on the allegation of a blockade of Russian ports, there were not wanting circumstances which might reasonably excite grave doubts, whether any such blockade had been established with sufficient authority, or would ultimately be recognised by the British Government.

In the first place, the intention to blockade had been duly notified to the Danish Government, and they might naturally expect that as the British Government, on the one side, and the Admiral on the other, had means of easy and rapid communication with Copenhagen, any measure so seriously affecting their trade as the actual blockade of any of the Russian ports, would be forthwith intimated to them in the same authentic manner. It now appears why this was not [68] done, namely, that the Admiral considered the notification of the 11th April, as equivalent to notice of

actual blockade, but of this of course the Danish Government could not have been apprized.

Besides this, they would see that, by the British Order in Council, and the French Ordinances of the 15th of April, issued subsequently to the notification by the Admiral of the intended blockade, a certain degree of commerce—which, if the ports were blockaded, would expose neutrals to confiscation—was permitted to Russian ships up to the 15th of May: they would observe that no such permission was given to neutrals: and they would not unreasonably infer that such permission was not granted only because it was not required: that the permission was granted to Russians because they would be liable to capture, whether the ports were blockaded or not; that it was not extended to neutrals, because, there being no blockade, there would on their part be no risk: and this impression would be confirmed by observing that, in the permission to Russian ships in the ports of the allies to proceed on their voyages, no reference is made to blockaded ports as either included in or excluded from such permission.

Again, it might be known at Copenhagen that the rumours of blockade which prevailed were, to a certain extent at all events, so far unfounded that many of the ports which were said to be closed were, in truth, open: that as to the coast of Courland itself, there had been for two days no ships of war upon the blockading station, and that on those days and the day following a very large number of ships were reported at least, whether truly or not, to have entered Riga.

Their Lordships cannot but think that these con-[69]siderations might with great justice affect the credit of any reports in circulation at Copenhagen, and create a not unreasonable doubt whether any blockade of Russian ports had yet been established by a competent authority: and they go far to explain much of the testimony which might otherwise be fairly open to severe animadversion. There has been much confusion and perplexity with respect to this blockade; there are, as usually happens in such cases, some inaccuracies and errors in the evidence on both sides, but their Lordships are not inclined to attribute to the statements of the witnesses, or the certificate of the merchants, which has been produced on the further proof, any wilful distortion or concealment of the truth.

The view which their Lordships have taken of this part of the case makes it unnecessary for them to advert to the many other important points which were argued at their Bar. They must advise a restitution of the ship (or rather of the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party.

[See *Schacht v. Otter, The Ostsee*, 1855, 9 Moo. P.C. 150, and note thereto. S.C. 8 St. Tr. (N.S.) 350; and separate report of the proceedings before the High Court of Admiralty by Deane.]

## [70] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

CHARLES TOTTIE.—*Appellant*; EDMUND HEATHCOTE and FRANCIS HART DYKE, Her Majesty's Procurator-General,—*Respondents* \* [August 1, 1855].

### THE "JOHANNA MARIA."

Condemnation of a neutral ship for a breach of the blockade of Riga. The ship having come out of the blockaded port with a full knowledge of the blockade. Ship condemned, without costs of appeal, on account of the laxity of the blockade.

\* Present: The Lord President of the Council (the Earl Granville), the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.



The circumstances in this case which led to the capture of the ship, differed from those of *The Franciska* (*ante* [10 Moo. P.C.], p. 37), in this extent. The *Johanna Maria*, a neutral ship, belonging to a subject of Sweden, under Norwegian colours, took on board at Stavanger, a cargo of herrings, and sailed therewith on the 5th of May, 1854, bound for Riga, where she arrived on the 20th of that month, and discharged her cargo, and then took on board a return cargo of rye and hemp, and sailed from Riga on the 24th of May, bound for Elsinore for orders, destined for a Norwegian port, and in the prosecution of such voyage was captured on the following day, about eight miles off Lyserort, at the entrance of the Gulf of Riga, by Her Majesty's ship *Archer*, the Respondent, Edmund [71] Heathcote, Esq., Commander, and brought to England for adjudication.

On the 19th of July, a claim was entered for the ship by the Appellant, the Swedish Consul-General, on the part of the owner, Christian Lindtner, of Stavanger, Norway.

After the admission of further proof by the captors and claimant, the ship and cargo were condemned by sentence of the High Court of Admiralty, dated the 3rd of February, 1855, for a breach of the blockade of Riga with a full knowledge by the master of the blockade. From that sentence the present appeal was brought.

Dr. Addams, and Dr. Twiss, for the Appellant; and The Queen's Advocate (Sir John Harding), and Dr. Jenner, for the Respondents.

The arguments were to the same effect as those advanced in the case of *The Franciska*. The authorities referred to, were *The Rolla* (6 Rob. 364); *The Juffrow Maria Schroeder* (3 Rob. 147), *The Neptunus* (2 Rob. 110).

Judgment was delivered at the same time (30th Nov., 1856) as in the case of *The Franciska*, as follows, by

The Right Hon. T. Pemberton Leigh.—This vessel entered Riga on the 20th of May, after all difficulty arising from the Order in Council of the 15th of April had been removed. She came out again on the 24th of May, having taken on board a cargo, [72] with a full knowledge of the existence of the blockade at the time of loading, and in the expectation, as it is said, that the worst that could happen would be that she would be sent back by the British ships forming the blockade, to unload her cargo.

The only ground on which she could ask to be relieved from condemnation would be, that the letter of Sir Charles Napier, of the 27th of May, 1854 (*ante*, [10 Moo. P.C.] p. 65), and the subsequent announcement by the British Government in the London Gazette, of the 14th of August, would be sufficient to annul all that had previously taken place, and, in the principles laid down by Lord Stowell, in *The Rolla* (6 Rob. 368), to postpone all penalties for breach of blockade till after the 28th of May.

Their Lordships, however, are of opinion, that such a judgment would carry the doctrine referred to further than either the decision itself or sound principle would warrant. In that case, Lord Stowell observed that the blockade had been very lax: that several vessels had been permitted by the blockading squadron to enter, and the observations relied on must be understood with regard to the circumstances out of which they arose. In this case, from the 5th of May, there had been an uninterrupted blockade; no single instance has been produced in which any vessel had been permitted by any of the blockading ships to enter the port; nor had any been permitted to come out after the 15th of May, with cargoes subsequently loaded. There is clear proof of a *de facto* blockade; full knowledge of it by the master, and nothing which could mislead him as to its extent or effect. The usual consequences must, therefore, follow, and the [73] sentence below be affirmed, but without costs of the appeal.

By respective Orders in Council the sentences in these cases, as well as the sentences relating to the condemnation of their cargoes, were reversed, and simple restitution decreed.

[Mews' Dig. tit. WAR; 3. PRIZE OF WAR; a. *Rights as to*. See note to *Schacht v. Otter*; *The Osteen*, 1855, 9 Moo. P.C. 150.]

## THE FRANCISKA.

A ship and cargo taken as prize having been condemned by the Admiralty Court, was sold under a decree of that Court, pursuant to the Prize Act, 17th and 18th Vict., c. 18, s. 26. The decree was reversed by the appellate Court, and simple restitution decreed.

Held: that as the captors were *bona fide* in possession during litigation, they were entitled to the rights, allowances, and incidents attaching to such possession, and that the claimants were only, upon simple restitution, entitled to the nett proceeds of the sale, after deducting from the gross proceeds the Marshal's charges, consisting of (1) expenses of sale, (2) reasonable expenses for the care and custody of the property pending adjudication, and (3) for pilotage, lights, and other dues, incurred in bringing the ship to England [10 Moo. P.C. 92].

Practice in former wars in such cases [10 Moo. P.C. 90-92].

A further question arose in the cases of *The Franciska*, and the ship *Union*, which had been also seized by *The Crusier* for a breach of the blockade of Riga, and condemned; but in accordance with the decision in *The Franciska*, the sentence of condemnation had been reversed; whether the claimants upon the reversal of such sentences were entitled to the gross proceeds of the sale, or only to the nett proceeds, after deducting the Marshal's charges.

It appeared that after their condemnation as prizes by the Admiralty Court, the ships were, upon the petition of the Queen's Proctor, in pursuance of the Act, 17th and 18th Vict., c. 18, s. 26, decreed to be appraised and sold. The sales were accordingly effected by the Marshal as directed by that section, and the gross proceeds were paid by him, to the account of the Paymaster-General, into the Bank of England. Subsequently, the Marshal brought in his account of charges in each case, which being taxed, an order was made under the provisions of the 28th section of that Act, for the payment out of the proceeds then in the hands of the Paymaster-General. The Marshal's [74] charges were of three descriptions: First, those which related exclusively to the charge for advertising, sale, for printing and distributing inventories, for use of Lloyd's room, appraising, commission of sale, etc.; secondly, those which related to the care and custody of the ships and cargo, pending adjudication, the charges for possession, dock dues, warehouse room, etc.; and, thirdly, those which were incurred in bringing the ships and cargoes to this country, for Pilotage, Trinity lights, Ramsgate dues, etc. The Registrar received from the Paymaster-General the proceeds realised by the sale, on account of the prizes and their cargoes less the Marshal's claim for fees and disbursements; which the claimants refused to accept, insisting on their right to the gross proceeds of the sales.

The claimants now moved (12th April, 1856 \*) for payment to them of the amount of such gross proceeds.

Dr. Addams for the Claimants.

The Queen's Advocate (Sir John Harding), for the Captors, opposed,—Submitting that the question was one rather between the officers of the Court and the claimants, than between the claimants and the captors.

At the conclusion of the argument their Lordships reserved judgment, the question being, in their opinion, one of considerable importance, and as such, they deemed it requisite to see whether there were [75] any authorities upon the point. They referred the matter, therefore, to the Registrar of the Court, in Ecclesiastical and Maritime causes, to examine into and report upon the practice in such cases prevailing during the last war in this respect, upon the question, whether any and what deductions were allowed from the gross proceeds of property sold in cases of simple restitution. The Registrar having made his report (a),

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

(a) As the report of the Registrar contains a very full and valuable account of the practice in former wars upon this point, the Reporter, thinking that it would be acceptable to the profession, has obtained permission of the Registrar to print it.



## [76] Judgment was delivered by

The Right Hon. Sir John Patteson (1st July, 1856).—In these cases, the ships and cargoes having been condemned by the Court of Admiralty, appeals were [77]

The report, after setting forth the above facts, proceeded as follows:—"The fact which I am directed to ascertain is, whether in former wars, any, and, if so, which of these charges were allowed as deductions from the gross proceeds in cases of simple restitution on appeal.

"It will not be unimportant to examine, in the first place, what was the practice in former wars, in regard to the care, custody, and sale of prizes, and in what respect that practice was altered in the late war, by the provisions of the Prize Act. (17th and 18th Vict., c. 18.) In all previous wars, prizes, when captured by commissioned vessels during hostilities, were left, pending adjudication, in the custody of the captors; the prize master and crew, who had brought the vessel to port, frequently remaining on board and taking care of her until she was either condemned or restored. On the breaking out, however, of the late war with Russia, it was thought better that the practice prevailing in the United States of America, in this respect, should be adopted, and that the prizes should, immediately upon their arrival in port, be placed for safe custody in the charge of some public Officer. Accordingly, the 15th Section of the Prize Act directed that all prizes which shall be brought within the jurisdiction of the Court of Admiralty, shall be forthwith delivered up to, and remain in the custody and care of, the Marshal, his substitute, or other Officer to be appointed by the Court, or if there be no such Officer, then shall be delivered up to the Collector or Comptroller, or other principal Officer of the Customs, or of Navigation Laws, at such port, and shall remain in such custody and care, subject to the decree of the Court.

"This transfer of the prize, pending adjudication, from the custody of the captors to that of an Officer of the Court of Admiralty, necessarily led to another very important alteration. In former wars, upon the condemnation of any prize, it was the captor, or, rather, his agent, who sold it. But under the present Prize Act, it is the Marshal who is directed in all cases to effect the sale. The 26th Section of the Act provides that, whenever any ship, vessel, goods, or merchandise, has been condemned as prize, in the Court of Admiralty, the Judge of the Court shall forthwith direct the same to be appraised and sold by the officers of the Court, or by persons authorized by the Court for that purpose, and the proceeds thereof to be paid to the account of Her Majesty's Paymaster-General on account of naval prize.

"Some prizes, indeed, there were even during former wars, in which sales were effected by the Marshal, as when the property was condemned as Droits of Admiralty, or when it was sold *pendente lite*, in consequence of its being in a perishable condition; but such cases were, comparatively speaking, rare. When a prize was sold, it was generally through the instrumentality of the prize agent. It is important to bear this distinction in mind, as it will explain why it has not been possible to find any case exactly similar to those of *The Franciska*, and *The Union*; that is to say, any case in which the prize, after having been condemned, has been sold by the Marshal, and where the proceeds have been ordered to be restored on appeal; for if the prize had been condemned, the captors' agent, and not the officers of the Court, would have effected the sale thereof. I shall, however, bring before your Lordships cases as nearly similar as the altered practice of the Court will allow. I shall bring before you cases in which the sale has been effected by the Marshal, and shall show you the deductions which have in such cases been usually made by him from the proceeds. And I shall also bring before you cases in which the prize has been first condemned, and then restored upon appeal, where the sales have been effected by the captors, and where they have been called upon to bring in account sales on oath, and where the deductions which they have claimed to make from the proceeds have been objected to by the claimants.

"First, then, as to sales effected by the Marshal under an order of the Court.

"In the middle of the last century, a curious practice existed in regard to sales effected under an Order and by the Marshal of the Court,—the practice of making, not only the expenses of the sale, but all incidental charges, and even the costs of the

entered and prosecuted, and their Lordships reported to Her Majesty, that the sentences of the Court of [78] Admiralty ought to be reversed, and that the ships and cargoes in question ought to be restored, or the [79] proceeds arising from the sale thereof paid to the claimants for the use of the owners and proprietors [80] thereof. These reports were duly confirmed by Her Majesty in Council.

proceedings, form part of the price. That this was the practice, at least in some cases, appears clearly from Marriotti's Admiralty Reports, for the period from Michaelmas term 1776 to Hilary term 1779; at page 142 of which we find the case of *The Frow Antoinette*, in which the Court ordered that certain goods 'should be sold for His Majesty's use, to persons to be authorized, on a fair valuation by merchants; the carrier to be paid his freightage and all incidental charges by the buyer; and the money to be paid to the claimant or captor, whosoever should finally have the property.' Again, at page 170, of the same Reports, in the case of *The Concordia Affinitatis*, the Court directed a portion of the cargo 'to be sold for His Majesty's use at a fair valuation by merchants; the freight and expenses of proceedings to make a part of the price, and the money to be brought into the Registry, for the use of the parties who should finally obtain the property upon a further hearing.' At page 235, in the case of *Le Perlan*, the Court ordered the cargo to be sold for the use of His Majesty's navy, upon a valuation by merchants named on each side, for the profit of the claimants, all expenses on both sides to be charged to the buyer.' And again, at page 287, in regard to the cargoes of certain Dutch store ships, it is stated that 'all freight and expenses were to be charged to the buyers, and the money to be brought into Court for the benefit of all parties who should be proved to have right.'

"Now, I need hardly observe that the effect of such a practice must have been to throw the whole of the expenses upon the proceeds, so that they would be payable by the captor in the event of a condemnation; by the owners in the event of a decree of restitution ensuing. No constat of these expenses would appear amongst the records of this office, as they would naturally be settled out of Court by the purchaser.

"The inconvenience, however, attending such a mode of sale must have been very great, and must necessarily have had the effect of narrowing the circle of purchasers to those only who could form a pretty accurate estimate of what the expenses would amount to. Whether or not this course was adopted, in regard to all sales effected at that period, under a decree of the Court, or when in fact the practice was altered, I have not thought it necessary to inquire. Suffice it to say, that from the early part of this century, it was the invariable practice of the Marshal, in all sales effected by him under an order of the Court, to deduct the expenses of the sale and all charges which he might have against the property, from the gross proceeds, and to pay the nett proceeds only into the Registry.

And, if the deductions thus made by him were improper, or his charges extravagant, a monition could be taken out against him on the part of any person interested in the proceeds, calling upon him to bring into the Registry the amount improperly deducted by him. In the Appendix to this report will be found the account sales in a number of cases, in which the sales were effected by the Marshal under orders of the Court, between the years 1804 and 1816; and in every one of these cases the amount paid in by the Marshal, as appears by our books, was the nett and not the gross proceeds.

"The practice of permitting the Marshal to repay himself all his charges and disbursements out of the gross proceeds, and of bringing in only the nett amount of proceeds, prevailed in the Court of Admiralty from the time to which I have referred down to about the end of the year 1853, when it was thought better that the Marshal should, in the first place, pay in the whole of the gross proceeds, and that the amount of his charges and disbursements should, after taxation, be paid out to him. It was thought that the Marshal ought not to be the Judge, even in the first instance, of what charges were and what were not proper to be retained by him out of the proceeds, and accordingly the practice was, with the sanction of the Judge, altered in this respect. Hence, in all the sales effected by him, under the present Prize Act, it has been his practice to pay to the account of the Paymaster-General at the Bank of England, the amount of the gross proceeds, and to receive thereout, under an



[81] Questions now arise and have been discussed before their Lordships. First, whether the gross proceeds [82] of the sale ought to be paid to the claimants, or whether the nett proceeds only should be repaid, after [83] deducting the Marshal's charges; and, secondly, if the nett proceeds only ought to be paid, what deductions from the gross proceeds ought to be allowed.

order of the Court, the amount of his charges, after they have been taxed and allowed by myself, in accordance with the provisions of the 28th section of the Prize Act. This is the course that was adopted, not only in regard to the cases of *The Franciska* and *The Union*, but in regard to all the prizes which have been sold during the late war by order of the Court.

"It should, however, not be forgotten, that the amount remaining in the Paymaster-General's hands, after payment of the Marshal's charges, is, in fact, the sum which the Marshal would originally have brought in, before he was precluded from deducting his charges from the proceeds. Your Lordships will perceive, by an examination of the account sales, printed in the Appendix hereto, what was the general character of the charges which the Marshal was in the habit of deducting from the proceeds, and how far they resemble the charges in the cases of *The Franciska* and *The Union*.

"I now proceed to call your Lordship's attention to the sales effected by the captors or their agent, upon condemnation of the property to them. And, first, let me observe, that the practice of selling a prize after condemnation, even though an appeal had been entered from the decree of the Court below, was almost invariably adopted in former wars. It was considered to be more for the interests of all parties concerned, that the property should be sold, than that it should remain under arrest, necessarily at a heavy expense, to become, as Lord Stowell expressed it, 'food for the worms.' The minute usually entered on the occasion of an appeal being entered, *apud acta*, from a decree of condemnation, was as follows.— \* \* With all due reverence protested of a grievance and of appealing. The Judge assigned the captors to bring in account of sales on oath, and directed the sentence not to be suspended on bail being given to answer the appeal. The assignation Books of the Admiralty Court, for past wars, are filled with similar minutes.

"First, then, I would observe that there is a clause to be found in all the Prize Acts passed during the wars, from 1793 to 1815, but which, from some cause or other, was not inserted in the late Prize Act, that of 1854. It is in the following terms:—'Provided always, and be it further enacted, that in case the sentence or interlocutory decree, having the force of a definite sentence of such Court of Admiralty or Vice-Admiralty, shall be finally reversed after sale of any ship or goods, pursuant to the directions in this Act contained, the nett proceeds of such sale (after payment of all expenses attending the same) shall be deemed and taken to be the full value of such ship and goods, and that the party or parties appellate and their securities shall not be answerable for the value beyond the amount of such nett proceeds, unless it shall appear that such sale was made fraudulently or without due care.

"This section will be found in all the Prize Acts passed from 1793 to 1815: the references to it are as follows:—33 Geo. III., cap. 66, sec. 32 (1793); 43 Geo. III., cap. 160, sec. 29 (1803); 45 Geo. III., cap. 72, sec. 44 (1805); 55 Geo. III., cap. 160, sec. 41 (1815).

"In the present Prize Act, however, no such clause is to be found. How this came to pass, I am unable to say. It may have been omitted *per incuriam*, or, more probably, it may have been thought better to leave the Court of appeal wholly unfettered in its discretion as to the degree of restitution which it might think proper to grant, and as to the deductions which it might or might not think proper to allow from the value of the property in such cases.

"To return, however, to the practice in previous wars;—the words of the section, quoted above, 'the nett proceeds of such sale (after payment of all expenses attending the same),' would certainly seem to imply that the expenses of the sale only, and not those relating even to the care and custody of the property, were properly chargeable against the proceeds in cases of this description; and I think that I shall be able to show that up to about the year 1805, this was the admitted practice

[84] These questions must have arisen during former wars, but as no direct decisions upon them were to be [85] found in the printed reports, their Lordships ordered that search should be made by the Registrar into the [86] books of the Admiralty Court, in order to ascertain what had been the practice in such cases in former wars, and that the Registrar should report thereon.

of the Court in cases of this description; but that the question then, and subsequently, underwent very full consideration from the Lords of Appeal, and that very important alterations were made in regard thereto.

"It is, indeed, much to be regretted that questions of this description, which are of the greatest importance to the parties interested in the proceeds, were not, in former times, thought worthy of being reported; so that, throughout the volumes of Admiralty Reports, no one case is to be found bearing directly upon the question at issue, namely, as to what charges are or are not proper to be deducted from the gross proceeds in cases of simple restitution on appeal (although it can hardly be supposed that the subject was not frequently brought under the consideration of the Lords of Appeal). Allusions are indeed made to the subject in several places; as in the first volume of C. Robinson's Reports, p. 187, where there is an Order of the Court dated the 3rd of July, 1799, one clause of which is in the following terms:— 'That the Commissioners and Marshal bring in the proceeds which have been collected, at the same time with their returns; and that if the whole proceeds have not been collected, they retain only such sums as may be required to answer accruing expenses.' There is also the case of *The Narcissus*, Moulton, reported in the fourth volume of the same reports, p. 17, where the expenses of sending a cargo from Bermuda to Europe were decided to be not chargeable to the claimant on restitution. There is also the case of *The Industrie*, reported in the fifth volume of the same reports, p. 90, where the expenses of the unlivery and appraisement of a cargo were held to be a charge on the property. And in a note to that case, at the same page, it is said, 'In the case of *The Peggy*, March the 8th, 1804, a similar decree was made, that the captor should be liable to the Marshal for the expenses of appraisement and unlivery, but that he should be considered to have a demand against the goods for such expenses, to be charged rateably on all the property restored.' And there is also the case of *The Frau Maria*, reported in the second volume of the same reports, p. 292. I must also not omit to mention the case of *The Rendsberg*, reported in the sixth volume of the same reports, p. 142, where the Marshal's fees were very fully considered by Lord Stowell.

"I do not, however, cite these cases as being in point, for they are not so. The utmost that they prove is, that the Marshal has a claim against the proceeds for the amount of his charges, or, if the proceeds be insufficient, then against the captors. But neither of these cases are cases of simple restitution on appeal, like *The Franciska* and *The Union*.

"It is, however, amongst the old records of this office that cases of this description are to be found; and by good fortune I have discovered three leading cases, which, although unreported, appear to have undergone the very fullest consideration from the Lords of Appeal and which I shall have the honour to lay before you. The disadvantage, however, of referring to an unreported case is this, that we have no means of knowing what fell from the Court on the occasion of its finally disposing of the case, further than what appears from the formal words of the decree; nor can we say what general principles the Court may have laid down, or how far it may have been induced to deviate from those principles by the special circumstances of the case. Such as they are, however, they are submitted to your Lordships' consideration.

"First, then, I would observe that upon a decree of condemnation being reversed upon appeal and restitution decreed to the claimant, it was the practice to call on the captors, by whom the property had been sold, to bring in the proceeds, together with the account sales, on oath. If the owners were satisfied with the accounts as furnished by the captors, they received out the proceeds in satisfaction of their claim; but if, as frequently happened, the owners were not satisfied with the deductions claimed to be made by the captors from the proceeds, the accounts were referred in the usual way to the Registrar and merchants to report the amount due.



[87] Mr. Rothery, the Registrar, has accordingly made diligent search, and has furnished their Lordships with an elaborate and highly valuable report.

[88] It must always be borne in mind that these cases are cases of reversal on appeal, decreeing simple [89] restitution of the property or its proceeds. The captors are, therefore, treated as being *bona fide* in posses-[90]-sion of the property,

The report of the Registrar and merchants when brought in could be objected to by either party, and the question would then be decided by their Lordships. The cases to which I am about to refer you are cases of this description.

"The first case to which I will call your Lordships' attention is that of the *Catherina Maria*, captured by the private ship of war *General O'Hara*, on the ground of her having enemies' goods on board. The vessel was accordingly taken to Gibraltar, and proceedings having been instituted against the cargo in the Vice-Admiralty Court there established, the same was, on the 27th of July, 1797, condemned as prize, and was thereupon sold by the agent for the captors! An appeal was, however, prosecuted against the decree to the Lords Commissioners of appeal in Prize Causes, and on the 17th December, 1802, their Lordships reversed the judgment of the Court below, pronounced the cargo to have belonged as claimed, decreed the same to be restored, or the value thereof paid to the claimant for the use of the owners and proprietors thereof. The captors were then monished to bring in the account sales on oath, which they did, showing deductions from the proceeds, not only of the expenses of unlading the cargo, selling and measuring it, etc., but also of the Court fees and proctor's charges, and of a commission to the agent himself of five per cent on the gross proceeds, and making the nett proceeds to amount only to the sum of seven hundred and nine pounds nine shillings and fivepence (£709 9s. 5d.). These accounts were, of course, objected to by the owners, and were accordingly referred to the Registrar, assisted by merchants, who on the 22nd of July, 1803, reported the sum of one thousand and thirty pounds one shilling (£1030 1s.) to be due to the claimant. In the Appendix hereto, will be found a copy of the account sales brought in by the captors, as also the Registrar's report with schedule annexed, and by a comparison of these two documents, it will be seen that the only deductions allowed by the Registrar and merchants were the expenses of the sale and the freight, which was necessarily a charge on the cargo. By the subsequent proceedings in the cause it appears that a monition issued against the master of the privateer, the two owners, and the bail given on their behalf, to bring in the said sum of one thousand and thirty pounds one shilling (£1030 1s.), and that this amount was subsequently brought into the registry by the privateer's agent, and was then paid out to the claimant.

"The next case is a very important one, and occurred a few years afterwards: it is that of *The Falk*, a vessel which was captured by H.M.S. *Brunswick*, on the ground of her having enemies' goods on board, and was carried to Jamaica for adjudication. The ship was restored and freight was ordered to be paid to the neutral master, but the cargo was condemned by the Vice-Admiralty Court of Jamaica, and the sale thereof was effected as usual by the captor's agent there. Subsequently an appeal was prosecuted, and on the 14th of July, 1803, the Lords of Appeal reversed the sentence of the Court below, decreed the cargo to be restored, or the value thereof to be paid to the claimant for the use of the owners and proprietors thereof. The captor then brought in the account sales, showing the gross proceeds to have amounted to the sum of nine thousand and sixty-seven pounds one shilling and tenpence halfpenny (£9067 1s. 10½d.), and the deductions therefrom, including a large item for freight, to four thousand seven hundred and sixty-seven pounds four shillings (£4767 4s.). To these deductions an objection was taken by the claimant, and the accounts were accordingly referred to the Registrar and merchants in the usual way. On the 18th February, 1804, the Registrar made his report, disallowing the charges for pilotage, prize master's allowance, and expenses of landing and warehousing the cargo, and allowing only the freight, the expenses of advertising the sale, cooerage of cargo, and the duty paid on the wine. On this report being brought in, an objection was taken to it by the King's Proctor, on the ground that the charges which had been disallowed were necessary expenses attending the sale of the cargo, and as such ought to have been allowed. An Act on petition

during the time of litigation, and are entitled to all rights, allowances and incidents [91] attaching to such *bona fide* possession, though the legal right to such possession may ultimately be determined against them. The distinction between *bona fide* possession, and legal right to possession, as regards prize cases, is in itself sufficiently obvious, and it is fully and clearly explained by Lord Stowell, in the cases

was gone into on the subject, the case was argued, and ultimately, on the 22nd June, 1805, their Lordships, after having taken time to deliberate, overruled the King's Proctor's objections in respect of the allowance to the prize master, and a charge of 5 per cent commission on the gross proceeds of the sale by the captor's agent, and two other small items, but directed the report to be reformed by allowing to the captors the expenses of landing the cargo, including the permit for that purpose, and wharfage and warehouse rent for a reasonable time, and the article of appraiser's fee on perishable goods, £37 9s. 3d., if it should appear to have been incurred by order of the Court. I should add, that the Lords who delivered this judgment were Sir William Grant, Sir William Wynne, and Sir William Scott.

"The next case is that of *The Triton*, a case very similar in many respects to that of *The Falck*. This vessel, *The Triton*, was captured on the 7th of October, 1799, by the private ship of war *Caroline*, on the ground of her having enemies' goods on board, and was carried to Jamaica for adjudication: proceedings were thereupon commenced against the cargo in the Vice-Admiralty Court there established, and it was ultimately pronounced to be Dutch property. It appeared, however, that *The Caroline*, although commissioned against the French, was not commissioned against the Dutch, although we were at war with Holland at the time; and accordingly the goods were condemned as *droits* and perquisites of His Majesty in His Office of Admiralty, and were thereupon sold by the Receiver of Admiralty *droits* in that island. From this decree an appeal was entered, and on the 7th of May, 1803, their Lordships reversed the sentence appealed from, decreed the cargo to be restored, or the value thereof paid to the claimant for the use of the owners and proprietors thereof. Subsequently the Admiralty Proctor brought in the account sales, showing very large deductions to have been made from the gross proceeds on account of the expenses, including wharfage and warehouse rent, labour and duties, also the captors' costs in the Court below, and the agent's charge of 5 per cent on the gross proceeds of sale. These account sales being objected to by the claimants, were referred in the usual way to the Registrar and merchants, and on the 7th of October, 1803 (the judgment of their Lordships in *The Falck* not having been then pronounced), the Registrar made his report, allowing only the charges for advertising and the duties paid. The report was objected to by the Admiralty Proctor, on the ground that his parties had been put into possession of the cargo by the decree of a competent Court for the use of His Majesty, in His Office of Admiralty, that they were bound to sell and dispose thereof to prevent its being wasted and altogether lost, but which they could not have done without incurring various and heavy disbursements, and he submitted and humbly insisted that all the said charges were necessarily incurred in the course of the proceedings in law in the said Vice-Admiralty Court in supporting the interest of His Majesty in His Office of Admiralty and in the sale of the said cargo, etc. The question was argued before Sir William Wynne, Sir William Scott, and Sir John Nicholl, and on the 19th July, 1810, their Lordships referred back the Registrar's report to have the allowances made to the captors according to the decree of their Lordships in the case of *The Falck*, and also to reconsider the rate of exchange. What was the exact amount of the charges ultimately allowed does not appear from the records of the Court; probably the case was compromised out of Court; but there is sufficient in their Lordships' decree to show the principles upon which deductions from the gross proceeds were to be allowed.

"Lastly, there is the case of *The Madoc*, which was finally decided in 1817, after the conclusion of the war. This ship was captured on the 15th day of June, 1813, by His Majesty's brig *Rebuff*, and having been sent to Gibraltar for adjudication, was, together with the cargo, condemned as prize by the Vice-Admiralty Court there established, and subsequently sold by the captors' agent. An appeal was, however, entered against the said decree, and on the 16th day of February, 1815, the Lords



of *The Betsey* (1 Rob. 93), and *The John* (2 Dods. 336). The captors in such cases of *bona fide* possession are not answerable for incidents not arising from any misconduct on their part, and are to be protected in doing whatever may be necessary for the preservation of the property, and for converting it into money, if a sale takes place in the ordinary course of judicial proceeding.

of appeal reversed the sentence of the Court below, decreed the ship and cargo to be restored, or the value thereof paid to the claimants for the use of the owners and proprietors thereof.

The captors thereupon brought in the account sales of the ship and cargo, in which they claimed very large deductions from the proceeds on account of labour, pumping the ship, cooping casks, fees of appraisement, wharfage, unloading cargo, watchmen, shipkeepers, lighterage, Court charges, auction dues, brokerage, commission, and a variety of other charges. To these deductions the claimants objected, and accordingly the accounts were referred to the Registrar and merchants as usual. On the 5th of July, 1815, the Registrar made his report, allowing a portion of the charges for labour, wharfage, warehouse rent, lighterage, auction dues, and brokerage; but disallowing altogether the charge for shipkeepers, and of course the law expenses and agent's commission. This report was objected to by the captors, and an Act on petition having been entered into, their Lordships, on the 20th March, 1817, referred back the report to the Registrar and merchants to reconsider it, which they did, and the amended report was brought in on the 21st of May, following. This case is extremely important, as it occurred nearly two years after the final termination of the war, and it enters very fully into the whole question of the allowances proper to be made in cases of simple restitution. In the Appendix hereto, will be found the account sales, the Registrar's first report, the Act on Petition in objection thereto, the Registrar's amended report, and the decrees of their Lordships relative thereto. A comparison of the first and second reports with the account sales will show the general character of the deductions which were allowed from the proceeds by the Registrar's amended report. At the second inquiry before the Registrar and merchants, it transpired from the evidence produced, that the greatest frauds had been attempted to be perpetrated by the captors' agents, and, amongst other things, that a large sum, which had been charged by them for auction dues, and had been allowed by the Registrar in his first report, had in fact never been paid by them: so that this is not a case in which any great indulgence was likely to have been shown to the captors, or that other than the most legitimate charges would have been allowed them as deductions from the proceeds. And yet we find that the Registrar in his amended report allowed them not only the expenses attending the sale, the brokerage, the auction dues as far as paid, the labour, lighterage, wharfage and warehouse rent, but also (and which is most important) a certain amount for shipkeepers,—not indeed the full amount charged as for four shipkeepers during the whole time, but about a third of that amount. From the further proceedings in this case it would seem that no objection was taken to the Registrar's amended report, and that the amount reported due from the captors was paid by them into the registry.

"The conclusions, then, which may fairly be drawn from these cases as to the practice prevailing in former wars in regard to cases of simple restitution on appeal, are as follows:—

"First. It may, I think, be safely affirmed that the expenses of sale were always allowed as proper deductions from the gross proceeds. The clause in the former Prize Acts appears to be conclusive upon this point; but, independently of this, in all the cases cited above, *The Catherina Maria*, *The Falck*, *The Triton*, and *The Madoc*, the expenses of the sale were allowed from the first by the Registrar and merchants: nor, indeed, do they appear to have been objected to by the claimants.

"Second. As regards the expenses attending the care and custody of the property, the cases of *The Falck*, and *Triton* (where the property in question was cargo), appear to sanction the principle that warehouse, wharfage, and other such charges are proper to be allowed as deductions from the gross proceeds; and the case of *The Madoc*, in which both ship and cargo had been sold, that possession fees likewise are proper deductions from the proceeds.

The Registrar has furnished their Lordships with four cases not reported, during the former wars, in which simple restitution was decreed by the Lords of Appeal, after condemnation in the Admiralty Court, and in all which the question arose as to what deductions ought to be made from the gross proceeds of the sale. These cases are *The Catherina Maria*, in 1802, *The Falck*, in 1805, *The Triton*, in 1810,

" It should, however, be observed in regard to the item of possession fees, that in former times prizes generally remained in charge of the prize master and prize crew pending adjudication, and that consequently no charge in the nature of possession fees would ordinarily be found in the account sales. Whereas, in the late war all prizes were handed over to the Marshal or his substitute, who was obliged to provide and pay persons to take charge of them, the prize master and crew at once rejoining their respective ships; so that one of the expenses for the care and custody of prizes in the late war would not ordinarily have been incurred in previous wars.

" Third. As regards the expenses of bringing the prizes to this country. These relate exclusively to the ship; and in the case of *The Franciska* are (here he enumerated the items).

" The only important items in the accounts are those for pilotage, the others are but trifling in amount. Now in the case of *The Falck* a sum of £3 was allowed for pilotage out of the proceeds, and in that of *The Madoc* a sum of forty-eight dollars, or about £8, for mooring and pilotage. Whether your Lordships will consider these two instances as sufficient authorities for allowing these charges in the cases of *The Franciska* and *The Union* is a matter entirely for your Lordships' consideration.

" There is yet another case to which I would wish to call your Lordships' attention, as bearing upon the questions at issue in these causes: it is not strictly speaking a prize case, but is in the nature of prize, and occurred so late as the year 1840.

I refer to the case of *Barton v. The Queen*, reported in the 2nd Moore's P.C. Cases, page 19. It was the case of a ship called *The Winwick*, which was seized in the Port of Gibraltar on the ground that she was engaged in the slave trade. Proceedings were commenced against her in the Vice-Admiralty Court there established, and on the 20th of July, 1838, the Judge of that Court adjudged her to be forfeited to the Queen. From this decree an appeal was prosecuted to this Court, the result of which was, that their Lordships ordered the vessel to be restored to the claimant for the use of the owners and proprietors thereof, or the proceeds thereof (transmitted to the registry of this Court) paid to them, but without costs and damages, etc. In the meantime, however, and pending the proceedings in the Court of Appeal, the vessel had been sold by the Vice-Admiralty Court of Gibraltar, and the sum of £1591 had been paid into the registry of that Court as the nett proceeds of the sale, the Marshal having first deducted his fees and expenses, and then paid the balance in. Subsequently, however, the bill of costs of the Proctor for the captors, amounting to no less than £955 10s. 10d., was paid out of the proceeds: and when a monition issued from this Court to transmit the proceeds, the sum of £635 9s. 2d. only, being the balance after payment of the captors' bill of costs, was transmitted. Upon this a further monition was issued against the Judge, Registrar, and Marshal of the Court below, ordering them to transmit the above sum of £955 10s. 10d. into the registry of this Court, the said sum being the balance of the nett proceeds of the said ship or vessel *Winwick*, etc. Before, however, the attachment actually issued, Captain Sheriff, the captor, brought in the said sum of £955 10s. 10d. I have carefully examined the papers in the cause to ascertain whether the £1591 brought in by the Marshal was really the gross or the nett proceeds of the sale, and have assured myself that it was the nett proceeds only, after payment of all the expenses attending the sale; the affidavits both on the one side and on the other agree in this.

" The case, therefore, of *The Winwick* establishes the fact that the proctor's bill of costs is not a proper deduction from the gross proceeds in cases of simple restitution on appeal; but it does not prove, as would at first sight appear on a hasty perusal of the reported case, that no deductions whatever are to be allowed from the proceeds in such cases. On the contrary, the expenses of the sale were in that case deducted from the proceeds by the Marshal, and there was never any question as to his refunding the amount. I regret to say that I have not discovered amongst the



and *The Madoc*, in 1817, after the conclusion of [92] the then war. In all these cases, and indeed in all similar cases, the expenses of sale were uniformly allowed, as proper deductions from the gross proceeds.

It is true that in the Prize Acts in those times, passed from 1793 to 1815, an express clause was inserted, that in cases of reversal on appeal, the nett proceeds of the

papers in the cause any detail of the Marshal's charges, but only the fact that they related to the sale, and that they amounted to about £65 sterling; no question as to the propriety of their being deducted appears ever to have been raised.

"Such are the facts which I have been able to collect as bearing upon the question of whether any and what deductions can be properly made from the gross proceeds of sale in case of simple restitution on appeal; and the only question that now remains to be considered is, in what manner the claimants are to be reimbursed in the event of your Lordships being of opinion that all or any of the charges in question ought not to fall upon the proceeds.

"The Proctors for the claimants, in their printed cases, state that I have claimed to make certain deductions from the proceeds, and pray that your Lordships will be pleased to order me to pay to them the gross proceeds, and not the nett proceeds. I would, however, beg to observe, first, that as Registrar of the Court of Admiralty, no part whatever of the proceeds came into my possession or under my control; the gross proceeds were paid by the Marshal directly to the account of the Paymaster-General at the Bank of England in accordance with the provisions of the Prize Act: I then taxed the Marshal's account of charges, and certified their correctness, upon which an order of the Court was made for the payment thereof to the Marshal, and the amount was accordingly paid by the Paymaster-General out of the funds remaining in his hands. And, secondly, as Registrar of the Court of Appeal, I have never received from the Paymaster-General more than the nett proceeds after the payment of the Marshal's charges. I have not, therefore, made or claimed to make any deduction from the proceeds, and I would humbly submit, that I cannot be ordered to pay that which has never come into my possession or been under my control.

"The question, then, remains to be considered, by whom the deficiency, if any, should be made good; whether the Marshal should be ordered to pay into the registry the amount of such charges as may appear to be not properly chargeable against the proceeds, or whether a monition should be issued against the captor to bring in the amount.

"In former wars, when the sale and everything relating thereto was conducted by the captors or their agents, and the proceeds passed directly into their possession, it was natural that the monition should issue against them to make good any deficiency which might be found in the proceeds in cases of restitution on appeal. Under the present Prize Act, however, the captors have not the whole conduct of the sale, nor, in fact, are the proceeds paid as formerly directly into their possession. On the other hand, however, both these vessels and their cargoes were sold at the petition of the Queen's Proctor, acting therein as the captors' agent, the decrees or instruments for effecting the sales were taken out by him, and by him entrusted to the Marshal with directions to carry them into execution. Again, when the vessels and their cargoes had been sold, and the Marshal brought in his accounts of expenses relating thereto, they were sent by me to the Queen's Proctor to ascertain if he had any objections to offer to them on behalf of the captors, or to an order being made upon the Paymaster-General for the payment thereof out of the gross proceeds. No objections were made by him to the accounts, and they were accordingly paid in the manner stated above. Every step relating to the sale of these vessels and cargoes was done with the full knowledge and sanction of the Queen's Proctor; and in his bill of costs in those cases, which have been since taxed by me, will be found charges for taking out the decrees of sale, for instructing the Marshal to execute them, and for examining the Marshal's accounts of charges, etc. So that, in case the Marshal were ordered to repay any portion of the sums which he had received out of these proceeds, he would be entitled to recover the amount from the Queen's Proctor, by whose directions and under whose instructions he has acted throughout."

sale (after payment of all expenses attending the same) should be decreed and taken to be the full value of such ship and goods, and that in the present Prize Act that clause is omitted; but their Lordships are clearly of opinion, that such omission, if intentional, could at most only operate to leave the matter in the discretion of the Court, and that the Court, whether that of Admiralty or appeal, ought to continue and act upon the practice which has hitherto prevailed.

Their Lordships, therefore, have no hesitation in saying that the expenses of sale must be deducted from the gross proceeds, before any money is paid over to the claimants.

But there are two other heads of deduction which require a distinct consideration. The one is composed of charges which relate to the care and custody of the property, pending adjudication, and before sale. Now in former wars that care and custody remained with the captors, excepting the few cases in which the property was condemned as droits of the Admiralty, or, being perishable, was sold at once. The present Prize Act directs that the property shall be forthwith delivered up to, and remain in, the custody and care of the Marshal, or other officer (as the case may be). It necessarily follows that persons must be employed and paid to keep possession of the property: whilst [93] in former wars those persons would have been the servants of the captors themselves.

Their Lordships are of opinion that this alteration made by the present Prize Act, being intended for the benefit of all persons concerned, the reasonable expenses attending the possession, care and custody of the property, must be treated as a charge upon the property itself: and must be deducted from the gross proceeds of the sale, whether the property be condemned or restored: and indeed this appears to have been the practice in former wars, whenever, from circumstances, the possession, care, and custody did not remain with the captors themselves.

Another head of charges is composed of "Pilotage," "Trinity Lights," "Rams-gate Dues," etc. These charges relate to the ships only. The charge of pilotage appears to have been allowed in the cases of the *Falck* and the *Madoc*. The amount indeed in those cases was much smaller than in the present instances: but the principle applies equally to all. They are charges necessarily incurred, in order to bring the ships into the proper port for adjudication, whilst the captors were *bonâ fide* in possession of the ships, and which they were compelled to pay by the Acts of Parliament relating to "Pilotage," "Trinity Lights," etc.

Their Lordships are of opinion, that these charges fairly and properly attach to the property, and ought, therefore, to be deducted from the gross proceeds of the sales. Their Lordships, therefore, determine that the sums which have been received by the Registrar from the Paymaster-General, and those only, are the amounts which the claimants in these cases are entitled to receive.

[See note to *Schacht v. Ostsee*, 1855, 9 Moo. P.C. 150.]

#### [94] ON APPEAL FROM THE ROYAL COURT OF APPEAL AT MALTA.

LOUIS CASTRIQUE,—*Appellant*: GIUSEPPE BUTTIGIEG,—*Respondent* \*  
[Nov. 27, 1855].

The doctrine of the liability of an agent indorsing a Bill of Exchange for his principal examined and explained.

The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no instance consists exclusively in the writing popularly called an indorsement, which is necessary to the existence of the contract in question, but arises out of the written indorsement itself:

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule



the delivery of the Bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, by the parties, and the circumstances, such as the usage of the place, and the course of dealing between the parties under which the delivery takes place [10 Moo. P.C. 108].

The Respondent acted as agent in Malta, for the Appellant: for the purpose of buying and remitting to the Appellant in England, Bills on England, on account of money received by the Respondent in Malta. In the course of his agency the Respondent purchased Bills in Malta and indorsed them to the Appellant, without any reservation in the indorsement as to his liability.

Held (affirming the judgment of the Courts at Malta), that in the absence of special circumstances, showing that any liability was intended, by the general mercantile law, which must be taken to be in force in Malta, that the Respondent was not liable to the Appellant, upon the Bills being dishonoured [10 Moo. P.C. 123].

Observations upon the report of *Goupy v. Harden* (7 Taunt. 159).

In circumstances special leave to appeal allowed, although the subject-matter of the appeal was under the appealable value stipulated by the Order in Council, dated the 18th December, 1834 [10 Moo. P.C. 103].

The Appellant was a merchant resident in London, and the Respondent was also a merchant resident at Malta.

The appeal was brought against two judgments of the Royal Court of appeal at Malta, confirming two judgments of the Royal Court of Commerce of that Island, in two several actions brought by the Appellant against the Respondent. In the first action the [95] Appellant was Plaintiff, as indorsee of a Bill of exchange for £55, drawn in Malta on the 4th of February, 1846, by N. J. Aspinall upon J. A. Mathieson of Glasgow, payable ninety days after date to the order of the Defendant (the Respondent), specially indorsed by him to the Plaintiff, and accepted by the drawee, but not paid at maturity, and duly protested. The Defendant denied his liability, on the ground that he had bought and remitted the bill for account of the Plaintiff.

The other action was on a Bill of exchange for £200, payable at ninety days after date to the order of the Defendant, drawn in Malta on the 24th of February, 1846, by Davidson and Scerri, on Williams and Waring of London, specially indorsed by the Defendant to the Plaintiff, but which the drawees refused to accept or pay, and which was duly protested. In this case also the Defendant denied his liability, on the ground of his having bought and remitted the Bill on account of the Plaintiff.

It appeared from the evidence and documents, that the Plaintiff, who was a merchant in London, trading under the firm of L. Castrique and Co., in October, 1843, commenced a correspondence with the Defendant, a merchant in Malta, offering the services and correspondence of his firm as general commission merchants, and requesting him to sell some goods for his account, for which he inclosed a bill of lading: and also to procure the acceptance of an inclosed Bill of exchange, and to carry the same to his credit. On the 17th of November, 1843, the Defendant answered the Plaintiff's letter, accepting his offer, and informing him that he had procured the acceptance of the Bill inclosed in the Plaintiff's [96] letter. On the 6th of January, 1844, the Plaintiff in another letter sent a second Bill to the Defendant, requesting him to procure its acceptance, and to remit the amount, together with that of the former Bill, in "paper on London." On the 29th of January, 1844, the Defendant wrote to the Plaintiff a letter, in which he says, "Agreeably to your desire you have, annexed, a Bill payable at your place of £63 18s. 11d., for which, at the present exchange of 49d., you are debited with Sc. 783. 0. 2." Several other letters passed between the parties, in some of which the Plaintiff sent Bills on Malta to the Defendant, requesting him to remit the amount in Bills on London.

The transaction out of which the present actions arose began by a letter of the 24th of November, 1845, from the Plaintiff to the Defendant, inclosing four Bills for the sums of Sc. 900, 1250, 1148 and 240 respectively, requesting him to remit the proceeds by Bills on London. The Defendant, in answer to this letter, wrote on the 1th of December, 1845, stating that the Bills had been accepted, and added, "when due, I shall encash the same to your credit, and reimburse you the amount thereof by

Bills on your place." By letter of 4th of February, 1846, the Defendant informed the Plaintiff that two of the Bills inclosed in the Defendant's letter of 24th of November, being those for Sc. 900 and 240, "by me encashed to your credit, fell due on the 1st inst., and, *per contra*, I debit you with Sc. 660, for the inclosed appoint for £55, at ninety days' date, on J. A. Mathieson, of Glasgow, which I bought at 50d. per dollar." This letter inclosed the last-mentioned Bill, which was the subject of the first action.

On the 24th of February, 1846, the Defendant [97] wrote to the Plaintiff inclosing the Bill for £200, the subject of the second action; in this letter he said, "I confirm my last of the 4th inst. inclosing an appoint for £55, of which, herewith, you have the second, together with another appoint for £200, which I have just bought for you at 49½d., including the brokerage, for which I have debited your account in Sc. 2414. 6.; and *per contra*, I encashed yesterday to your credit your two remittances of Sc. 1250 on Fabrizzi, and of Sc. 1148. 10. upon Matteo German, both of this place." The last-mentioned two Bills are the two others of the four Bills sent in the Plaintiff's letter of November the 24th, 1845.

On the 7th of March, 1846, Edward Coombe for the plaintiff wrote to the Defendant, informing him that the Bill for £55 had been duly accepted, but that Messrs. Williams and Waring, the drawees, had refused to accept the Bill for £200, adding, "We have thought proper to protest the same, and debit you with 12s. cost of protest." On the 16th of March, 1846, the Defendant wrote, "I have to acknowledge the receipt of your esteemed favour of the 7th, which has just reached me, with protest for non-acceptance of my remitted appoint of £200 on Williams and Waring, of your place; the drawers have told me that that irregularity arises through the death of Mr. Waring, and that it will be paid at maturity." On the 24th of March, 1846, the Defendant wrote to the Plaintiff, informing him that on that day the house of Davidson and Scerri, the drawers of the bill for £200, had stopped payment. In answer to this letter, the Plaintiff, on the 7th of April, 1847, wrote, "We duly received your favours of the 16th and 24th ult., the first of which acknowledged receipt of the protest for [98] non-acceptance which we transmitted you for your remittance of £200 on Williams and Waring of this place, and intimated your opinion that the same would be paid notwithstanding at maturity. Your last informs us that the drawers of the said Bill, as well as the drawees, stopped payment: we are sorry for that occurrence, but have nothing to do with it; you should have remitted us Bills from a solvent house, and we must hold you responsible for the payment of the £200, at maturity." On the 24th of April, 1846, the Defendant wrote, "By your esteemed favour of the 7th, I learn with surprise your pretensions to consider me responsible for the remitted appoint for £200, drawn by Davidson and Scerri of this place, whereas the same is entirely yours, and as such does not concern me in any way," etc. On the 23rd of April, 1846, the Plaintiff wrote, "We are much surprised at not receiving from you another Bill for the one of £200, on Williams and Waring, although you have known for some time that the same would not be paid at maturity, and is utterly useless to us. Surely, you do not intend to render us responsible for your having taken a bad Bill: that would be contrary to every commercial precedent, and derogatory to the honour of any respectable house of business." On the 4th of May, 1846, the Defendant wrote to the Plaintiff, "Confirming my last of the 24th *ultimo*, respecting the Bill for £200, for your account on Williams and Waring of your place. I have nothing now to mention, but to refer you to my before mentioned last letter."

On the 12th of May, 1846, the Plaintiff wrote, "We now see with regret that your remittance of £55, has been returned us dishonoured although [99] accepted: we debit you with £55 10s. thereon. We hope you will contrive and send us another remittance, as we are at the present time, through sundry disappointments, very much in want of it."

On the 3rd of June, 1846, the Defendant wrote, "I beg to acknowledge the receipt of your esteemed favour of the 12th of the same month, inclosing only the protest for the non-payment of the Bill of £55, accepted by J. A. Mathieson of Glasgow. Owing to your not having returned me the accepted appoint, I have not been able to claim payment thereof from the drawer, but merely a guarantee until I can return him the same on its being furnished to me; therefore, hasten to send me the



said original document that I may carry the amount to your credit; the drawer tells me that your having retained the same, induces the supposition that you hope to be paid by the acceptor, as often happens; wherefore I am anxious to hear by your next whether that presumption be verified."

On the 6th of June, 1846, the Plaintiff wrote, "Our letter of the 12th of May informed you of the dishonour of your remittance of £55, due the 8th of May, on Mathieson of Glasgow, and handed you protest of same. We kept the Bill back, expecting the acceptors might take it up, but as yet they have not done so, we shall return you the Bill if you wish, or proceed against the acceptors for your account, if you authorize us to do so; but at any rate, we expect you will immediately reimburse us the amount, as money is an object to us at the present moment. Your Bill for £200, drawn at Malta, the 24th of February last, by Davidson and Scerri, at ninety days' date on Williams and Waring of London, payable to your order, [100] and indorsed to us by you, due 28th May last, was duly presented for payment, dishonoured, and protested; we beg you will immediately remit us the amount with £1 4s. notarial charges."

On the 24th of June, the Plaintiff wrote, "We sent you the protest on Mathieson's Bills, expecting you will send us the amount to retire the same, but find we are disappointed. The acceptor has not yet taken it up; please send us the amount, and we shall then return your said Bill: the same with regard to your remittance on Williams and Waring."

On the 28th of July, 1846, the Defendant wrote, "I am in the receipt of your most esteemed favours, by which I am wearied at observing your persistence in endeavouring to uphold your strange claim in respect to the two protested Bills which I had bought and remitted to you for your account; a claim I never expected to hear of from men in business who say they are acquainted with the rules and usages of commerce; my signature appearing on these two appoints for no other object, but solely and absolutely for your account, being relative to your affairs, etc. Respecting the other appoint for £55, Mr. Aspinall of this place, the drawer, is ready to pay the same, but I see you wish to keep it by you; I shall be obliged to release him from the security given to me, as I cannot keep the same any longer; this is to serve by way of special intimation. Inclosed you have a copy of your account current, balanced to the 30th of June last past, by Sc. 736. 11. 6. appearing to your credit in new account."

The account referred to in the last letter debited the Plaintiff with the amount of 660 scudi, the sum paid by the Defendant as the price of the £55 [101] Bill, and with that of Sc. 2414. 6. 0. as paid for the £200 Bill, but did not credit the Plaintiff for any sum on account of the dishonour of either of the Bills. The Plaintiff drew Bills on the Defendant for the amount of this balance, which were paid. The last of them was drawn on the 24th of August, 1846, for the sum of Sc. 256. 11. 6., the balance then due to the Plaintiff, on the supposition that the Defendant was right in his mode of stating the account. The Plaintiff gave in evidence a letter, dated the same 24th of August, informing the Defendant that he had drawn on him for the amount of the two dishonoured Bills in question, and added, "We are in receipt of your esteemed favours of 28th ultimo, inclosing a statement of account current between us, showing a balance of Sc. 736. 11. 6. in our favour, but as you omit to give us credit therein for the two unpaid Bills above mentioned, we cannot agree thereto. Having occasion to place a small appoint on your place, we have this day valued you for Sc. 256. 11. 6., to the order of G. B. Carr, which please honour and place to our debit, without prejudice to any further claim we may have against you." The Defendant denied having received this letter.

It appeared in evidence that the two Bills in question, which the Defendant in his letters of the 4th and 24th of February, 1846, represented as bought by him at the exchanges of 50d. and 49½d. per £, and charged in account at those rates, had really been bought at 50½d. and 50¼d., and were consequently charged against the Plaintiff at prices something more than 1 per cent. higher than those actually paid. It appeared by two accounts current given in evidence, that the Defendant did not charge any com-[102]-mission on the Bill remitted by him, but charged ½ per cent. on money collected.

On the 6th of March, 1852, the Court of Commerce of Malta gave judgment for the Defendant in both actions, as follows: "Having read the documents produced by the litigants, and heard the witnesses in the cause; and considering that the merchants, Castrique and Co., in entrusting certain of their businesses to Buttigieg, did not make any stipulation whatever respecting the liability of the latter, wherefore it must be considered that the commission was given according to commercial usage, that is to say, that the agent was to act for account and risk of his principal, without any responsibility of his own; considering, that in the accounts there does not appear from the beginning of the transactions any item whatsoever for '*del credere*' or other equivalent commission; and the alleged difference in the exchange not being sufficient to stand in lieu of such commission, it must rather be considered as having arisen through error, as by Buttigieg is alleged; considering that the final account sent by Buttigieg to Castrique and Co., in which mention of the Bill appears, was by the latter agreed to, without any opposition and protest, having drawn for the precise balance, it does not avail to say that the phrase 'without prejudice,' occurring in the letter marked by the Plaintiff, proves any contrary intention of the drawer, since Buttigieg denies having received such letter, such denial being justified by the expression appearing in the Bill of exchange drawn for balance, where the words 'without any further advice' occur;—for these, and other reasons omitted, the Court decides for the exclusion of the Plaintiff's demand, reserving unto the Plain-[103]-tiff any right against any other persons under and by virtue of the Bill of exchange in question, should any there be, without taxed costs."

Both parties appealed against this judgment to the Royal Court of appeal at Malta, the Defendant complaining that it did not give him his costs of suit. That Court, on the 4th of August, 1852, gave judgment, adopting the reasons given by the Court of Commerce, and confirmed both judgments.

In consequence of the subject-matter of these suits being under the sum of £1000, the amount required by the Order in Council of the 18th of December, 1834, an *ex-parte* application was made by the Appellant, praying for leave to appeal, notwithstanding such Order in Council.

Sir Frederic Thesiger, Q.C., and Mr. C. E. Pollock, for the Petitioner (28th Nov. 1853\*), relied upon two grounds, first, that the decision of the Court was against law, citing *Goupy v. Harden* (7 Taunt. 159) on that point; and secondly, that this Court would grant leave as an indulgence, upon a disputed point of law, though the appealable value was less than provided for by Charter or otherwise. *Spooner v. Juddow* (6 Moore's P.C. Cases, 257).

Their Lordships, under the circumstances of the case, granted leave to appeal upon security being given for £300, but intimated that it was not to form [104] a precedent for any other case where the amount at issue was under the required appealable value.

The appeal was argued upon the merits by Sir Frederic Thesiger, Q.C., and Mr. C. E. Pollock, for the Appellant; and Mr. Rolt, Q.C., and Mr. Field, for the Respondent.

The points taken in the arguments on both sides are fully stated in the judgment.

Upon the question whether the contract was governed by the Maltese law, *Allen v. Kemble* (6 Moore's P.C. Cases, p. 314), *Gibbs v. Fremont* (9 Exch. 25), was relied upon. It was also insisted by the Respondent, that the general mercantile law prevailed in Malta, and ought to be applied to the case.

And, upon the liability of the Respondent to the Appellant by indorsing the two Bills without any reservation in the event of their being dishonoured, it was contended that he bought them and remitted them to the Appellant, in the character of agent only for the Appellant, and pursuant to his directions: *Goupy v. Harden* (7 Taunt. 159), *Le Fevre v. Lloyd* (5 Taunt. 749), *Leadbitter v. Farrow* (5 Mau. and Sel. 345), *Kidson v. Dilworth* (5 Price, 564), Byles on "Bills of Exchange," p. 110 (5th Edit.), Story's Agency, sec. 156-7, Merlin's "*Questions de Droit*," "*Endorsement*," p. 676,

\* Present: The Right Hon. Dr. Lushington, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.



Dalloz's "*Dictionnaire de Jurisprudence*," tom. ii. p. 245, art. 407, Baldasseroni, Dict. of Commerce, tit. "*Gire*," tom. iii., secs. xxv. xxvi., p. 353, Pardessus' [105] "*Code de Droit Commerce*," p. 192, were cited and commented upon. The Appellant also insisted that as the Respondent charged for commission, it amounted to a *del credere* transaction, making him liable.

The consideration of the judgment was postponed, and now delivered by

The Right Hon. Sir William H. Maule (3rd April, 1856).—After stating at length the facts as set forth in the preceding statement of the case, he proceeded :

On the argument of the present appeal, it was insisted on the part of the Appellant, that the Defendant was liable as indorser to all subsequent holders, his indorsement not containing any restrictive expression, such as the words "without recourse," and in the absence of any special agreement between the Plaintiff and Defendant, either made in express terms or to be implied from the facts of the case, to restrict that liability as between the Plaintiff and Defendant : and that the circumstance of the Defendant having acted as agent for the Plaintiff did not afford such an implication. It was further contended that the Defendant, having charged the Plaintiff a profit of about 1 per cent. on the price paid by him for the bills, had in effect taken a *del credere* commission, or had entitled the Plaintiff to treat the transaction as a purchase of the Bills from the drawers on the Defendant's own account, and a sale of them to the Plaintiff at an increased price, so as to place the Defendant in the situation of an indorser for value of a bill, his own property, to the Plaintiff. The Plaintiff also contended that, inasmuch as it appeared that a sum of 600 scudi had been handed by Aspinall, the drawer of [106] the £55 bill, to the Defendant in respect of that Bill, the Defendant was at least liable to that amount.

On the part of the Respondent it was contended, that he had acted as agent only of the Appellant, and that this circumstance was of itself sufficient to show that he contracted no liability to his principal by his endorsement, at least by the law of Malta, by which, and not the law of England, it was contended that the case was to be governed.

With regard to the alleged charge of a higher price for the Bills than was actually paid, it was contended for the Respondent, either that such overcharge was made by mistake, as it appears to have been considered by the Maltese Courts, or that it might be accounted for by the brokerage being included in one sum, and not in the other, or at any rate, that this difference did not produce the effect of making the Defendant liable as indorser, if he could not otherwise have been so. As to the claim in respect of 600 scudi received from Aspinall, the drawer of the £55 Bill, the Respondent's counsel answered that it was not a claim which could be enforced to the present suit, which charged the Respondent only as indorser.

It may be convenient to dispose of the last two questions before proceeding to the consideration of the first and principal one. As to the overcharge of the price paid for the Bills, it seems to their Lordships, that, without adverting to the reasons given in the Courts below, it sufficiently appears that, supposing it to have actually taken place, and even to have been designed, and not accidental, though it would be misconduct on the part of the Respondent, it would not have the effect of inducing a liability on his part, in addition to, or in substitution of, that resulting from his [107] character of agent, supposing him, independently of the overcharge, to have acted and to have been liable as agent only. The letters of the 4th and 24th of February, 1846, which inclosed the Bills, and were written on the day they were drawn, describe the bills respectively as "bought at 50d. per \$," and "just bought for you at 49½d., including the brokerage." These expressions accompanying the act of sending the Bills, clearly import a purchase for the Appellant, and not a sale to him by the Respondent ; if they contain a misrepresentation of the amount paid for them, the Respondent may be answerable for his misconduct as agent ; but he does not by writing that purport to act in any other capacity. It is like an agent buying goods for his principal, and overstating the price paid for them ; a misconduct which would not make him liable as vendor, or as warranting the goods. To give to the misrepresentation in question the effect of making the party who made it liable as on a warranty, or as an indorser, would be to raise

a contract between two parties, into which neither of them intended to enter. With regard to the claim as to the 600 scudi, it appears to their Lordships that in the present suit, in which the Plaintiff sues as indorsee only, such sum is not in question, and cannot be recovered; and that the judgment to be pronounced on the present appeal, like those in the Courts below, will be without prejudice to any rights which may exist in respect of this claim.

The question, then, that remains to be considered is, whether the Respondent is liable to the Appellant as indorser. In determining this question, it does not appear to be necessary to consider any peculiarity, if there be any on this subject, of the law of Malta. The [108] case was argued, and appears to depend on the general Merchant law prevailing in all civilised countries; if there be in Malta any special form of writing which forms a necessary ingredient in an indorsement, the writing in the present case must be taken to be in that form, or, in other words, the indorsement was regular: the whole argument proceeding on that ground, and nothing appearing to the contrary. As to the question of the substantial liability of the Respondent, the foreign code establishing the liability of an indorser as a general proposition as well as the English text writers to the same effect, are merely declaratory of the general Mercantile law on the subject, and it is on this same law that the judicial decisions, both English and foreign, which were cited on both sides, proceeded. It is therefore to be considered whether, according to such general law, the facts appearing in the present case are sufficient to show that the Respondent is liable as indorser, to the Appellant, his immediate indorsee of the Bills in question.

The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the Bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties and their respective situations) under which the delivery takes place: thus a Bill, with an unqualified written indorsement, may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser, or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases the indorser is not liable to the indorsee, and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law. In the present case, therefore, it will be proper to consider under what circumstances the Bills in question were indorsed. It is clear, from the correspondence referred to, that in the course of dealing between them the Respondent was in the habit of acting as agent for the Appellant in procuring and remitting for him Bills on England, on account of money received by him for the Appellant at Malta: the Bills in question were remitted on account of the proceeds of four Bills sent to the Respondent by the Appellant on the 4th of November, 1845, in a letter, requesting him to remit the proceeds by Bills on London. This order was complied with on the 4th and 24th of February, 1846, when the Bills in question were drawn and remitted, the first being described in a letter, inclosing it as a Bill, "which I bought at 50d. per £," and the second as a Bill "which I have just bought for you at 49½d., including the brokerage." These expressions amount to a notice to the Appellant that the Bills had been bought for his account, so as to become his property by the act of purchase, which was [110] before they were indorsed by the Respondent; and, as they were received by the Appellant without objection, he appears to have consented to receive the Bills as sent in the execution of his orders, and so as to give no further effect to the Respondent's indorsements than belonged to them as indorsements made under all the circumstances of which both parties were cognizant.



Assuming the Bills to have been indorsed under these circumstances, that is, to have been bought for the Appellant in the execution of the Respondent's duty as his agent, and the Appellant to have taken them with a knowledge of their having been so bought, is the Respondent liable to the Appellant as indorser? It cannot be said that these circumstances necessarily excluded such liability: if it had been the intention of the parties, shown by their words or otherwise, that such liability should arise, there is nothing in the circumstances last adverted to which would prevent that intention taking effect: the employment of the Respondent by the Appellant as his agent generally, which was one from which the Respondent would make some profit, though none might be made on a transaction of remittance, would be a sufficient consideration for the Respondent incurring the liability in question, if it were the intention of the parties that he should so do. It was urged on the part of the Appellant that the intention of the parties must, in fact, have been that such liability should be incurred, for if that were not the intention of the Respondent, why did he indorse the Bills at all? or, indorsing them, if he meant not to incur the ordinary liability of an indorser, why did he not adopt the course which it was said was usual when such re-[111]-striction was intended, by adding words such as "without recourse" to his indorsement. To the first of these questions it may be answered that, as it was necessary, for safety of transmittance, that the Bills should be specially indorsed to the Appellant, it was a convenient mode of effecting this object that the bills should be drawn, payable to the Respondent, and that though the same object might have been attained by procuring the Bills to be drawn, payable to the order of the Appellant, agents are usually and not unreasonably unwilling to disclose the names of their principals. It would be a mark of distrust of his correspondent (the Appellant), if the Respondent avoided so carefully to incur a liability on his account, though one against which the principal would be bound to indemnify him, and, further, that the Bills so drawn and indorsed would be less negotiable than they would be with the addition of the Respondent's name: this last reason applies to another mode in which the Bills might be drawn without the Respondent's name appearing, *i.e.* by having them drawn payable to the order of the drawer and indorsed by him, the Respondent afterwards writing above the indorsement of the drawer, "Pay to the order of Castrique and Co."

With regard to indorsing the Bills with the words "without recourse," by so doing the indorser would indeed have avoided all liability to any subsequent holder, as well as to his immediate indorsee, but such a course would have cast suspicion on the bills: would have rendered them less negotiable, and would probably have been very distasteful to the principal. It is to be observed that the Bills, being payable at ninety days after date, would arrive in England many [112] weeks before their maturity, and it would, therefore, be important to the Appellant that they should be so drawn and indorsed as to be readily negotiable. In putting his name on the Bill as indorser, and thereby becoming answerable to holders subsequent to the Appellant, the Respondent adopted a mode of remitting Bills which was reasonable and convenient for the purposes of the Appellant, his principal, to whom he was bound by his duty as agent to remit in some reasonable and convenient mode, though he was not bound by such duty to incur any liability upon the Bill. If it be said that the Respondent having clearly rendered himself liable as indorser to any subsequent holder of the Bills, and not expressly restricted his liability to his immediate indorsee, ought to be considered as answerable to him; the answer is, that this is the usual case with an accommodation Bill, the accommodating party relying on the indemnity of the party accommodated, and in the present case, though the agent might, if he would, indorse the Bills he remitted, yet not being bound to do so he would not adopt this course, but would prefer some of the others above indicated, if his opinion of the solvency of his principal, or the state of accounts between them, rendered such caution necessary. If, therefore, the question on this appeal were to be determined upon principle, independent of authority, then Committee would be of opinion that the Respondent ought to be considered as an agent, who, in the due execution of his duty to his principal, bought the bills for him, and caused them to be made payable to himself, and indorsed them for the purpose only of performing his duty in a manner beneficial and convenient to the principal, and that the principal had [113] notice of these circumstances at the

time of the delivery. This state of things, it appears to the Committee, would, in the absence of any other circumstances, such as to express words or local usage, or a course of dealing between the parties, and in the absence of any authority to the contrary, show that no liability of the Respondent as indorser to the Appellant as indorsee arose out of the transaction in question. Several authorities, however, were cited in the argument, and it will be proper to consider such of them as were most relied on as bearing on the question of the liability of an agent, indorser to a principal indorsee. Those which support the general doctrine of the liability of an indorser to an indorsee need not be noticed; it was not disputed, on one side, that such was the general rule, nor, on the other, that it was subject to an exception whenever the contract between the parties should be shown to exclude such liability. Of the authorities relied on for the Appellant as showing the liability of an agent, indorser to his principal indorsee, the first was that of Mr. Justice Story (Agency, sec. 157), whose words, as far as they relate to indorsements of Bills, are—"Personal liability will attach to an agent who indorses a Bill generally" (this word is here to be understood as meaning "without describing himself as agent"), "for in such a case the indorsing of the instrument is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal." This is the language of the text, in a note, after citing six cases, four of which are cases between the agent and a third person, not his principal, the remaining two being *Le Ferre v. Lloyd* (5 Taunt. 749), and *Goupy v. Harden* (7 Taunt. 159) [114] (to be presently noticed); the learned author proceeds, "But see *Kitsou v. Dilworth* (5 Price, 564). In respect to the principal, the doctrine may, in many cases, require to be qualified; for if, as between him and his agent, there was no intention to create a personal liability, it will not arise." The authority of the learned writer, therefore, appears to be clearly in favour of the absence of liability where there is no intention to create it. Of the two cases of *Le Ferre v. Lloyd* [5 Taunt. 749], and *Goupy v. Harden* [7 Taunt. 159], cited in the note to Story, and also relied on by the Appellant, the first was one in which the Plaintiff had employed Maitland and Coles to sell cotton for him; they employed Lloyd (whose administrator the Defendant was) as a broker, to sell the cotton; he sold it, to be paid for in a Bill at two months. Lloyd drew the Bill on the purchasers, and delivered it to Maitland and Coles, who remitted it to the Plaintiff: the Bill being dishonoured by the drawee, the Plaintiff sued the Defendant as administrator of the drawer. The defence was, that the Banker having drawn the Bill only as agent for the Plaintiff, and without any reason for so doing, but merely for the purpose of facilitating business, the Plaintiff not being himself then in London, the Defendant was not liable on the Bill to the Plaintiff, his own principal, and that the means of paying for goods by a Bill at two months was, that the seller should draw a Bill on the buyer, and the broker here drew as servant to the seller. Gibbs, Chief Justice, thought it was imprudent in Lloyd to put his name on the Bill, but that he having done so, all the legal consequences of the act attached on him as much as on any other party whose name was thereon, and the jury found a verdict for the Plaintiff, and on a motion [115] for a new trial, a rule was refused. In this case the drawer of the Bill had been employed as broker to sell the goods; having done so, he had completely executed his authority. The Bill at two months, for which he had sold, meant, as the Defendant himself contended, a Bill drawn by the vendor on the purchaser; in drawing the Bill himself the broker acted without authority, in excess of his duty, and the Plaintiffs, on receiving the Bill with his name on it, had a right to treat him as an ordinary drawer, nothing having passed between them authorizing him to act for them in drawing the Bill. This case, therefore, has no application to one where a Bill is indorsed by an agent in the execution of his duty to his principal.

The other case of *Goupy v. Harden* (7 Taunt. 159), was the principal authority relied on by the Appellant, and requires a particular examination. It was an action on two Bills of exchange drawn on the 20th of May, 1815, by De Franca and Co., on Gould, Brothers, merchants at Lisbon, at thirty days after sight, payable to the Defendants, and by them indorsed to the Plaintiffs. It appeared at the trial that the Plaintiffs had employed the Defendants (Merchants in London), for a commission at  $\frac{1}{2}$  per cent., to procure in London, and transmit to them in Paris,



Bills on Portugal for £1000: the Defendants accordingly purchased on the Exchange the Bills in question, and having specially indorsed them to the Plaintiffs, transmitted them to Paris; the Plaintiffs put them into circulation without presenting them for acceptance, and they were not presented till the 22nd of August, when acceptance was refused, the drawers having previously failed; on the 12th of October, the Plaintiffs, by letter, apprized the Defen-[116]-dants of the dishonour of the Bills, and in a subsequent letter stated that they should certainly have sooner sent forward the Bills for acceptance, had they not relied on the Defendants' guarantee. The Defendants insisted that they having indorsed the Bills to the Plaintiffs only as their agents, were not liable on that indorsement. Evidence was given that when agents indorse foreign Bills for the mere purpose of transmitting them without intending to incur responsibility for the payment, it is their practice to add to the indorsement the words "*sans recours*;" that these words, however, implying doubts on the mind of the indorser of the stability of some of the parties, injure the credit of the Bills, and, therefore, were usually omitted if confidence existed between the parties, although it was nevertheless intended that the agent should not be responsible for the goodness of the Bills, and the Defendants contended that such was the course of dealing in the present instance, as evinced by the low rate of commission which the Defendants were to receive. There was a further defence insisted on, that the Defendants, if liable, had been discharged by the laches of the Plaintiffs in not presenting the bills for acceptance so soon as they ought to have done. The jury, however, found for the Plaintiffs. A rule for a new trial on both grounds was moved for and refused. On the first of them: Gibbs, Chief Justice, said, "It is not proved that the Defendants knew that the Plaintiffs were not (a) connected with the Bill otherwise than as agents; but if they had known it, (and I will take it in the strongest way, that they knew the Defendants were acting only as agents,) still they had a [117] right to consider that in this transaction the Defendants were liable as indorsers; and that they may justly say, as they have done, "we should not have sent forward these Bills for acceptance unless we had seen your names on them, which placed the respectability of the Bills beyond a question: otherwise we should have sought the security of the drawee;" and Dallas, J., added, "The Defendants might have specially indorsed this bill, *sans recours*, if they had thought fit so to do, but they have not done it."

In that case, as in the present, the question was whether an agent who had indorsed to his principal, without restrictive words, was liable to his principal, and that, as in the present case, the liability was treated as depending on the fact, whether the parties had evinced an intention that such liability should arise between them, or, in other words, what was the agreement between the parties to be inferred from the facts of the case. The evidence in that case was left to a mercantile jury of the city of London, who, by finding for the Plaintiff, decided that, in their opinion, the Defendant had contracted with the Plaintiff, so as to assume the ordinary liability of an indorser, and the Court considered that the evidence was such as to sustain the verdict. In the present case the Court (at which two Merchants, styled "Consuls," assisted) decided that under the circumstances of the present case no such contract was shown to have arisen. The jury in that case, and the Merchants in the present, must be taken to be cognizant of the usual course of mercantile practice in London and Malta respectively.

It is evident that the decision of the Court and jury in that case, and that of the Courts of Malta in the present, may both be right, if the cir-[118]-cumstances of the two were so different in material respects as to justify a conclusion that in that case there was such a contract, and that in this there was not. It may also be observed that all that the Court decided in *Goupy v. Harden* [7 Taun. 159] was, that the verdict of the jury should not be disturbed: it does not follow that if the verdict had been the other way, it would have been set aside. Indeed, as it was the case of a mercantile jury, deciding a mercantile question, on which there were considerations of weight on both sides, it would be according to the usual course to sustain it on whatever side it was. But it will be found on a close examination

(a) This word is omitted by mistake on the report in Taunton, as appears by the context in that report in 2 Marshall.

that the facts of the two cases differ very materially. In *Goupy v. Harden* [7 Taun. 159], it appeared that the Plaintiffs employed the Defendants for a commission of  $\frac{1}{2}$  per cent. to procure in London Bills on Portugal for £1000, and transmit them to Paris; that the Defendants purchased the Bills on the Exchange, and having specially indorsed them to the Plaintiffs, transmitted them to Paris; that the Plaintiffs indorsed and negotiated the Bills (which were payable after sight) without presenting them for acceptance; that the Bills were not presented till long after they might have been presented, and were then dishonoured, and the Plaintiffs compelled to pay them.

In that case there was no evidence of any course of dealing between the parties, nor of any communication by the Defendants to the Plaintiffs, accompanying the transmission of the Bills to the Plaintiffs. The Plaintiffs do not appear to have had any information respecting the Bills, except that they were sent in execution of an order to the Defendants to procure Bills, and that they bore the unqualified [119] indorsement of the Defendants. For anything that appeared to the contrary, the Defendants might have received the Bills from the drawers on their own account, in payment of a debt due from the drawers to them, and afterwards indorsed them, in order to transfer the property in the Bills to the Plaintiffs, in execution of their order to procure Bills on Portugal. In such a case, no doubt the Defendants would be liable as indorsers; and in the absence of any communication by the Defendants to the Plaintiffs, accompanying the transmission of the Bills, to show that such was not the case, the Plaintiffs might naturally infer that the Defendants intended to place themselves in the ordinary situation of indorsers, and that the Plaintiffs had so understood the transaction was shown by their conduct in not promptly presenting the Bills for acceptance, which they probably would have done, if they had not relied on the Defendants as indorsers. In that case, also, the Defendants were paid  $\frac{1}{2}$  per cent. commission for the duty they undertook, *i.e.* procuring and forwarding the Bills.

In the present case there was a course of dealing between the parties, by which it appeared that the Defendant had  $\frac{1}{2}$  per cent. on money collected by him, but no commission in respect of procuring and remitting Bills. The Bills were forwarded by the Respondent on the days on which they were drawn, in letters mentioning the receipt of funds of the Appellant, which he had directed the Respondent to remit by Bills on London, stating that he had bought the Bills inclosed; with respect to the larger Bill, using the words "bought for you," and sufficiently intimating the same with respect to the other, and in both debiting the Plaintiff with the prices alleged to have [120] been given for the Bills; these letters, therefore, in effect, represent the Bills as having been bought for the Plaintiff in pursuance of his direction, with his funds, and, therefore, as having become his property by the purchase before the indorsement by the Defendant. The Plaintiff having received the Bills, with notice of this state of facts, without objection, must be taken to have been willing to take them on the terms of such a contract as would arise out of an indorsement made under such circumstances; having so received them, he promptly presented them for acceptance, though being drawn payable after date, this was not needful, except to obtain security of the drawee; this indeed was a step which might properly be taken whether the Plaintiff considered the Defendant as liable on his indorsement or not. But it is material in comparing the facts of the present case with those of *Goupy v. Harden* [7 Taun. 159], in which great reliance was placed by the Court and probably by the jury, on the non-presentation for acceptance, as showing that the Plaintiff in that case considered the Defendant as liable on the indorsement.

It is not necessary to notice particularly those cases, such as *Leadbitter v. Farrow* (5 Mau and Sel. 345), cited for the Appellant, in which the question was, whether the Defendant, who was agent, not to the Plaintiff, but to a third person, was personally liable to the Plaintiff on a contract: these cases have no material application to the present case, in which the question is, how far the Defendant's character of agent to the Plaintiff affects his liability.

On the part of the Defendant, several authorities were cited which may now be considered. The case of *Kidson v. Dilworth* (5 Price, 564) was one very [121] much like the present. There the agent, Kidson, the Plaintiff in equity, had received for



his principal, Welsh, a Defendant in equity, a Bill, payable to his (the agent's) order, and had indorsed it to his principal. An action was brought on behalf of the principal by the Defendant, Dilworth, on this indorsement. The Court of Exchequer restrained it by injunction, on the ground that the principal had no right to claim payment of the Bill from his agent. Richards, Chief Baron, says, " Shall he (the indorsee) be permitted to proceed, through the medium of another person against a mere agent, because that agent has imprudently put his name on the instrument to satisfy a formality, made necessary by the mode of drawing it? It is impossible." Graham, Baron, adds, " The Plaintiff's letter was acquiesced in and acted on, and this Bill was sent in consequence: it was a natural mode of remittance: it was also natural that the drafts should have been made payable to the Plaintiff, but still it was merely as an agent to Welsh, and it was indorsed by him in that character." Wood, Baron, says, " The Bill was clearly made payable to the Plaintiff in his character of agent, and it was, therefore, necessary, that he should indorse the Bill *pro forma*: having done so, merely for the accommodation of the Defendant, a Court of Equity ought not to suffer him to turn round on the agent, and fix him with liability on such an indorsement. Had he indorsed the Bill to guarantee the payment, it would have been a very different case; but here it is clear that nothing of the kind was meant, nor was there any consideration for his so doing; the nature of the transaction is very clear."

In this case the proceeding was in equity, but the [122] reasons given by the Court show that, in their opinion, the facts of the case showed that it was not the intention of the parties that the indorser should be liable to the indorsee under his indorsement, and when that is the case, there is no implication of a promise to pay, and no legal liability out of which such promise would arise. The written indorsement is indeed unqualified in its terms, but the delivery to the indorsee from which, together with the written indorsement, and not from the written indorsement alone, the contract between the parties is to be inferred, is so circumstanced as to show that the indorser does not make himself liable to his indorsee; this is a defence at law, though a Court of Equity may have a concurrent jurisdiction. No question of jurisdiction was raised, and the Plaintiff might prefer a proceeding in equity on account of the action being brought by a third party, and from the superior facilities he would have in equity for establishing his case.

This case is, therefore, an authority of great weight in favour of the Respondent, and there are some foreign authorities also in his favour, which deserves to be considered. In Merlin's "*Questions de Droit*," p. 676, "*Endossement*," "*Le Banquier commissionnaire qui endosse la lettre de change qu'il achète sur la place pour son commettant, se rend-il par là garant envers celui-ci de la solvabilité de la personne sur laquelle cette lettre de change est tirée? La Cour de Cassation a jugé pour la négative dans l'espèce suivante.*" The book then gives a report of a case of *Meulemeester v. Tourton and Ravel*, fully supporting the above proposition.

Dalloz' "*Dictionnaire de Jurisprudence*," tom. ii. [123] p. 245, art. 407, "*Lorsque le cessionnaire chargé de se procurer des effets pour un correspondant les lui transmet avec son endos, cet endossement n'est alors entre les parties que la suite d'un mandat et ne peut avoir d'autres conséquences.*"

Baldasseroni, an eminent Tuscan jurist, *Dictionario*, tom. iii. p. 353, tit. "*Gira*," s. 26, in treating of indorsements which do not render the indorser liable to the indorsee, after mentioning the case of a principal who indorses to an agent, to enable him to receive the amount of the Bill on account of the principal, proceeds to put the case of an agent, who, having bought a Bill on account of his principal, transmits it to him with a regular indorsement (that is, an indorsement sufficient in form to pass the property, and to charge the indorser as such), " not by way of transfer (*cessione*), because no one can acquire that which belongs to him, but as a species of declaration of the order, and because it is just to put this Bill into the hands and at the disposition of its true proprietor." In this case, says the learned author, the principal cannot, on failure of payment, exercise an action of warranty against his agent who indorsed for his benefit.

Their Lordships, therefore, on considering the facts of the case, and the arguments and authorities presented to them on the subject, are of opinion, that the Respondent is not shown to have incurred the liability with which he is charged.

and must humbly advise Her Majesty that the judgments of the Courts at Malta be confirmed.

[Mews' Dig. tit. BILLS OF EXCHANGE, C. CAPACITY AND AUTHORITY OF PARTIES, 1. *Agents*, F. NEGOTIATION, 1. *Indorsement*, a. *Generally*; tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to Appeal*. S.C. 4 W.R. 445. Explained in *Abrey v. Cruz*, 1869, L.R. 5 C.P. at p. 42; and cf. Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), ss. 16, 21 (2), b. 30; *Druff v. Parker*, 1868, L.R. 5 Eq. at p. 137. As to special leave to appeal in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 3 Moo. P.C. at p. 125.]

[124] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

RUGHOONATH SAHAI CHOTAYLOLL,—*Appellant*: MANICKCHUND and KAISREECHUND,—*Respondents* \* [Feb. 1, 2, 1856].

A wager contract in India (before the passing of the Legislative Act, No. 21, of 1848) upon the average price opium would fetch at a future Government sale, held legal, and an action thereon maintained.

The Plaintiff and Defendants, by contracts in writing, wagered as to the average price to be obtained for opium "of the 30th of November," "of the first *lelaum*, or public Government sale of opium." At the time when these contracts were entered into, the first Government sale had been advertised for the "30th of November, 1846." The sale on that day was prevented by a combination of opium speculators interested in similar contracts. The Government sale was again advertised, and took place on the 7th of December following, when opium of the quantity and description advertised for sale on the "30th November" was sold. Held: First, that the date mentioned in the contracts, the "30th of November," was a mere description of the period when the first public Government sale of opium usually took place, and formed no part of the risk contemplated by the wagers, the subject of the contracts, and was immaterial; and, secondly, that according to the true construction of the contracts, the first actual public Government sale of opium which took place next after the date of the contracts satisfied the terms of the contracts; and upon a certain average being realised thereon, the event on which the Plaintiff had wagered was determined in his favour, and he was entitled to recover the differences under the averages.

The action in this case was brought upon certain wager contracts made between the Appellant and Respondents, as to the average price to be obtained on a future *lelaum*, or public Government sale of opium.

The facts of the case were these:—

The Respondents were merchants, trading in copartnership together at Calcutta, and the Appellant, [125] as well as the Respondents, were dealers and speculators in opium. At the time of the making of the contracts in question, the Appellant was a speculator for the high, and the Respondents were speculators for the low average price of opium, which should be obtained at the first public Government sale of the season.

The contracts entered into between the Appellant and Respondents were eleven in number, and all referred to the same day, the 30th of November, as the day of sale to determine the wager, the several instruments differing only as to the fixed limit or amount agreed upon to be the standard. All these contracts were reduced into writing, and the *chittee*, or writing, of one of these contracts, dated the 30th of September, 1846, was as follows:—

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.



"Marked in the *Khattah* on account of your house, the money of the '*Taijee*' or rise is with you.

*Taijee* or rise on the average of 1600 of the first *lelaum* or public sale of the *Patna*.

1½ Sri Purmaissore Jee.

"1½ To Brothers Rughoonauth Sahoi Chotayloll. This is written by Manickchund Kissoreechund, with salutations, which they will peruse.

"Further, we have eaten the *Taijee* or rise on the average of one lot of 5 (in letters) five *Paitees* or chests of *Patna* opium of the 30th of November (*Sumbut*), 1903. Nineteen hundred and three, at the price of 1600, (in letters) sixteen hundred. If the average of the first *lelaum*, or public sale of the Company's *sircar*, rises above sixteen hundred, according to that we will give you the '*bullun*' or rise; if it falls below sixteen hundred, you have no '*dauwah*' [126] or claim. We will not give you credit for the '*Nazurannah ka roopia*,' or *bonus* money that we have taken from you. *Sumbut* 1903, *Mittee Mugsur* or *U'ghun*, the 5th day of the light side of the moon.

Signature of Kulean Mull,"

(Written on the back,)

"Rughoonauth Sahoi Chotayloll, Ubbeer Chund."

At the time when the contracts were entered into, the first public Government sale of opium by the East India Company for the season had been advertised in the Calcutta Gazette of the 29th of August 1846, for the 30th of November, 1846. On that day the opium advertised to be sold by the Government was put up for sale by public auction at Calcutta, subject to certain printed conditions of sale; but, owing to the first lot put up for sale having been bid for to an exorbitant price by persons who attended the sale, no lot was knocked down, and the sale was postponed. On the 7th of December, 1846, the opium advertised for sale on the 30th of November, was again put up for sale, subject to certain modified conditions of sale, which had been advertised by the Government between the 30th of November, 1846, and that day. On this last day the opium was sold, and realised the average price of Company's Rs. 1793, 5 annas, and 9¾ pice, per chest. After the sale, the Appellant claimed from the Respondents the sum of Company's Rs. 18,134, 13 annas, and 3 pice, being the amount of the differences between the sums mentioned in the contracts and the average price for which the opium sold, with interest thereon from the 7th of December, 1846; but the Respondents refused to pay, whereupon the Appellant, in October, 1848, brought [127] an action upon promises in the Supreme Court at Calcutta against the Respondents. The declaration contained eleven special counts, followed by a count for money had and received. Each of these special counts was laid upon a separate and distinct written contract, in the nature of a wager, respecting the average price which should be thereafter obtained by the Government for *Patna* opium at a certain future public Government sale.

The Respondents pleaded first *non assumpserunt* to the whole declaration, also several pleas traversing its allegations; and further setting up fraud on the part of Appellant.

Issue was joined upon these pleas. Afterwards the Respondents obtained leave to plead additional pleas, which set up in substance the same defence.

The cause came on for trial on the 21st of July, 1852. Evidence was given on behalf of the Appellant and Respondents, and, by consent, the depositions of witnesses in another action [10 Moo. P.C. 135], entitled *Chotayloll v. Uggurchund and Hurruckchund*, being the same Plaintiff against other Defendants upon similar wager contracts, were used as evidence. The Appellant proved the contracts upon which the action was brought, and also that the first *lelaum*, or public Government sale of opium, was advertised for the 30th of November, 1846, and that there was an attempt to hold the sale on that day, but that it went off owing to parties trying to run up the bids to an immense amount: and that the first actual *lelaum*, or public Government sale of opium for the season, took place on the 7th of December, 1846, when the same number of chests of *Patna* opium, and of the like quality as advertised for the 30th of November, [128] 1846, were sold, and produced the average price before mentioned. Upon this evidence the Court found a verdict for the Respondents on the pleas of *non assumpserunt* to the special counts, and a

verdict for the Appellant on all the other issues; damages Company's Rs. 5775. on the common counts for money had and received; leave being reserved to the Appellant to move to increase the verdict by the amount claimed on the special counts, and to the Respondents to move to enter a verdict for them. This sum was the amount of the premiums, or *bonuses*, paid by the Appellant to the Respondents, and which the Court thought the Appellant entitled to recover.

The Appellant obtained a rule to show cause why the verdict for the Respondents, on the plea of *non assumpserunt* to the special counts, should not be set aside, and a verdict entered for the Appellant on that issue, with damages contingently assessed; namely, Company's Rs. 18,134, 13 annas, and 3 pice, in substitution for the verdict for the Appellant upon the money counts; and the Respondents also obtained a rule to show cause why the verdict for the Appellant on the first plea, as applicable to the twelfth count of the declaration, should not be set aside, and a verdict entered for the Respondents; and why the verdict entered for the Appellant, on the fifth plea, should not be set aside, and a verdict entered for the Respondents; and why the verdict entered for the Appellant, on the sixth, seventh, and eighth pleas, should not be set aside, and a verdict entered for the Respondents.

Both these rules were argued before the Supreme Court on the 20th of August, 1852, and were, after [129] argument, discharged without costs. The judgment of the Court in this and two other cases, including the case of *Chotaylo v. Ggurchund and Hurruckhund*, was as follows:—

“These cases are in substance the same, and our judgment in one case is applicable alike to all. The contracts declared upon are gambling contracts, on the average price to be obtained on a future public Government sale of opium. At the time when these contracts respectively were entered into, the sale was advertised to take place on a certain day in November. The sale was attempted on that day by the vendors; but the sale was prevented by a combination, and by the machinations of certain persons interested in similar contracts, who had taken the low average, and who, to avoid losing their bets, were bent on preventing any sale that day.

“The sale not having taken place, a sale was advertised by the vendors for a day in the ensuing month of December, under conditions somewhat different from those under which the defeated sale was advertised to take place. In these contracts which are now under consideration, though there is some variation of expression as to the sale, yet the expressions in all as to the time of the sale are inconsistent with the substituted day. In one, which is the case most favourable for the Plaintiff's argument, the term ‘the first opium sale’ is used; but that expression is preceded by a statement of the day; and we think that the true way of construing that, also, is to take the two expressions together, and, as meaning the first sale now advertised, for the reference to the day in the contract seems to be in that sense. In one contract, the very day of the defeated sale is [130] named, and the sale is described as a sale of that day; in the other, the sale is described as the sale of November.

“The language, we think, refers plainly to the sale, and is no stipulation that the very identical opium should be sold; which, indeed, the vendors, on the evidence of the Witness, Welsh, never bound themselves to, not selling opium specifically described, but taking indiscriminately from their stores opium of the quality described in their advertisements. In construing contracts by natives, an adherence to the letter, without regard to their style, is to be avoided; the expressions in all, we think, denote the day or time of sale.

“These contracts differ, therefore, materially from the case before the Privy Council, and from the former case in this Court, as here the then intended day of sale, which was a fixed day rarely departed from, is mentioned by reference to it in the contracts. In this Court it was held that the change of day on certain of those gambling contracts did not defeat the bets, because in those contracts the time named for the sale was general, namely, ‘the first opium sale;’ and as the first advertised sale proved abortive, that which next followed fulfilled the terms of the bets. The Privy Council have so decided in contracts thus generally worded. But these contracts contain, by reference to the day and the month respectively, a description of the sale, which is particular and limited in terms; and the question



is, whether we are at liberty to treat that part of the contract as mere description and nothing else, and to read the contracts, as bets on the result of the next first opium sale, whenever it might be. There are, certainly, no express words of [131] warranty or condition; still, the nature of the contract is such, that time, if named, would, upon legal principles, be of the essence of the contract: for it is a contract on a contingency or risk, which the alteration or retardation of the day might materially vary. In such cases, the question is, not whether in the particular case such alteration has, in fact, increased or diminished materially the chances of winning; but the rule where it prevails is a general one not dependent on the actual result in an individual case. It is obvious, for instance, that if a wager is with a capitalist, on the ability of that capitalist to influence a market price to a rise by means of his money, or credit, and transactions; that the retardation of the day on which the bet is to come off may give him an important advantage, as its acceleration might place him under great disadvantages, and various casualties might have the most important influence on the risk on such a bet as the present. The description of the day of sale in the contract cannot, therefore, in the reason of the thing, be regarded as mere surplusage.

"There is no evidence why the description was inserted in these particular contracts, nor do the rules of evidence permit the parties to explain by oral evidence the reason of their inserting the time. If such evidence were admissible, and it appeared that one side meant, in fact, the day to be material, and that the other did not, the contract would fail on the ground of want of mutual assent to the same agreement. The unwarrantable and successful attempt to frustrate the first sale would have been merely a purposeless wrong to the vendors, unless some, at least, of the contracting parties thought the day a material term in their contract. As then, there is no ground [132] in the reason of the thing, or in the surrounding circumstances, to treat the description as unmeaning surplusage, it must stand, and it denotes a sale which never took place; consequently, the event on which these particular bets hinged never took place, and, consequently, the bets were not lost. This view of the case appears to us to be supported by the language and reasoning of the Court, in the case of *Daintree v. Hutchinson* (10 Mee. and Wels. 85), especially by the judgment of Mr. Baron Alderson. That learned Judge says, in substance, that the day, if it had been a fixed day, would have limited the bet to a match on that day. The Court does not there say that the parties should have introduced words of express warranty or condition to that effect, but simply that the day should have been fixed. In that case, the Newmarket Meeting was considered on the evidence to be in the nature of a moveable feast, a time fluctuating with weather and other circumstances. But here the evidence shows only one change of day in many years, and that not recent. No doubt the wording of a contract, and its nature, might be such as to give rise to a confident belief that the mention of a day, or time, was merely descriptive of a thing as it then stood, an expression in its own nature, having, and intended to have, no limitation to time; but viewing the nature of the contract and the surrounding circumstances, we think it would be merely assumption of the point in dispute to adopt this view of the matter. There are no merits, and the demerits seem equally balanced. It is a mere question, whether a bet on a sale in a certain month, or on a certain day in that month, means a bet on a sale at any indefinite time.

[133] "We cannot vary the terms which they have used, and we do not feel justified in rejecting any of them. On the other ground, we think that the Plaintiff is entitled to a return of the premium. It is ingeniously argued, that it was part of the risk whether the sale would take place or not, at the appointed time; but we think that was no part of the risk: the risk was whether, at a sale to take place in the prescribed time, the price would rise above a named sum, consequently, we think the risk was not run. Had this argument been sound, then, of course, the wager would have been decided against the Plaintiff. The pleas of fraud, as they are framed, not being in any of the cases supported by the evidence, we think it unnecessary to enter upon a consideration of their validity in law. Therefore, the rules in all the cases will be discharged, and the verdicts supported as they were found."

The present appeal was from this judgment, so far as it related to this action.

Sir Fitz-Roy Kelly, Q.C., Mr. Serjeant Channell, and Mr. W. H. Clarke, for the Appellant.—At the time when these gaming contracts were entered into, they were legal. It has been so held by this Court, *Ramloll Thackoorseydass v. Soojumnul Dhoneimull* (6 Moore's P.C. Cases, 300), *Doolubdass Pettamberdass v. Ramloll Thackoorseydass* (7 Moore's P.C. Cases, 239). The Act of the Legislative Council of India, No. 21, of 1848, for avoiding wagers, had not then passed, and, therefore, does not apply to this case. The question, then, is simply one of construction. The terms of the contracts are [134] similar in their nature, and they must be determined upon legal principles, by endeavouring to discover what was the real meaning of the parties. Now, we submit, that the true construction of the term "the 30th of November," was intended as a mere description of the period at which the *lelaum*, or first public Government sale of opium, usually took place, and that whether such public Government sale did or did not take place in the month of November, 1846, that circumstance formed no part of the risk contemplated by the wagers. The actual time of sale was immaterial, the subject of the contracts being a sale of the quantity and description of opium advertised in the *Calcutta Gazette* of the 29th of August, 1846, at the next Government sale, whenever such sale should be effected. Although, therefore, the month of November, 1846, was mentioned in the contracts, the sale contemplated by the contracts was not limited to that month only. Suppose the 30th of November, had fallen on a Sunday, or a fast-day, that fact would not have avoided the contracts.—[Sir William H. Maule: Your argument is, that the language of the contracts import that the opium was to be the opium of the 30th of November, 1846, and not that the sale is to be on the 30th of November?—The contracts clearly bear that construction.—[Mr. Pemberton Leigh: Does the contract mean more than that it should be the opium that would be for sale on the 30th of November?—The first actual public Government sale of opium, namely, that of the 7th of December, 1846, which took place after the making of the contracts, satisfied the terms of the contracts, and upon a certain average being realised thereon, the event on which the Appellant had [135] wagered was determined in his favour, and he was entitled to recover the difference between the *bonuses* or premiums paid him under the contracts and those averages.

Mr. R. Palmer, Q.C., and Mr. Leith, for the Respondents. —No sufficient grounds are shown for disturbing the verdict or altering the judgment appealed from. The construction now put by the Appellant is unsound, for it cannot with any reason be argued that the description of the day of sale mentioned in the contract is to be regarded as mere surplusage. In *Daintree v. Hutchinson* (10 Mee. and Wels. 85), which was an action upon a wager upon a coursing match, Baron Alderson lays it down, that if a specific day be fixed for running a match, that would have limited the match to the day. Now, the Government sale, which was to have taken place on the 30th of November, never took place; the wagers were, therefore, off.

Sir Fitz-Roy Kelly, Q.C., replied.

Their Lordships reserved judgment, directing the following appeal, which arose under similar circumstances, to be argued.

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RUGHONAUTH SAHAI CHOTAYLOLL.—Appellant; UGGERCHUND and HURRUCKCHUND,—Respondents.

This case differed in no respect from the former appeal, the facts being similar, except as to the form of the contracts and the parties. In the view their [136] Lordships took of the case, the distinction was immaterial, and it is unnecessary to state the particulars of the case.

Sir Fitz-Roy Kelly, Q.C., Mr. Serjeant Channell, and Mr. W. H. Clarke, again appeared for the Appellant; and Mr. R. Palmer, Q.C., and Mr. Leith, for the Respondents.

Their Lordships' judgment in both appeals was delivered by



The Right Hon. Sir John Patteson.—These cases are in substance really one of construction only, as to the meaning of the contracts which the parties have entered into upon certain opium wagers. Undoubtedly, there is hardly anything which is more difficult than to arrive at a certain conclusion with regard to the meaning and intention of the parties to a written contract, if the words of the contract are in any way capable of more than one interpretation. It is very difficult to do so; but still their Lordships are, in this case, obliged, as well as they can, to ascertain from the contracts themselves and the surrounding circumstances, what was the meaning of the parties.

Now, looking at the words of the contracts, and at the surrounding circumstances of the case, their Lordships are of opinion, that the contracting parties intended to make a wager as to the average price of opium at the first Government sale, without any provision that such sale should necessarily take place on “the 30th of November,” and no other day. The 30th [137] of November had been advertised in the Gazette of the 29th of August, 1846, as the intended day of the first sale; and it appears that it really happened that no alteration was made in the day so advertised. The parties, therefore, would naturally in their contracts refer to the advertisement in the Gazette by way of description. If they had intended to confine their contracts to what should happen on the 30th of November, and no other day, they certainly would have used some words of limitation so confining it, but no such words are to be found. The words are, “the first public sale,” the addition of “the 30th of November” being introduced, as we are of opinion, only as a description, as if it had been, “which sale is advertised now on the 30th of November.” It appears by the evidence that no particular chests are marked or set apart for any particular sale, therefore it seems hardly likely that the parties intended by the words “the 30th of November,” to describe the particular opium then to be sold, and not to refer to the day of sale. It appears by the evidence of the witness Welsh, that sufficient opium had not arrived for all the sales contemplated in that year, though there was then sufficient for the first sale.

Such being the construction to be put upon the contracts when made, does the alteration made in the conditions of sale, after the attempted sale of the 30th of November proved abortive, do away with the contracts? Their Lordships think not. Their Lordships so thought in *Doolubdass Pettamberdass v. Ramlool Thackoorseydass* (7 Moore's P.C. Cases, 239), and there is nothing in the present case leading to the conclusion that the parties contracted with express reference to the conditions which are [138] published in the Gazette of the 29th of August. In truth, the only material addition to the conditions of the sale on the 7th of December, was the twelfth condition, guarding against the mischief which had rendered abortive the intended sale of the 30th of November.

The case of *Daintree v. Hutchinson* (10 Mee. and Wels. 85) is no authority on the point raised. There the day was decided to be immaterial, and the *dictum* of Baron Alderson in that case merely shows that where parties make a specific day essential in their contract they must abide by it. But the question here is, whether the parties did make a specific day essential, and their Lordships think that they did not. There is an expression in that case which is adopted in the judgment of the Court at Calcutta, which, perhaps, it is as well to mention. The Court there say, “In that case, the Newmarket Meeting was considered on the evidence to be in the nature of a moveable feast,” not fixed definitely for a particular day, but dependent in some degree on circumstances. Now, certainly, we do not feel disposed to agree with that, because, in truth, a moveable feast is as well known and as fixed at the beginning of the year, as any feast which is not moveable. All moveable feasts depend upon Easter. It is known what day Easter will be in the years 1857 and 1858, and for years to come, if it is calculated. Therefore, all feasts which depend upon Easter, are as well known as Christmas or any other day which is not commonly called a moveable feast. That expression, therefore, seems to us to be incorrect. Under these circumstances their Lordships will recommend Her Majesty that the verdict should be entered for the Plaintiff on the issue of *non assumpserunt*, and [139] on the special counts for the damages which have been found in each case. And we think the verdict should be entered for the Defendants in each case on the counts for money had and received.

Mr. R. Palmer.—Your Lordships did not say what your intention is about the costs. I believe, under the present Rules, if nothing is said the Appellant gets the costs of the appeal (see, however, upon this point, *Lindo v. Barrett*, 9 Moore's P.C. Cases, 456, where their Lordships held that to entitle a successful Appellant to costs, application must be made at the hearing for their allowance).

The Right Hon. T. Pemberton Leigh.—All we can do is to give the costs according to the ordinary rule.

By the Order in Council made upon the appeal, it was ordered, that the appeal be allowed with costs.

[Mews' Dig. tit. VENDOR AND PURCHASER; A. 3. *Time when of the Essence of the Contract*: a. *By Original Stipulation*. S.C. 6 Moo. Ind. App. 251; 4 W.R. 317. See note to *Doolubdass Pettamberdass v. Ramlohl Thackoorseydass*, 1850, 7 Moo. P.C. 239.]

#### [140] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

JOHN DOE, on the demise of RAJAH SEEBKRISTO and Others,—*Appellant*;  
THE EAST INDIA COMPANY,—*Respondents* \* [Feb. 2 and 4, 1856].

The East India Company, as representing the Indian Government, have a freehold in the bed of navigable rivers in India, and to the land between high and low-water mark [10 Moo. P.C. 161].

Land formed by gradual accretion belongs to the owner of the adjacent soil.

By the Hindoo law a verbal grant of real estate is good, if followed by possession by the grantee.

The grantors of real estate were Hindoos, and the grantees, the East India Company. Held, that as the Hindoo law which governed the grantors' rights allowed a verbal grant, the law of the grantees regulated the matter, and, as there was possession under the grant by the grantees, the grant was valid.

Ejectment by the Appellant against the Respondents for recovery of a piece of land situate at Hauteollah, in Calcutta, bounded and abutted on the north by a ghaut known as Ahereetollah ghaut, or Rajchunder Doss's ghaut; on the south by land in the possession of the Commissioners for the town of Calcutta; on the east, partly by land belonging to the lessors of the Appellant, and partly by the Strand Road; and on the west by the river Hooghly. This piece of land was claimed by the lessors of the Plaintiff as an accretion to certain lands which they asserted to be their property.

The Appellant, the lessors of the Plaintiff in the Court below, were Rajah Seebkristo, Rajah Kaleekristo, Rajah Dabeekristo, Rajah Opoorbokristo, Rajah Nreepaindrokristo, and Rajah Noraindrokristo, sons of [141] the late Rajah Rajkissen, Kistnochunder Ghose and Kistnosokah Ghose, Woomasoonduy Dossee, Bohoo Rancee, the widow of Rajah Madubkissen, a son of Rajah Rajkissen and Gopaullohl Tagore, as executor of the Will of Rajah Jaudubkissen, another son of Rajah Rajkissen.

The Respondents, who took up the defence as landlords, pleaded simply "Not guilty," and thereupon issue was joined.

The action was tried before the full Court on the 22nd and 23rd of March, 1854, when it appeared from the evidence, that the river Hooghly was a navigable tidal river, subject to the daily flow and reflow of the tide; that at different times the Respondents had taken measures for the public improvement of the town of Calcutta, and in the year 1824, took steps with that object through a Committee, which was called the "Lottery Committee," in consequence of the funds required for the intended improvements having been provided by means of a lottery. That previously to the year 1824, a narrow and inconvenient road followed the course of the Hooghly on its

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.



left or eastern side, as it flowed from north to south, and the "Lottery Committee," acting on behalf of the Respondents, altered and improved this road through the whole length of the town of Calcutta; and at the place in question widened, and in parts straightened the old road. At that place the new road thus formed was called the Strand Road. In executing these improvements, the "Lottery Committee" raised the ground to the west, and built along the west side of the Strand Road a strong retaining wall, with a paved embankment sloping off to the west into the river, and bounding the river by a defined [142] line. This wall, with its embankment, adjoined the piece of ground in dispute. The case set up by the Appellant at the trial was, that in the year 1778 the Respondents made a grant to Nubkissen, the grandfather of the Principal lessors of the Plaintiff, of the Talookdarry of Sootalootee, which on the death of Nubkissen, and Rajkissen his son, passed to Rajkissen's sons: that this grant passed to the lessors of the Plaintiff the freehold of the lands within Sootalootee: that the place where the retaining wall was built by the Respondents, the Talook Sootalootee, extended on its western boundary to the high-water mark of the river Hooghly: that between the old road and the river Hooghly there was, in 1824, a strip of ground within Sootalootee, which was let out as golahs for bamboos brought down the river Hooghly for sale: that in 1824 Rajkissen's sons allowed this piece of ground to be taken for widening and improving the road; but that by so doing, they did not part with the soil on which the additional width of the new road was made, and still retained in themselves the property of the same: that the terms on which the owners of the Talook consented to the land being so used by the Respondents were mentioned in a communication, partly verbal and partly written, which passed at the time between the "Lottery Committee," who then represented the Respondents, and Rajah Seebkissen and Kistnochunder Ghose, the executors of Rajah Rajkissen. The only evidence at the trial of what was stated in this communication was the deposition of a witness named Kistnochunder Ghose, who deposed that Roopnarain Ghosaul, a person on behalf of the "Lottery Committee," came to him and Rajah Seebkissen, and said the Lottery Committee were desirous of getting the [143] ground for the purpose of constructing a road. ["I said the land belonged to our estate, that there was no objection to take the land provided all our right and title in the land belonged to us, and that no loss or injury inured to us. We gave some land to make the road, reserving the bamboo market to ourselves, and all other ghauts should not be encroached upon, but reserved to us and the hauts that were there, and land was given up for the road. We did not give up the land on the river side; there was a little portion of the land given where these bamboos were placed. Had we given the land on the river side, the bamboo mart would be injured;" and in a letter dated the 16th of June, 1824, by the Secretary to the "Lottery Committee" to Rajkissen's executors, they said that the new road would not interfere with the haut at Haut-collah, nor with the advantages derived from their private ghauts in Sootalootee, of the nature of which the "Lottery Committee" however had no means of judging, nor any authority to decide upon them; that as far as their operations were concerned, they had the satisfaction of knowing that all their property in that neighbourhood would be greatly enhanced in value in consequence of them. The letter then proceeded, "In exchange for the high ground which was occupied by your tenants on the river side, and is required for the new road, you will receive all the surplus that may remain between it and the land in your possession on the east side of it;" that afterwards, the waters of the river Hooghly gradually retired opposite and adjoining the land which had been so taken for widening the road, and that the piece of ground in question having been left by the gradual retirement of the river, was an acre-[144]-tion to the adjoining land, the property of which they insisted was still in the family of Rajkissen, and, as a consequence, belonged to the lessors of the Plaintiff; and in support of their case, they relied on the fact that no written conveyance of the soil of the land for widening the new road was forthcoming, and that after the completion of the Strand Road, the whole space between the retaining wall and the eastern boundary of the Strand Road had not been used for traffic, but a strip of land on the west side of the Strand Road, and adjoining the wall, had been marked off by posts, so as to separate it from the part actually used for traffic; and that the family of Rajkissen had been allowed to use or let out places on this strip as golahs for bamboos, which were still sold there. The Respondents met the case of the Appellant by

evidence to show that the piece of ground in question had not been formed by an ordinary change in the bed of the river, but by acts done by conservators, with the object of forming new ground; and they brought evidence to disprove any title in the lessors of the Plaintiff to the adjoining strip of ground, or to the site of the boundary wall; by proving, that the whole space between the retaining wall and the eastern boundary of the Strand Road was, in 1824, paved in a corresponding manner, and that the subsequent use of the strip of land along the wall for bamboos had been by the express permission of the Respondents. They also contended that the character and nature of the improvements made, and the subsequent enjoyment by them, were inconsistent with the suggestion that any property in the freehold was in the lessors of the Plaintiff, and submitted that the evidence adduced by the Appellant did not establish any of the facts, on the [145] ground of which his claim was made, nor warrant in law the consequences to be deduced from them.

The Court found a verdict for the Appellant, leave being reserved to the Respondents to move to set aside the verdict and to enter a nonsuit, or a verdict, for the Respondents instead. The Respondents afterwards moved for and obtained a rule to show cause on those terms, which was, after argument, by an Order, bearing date the 4th day of April, 1851, made absolute for entering the verdict for the Respondents with costs, against the Appellant.

The judgment of the Court, on making the rule absolute, was delivered by the Chief Justice, Sir Lawrence Peel, as follows:—"We are of opinion that the lessors of the Plaintiff have not made out their title to the land, which is the subject of this action of ejectment. The land is part of that which was the bed of the river, and the lessors of the Plaintiff can have no title to it unless by accretion. Whether the ownership of the soil of the bed of the river is in the Crown, or in the Defendants, is unimportant with regard to the decision of this cause. The title by accretion cannot be made out, unless it be shown that the land to which the accretion adhered is the land of the lessors of the Plaintiff. To establish this they made out their claim thus. They proved that a grant had been made to a party, under whom they claim by the Defendants, of a *Talookdarry*, the boundary of which they proved to be the high-water mark of the river. Then, under this grant, they made claim to the soil down to that boundary, and claimed this land over which the water once flowed, as an accretion to that adjacent land. The waters retired gradually: it was not a case of derelict land; and though that with-[146]-drawal of the waters was aided by the acts of Defendants in various parts of the river contiguous, yet the proximate and not the remoter cause is alone looked to, and the lands were still gained by accretion, though that accretion was aided by human agency. If the waters had been bounded out, the character of an accretion could not have been given to this land. It was urged for the Defendants, that as they made the wall on their own soil, the accretion was an accretion to their soil. This in a certain sense is true: but the consequence would by no means have followed, if the lessors of the Plaintiff had established the rest of their case, that they could not, therefore, claim this accretion. Any one who possesses land on the banks of a river (and there is no difference in this respect between navigable rivers and rivers not navigable), has a right to the flow of the water in its usual course: subject to that right, the owners or conservators of the river have the right of repairing the banks and improving the course of the river. The erection of a wall or other bound between the land on the edge of the water, and the water intercepting the actual flow, must either be an invasion of the right of the landowner to the usual flow of the water, or a mere repair and support of the banks. In the latter case it would not infringe on his rights, and in the former it would; but in the former case, as no one can take advantage of his own wrong, the right could not be affected by the circumstance, unless by the laches of the sufferer. In a navigable river the erection of anything in the bed of it would be a nuisance if it impaired the free course of the navigation: the mere erection without that consequence would not be so. In *The King v. Russel* (6 Barn. and Cr. 566), which [147] case, though it was disapproved of and overruled on one point, namely, the question whether a set-off, as it were, could be made of public benefit against public detriment, in considering the question of nuisance or no nuisance by such an erection, which, in fact, impeded the course of navigation; yet it has never been questioned as to the general position, that nuisance or no nuisance by such an erection is a question



of fact, which the mere fact of the erection alone does not solve in favour of the existence of the nuisance. In like manner, where the soil belongs to the owners of the land on either bank *ad medium filum aquae*, as it does in general by the English law, in non-navigable rivers where the tide does not flow, the right of either proprietor on either side of the river to his own soil, though it be the bed of a river, is not restrained, unless in so dealing with his own he interfere with the rights, which are as it were of common right, to the flow and use of the water. If he do so interfere, then it is an actionable wrong. In this case, however, there is no ground for saying that any wrong was done either designedly or actually, in the erection of this road and its adjuncts; that which was done, was done with the full consent of the owners of the soil adjacent: nor is there any proof of any interference with the navigation, or of any encroachment on any private right to the flow or use of the water. The whole question turns then on this, namely, the ownership of the soil immediately next to the accretion as it began. + The lessors of the Plaintiff admitted a gift of the land to the Defendants (a) by [148] them for the purpose of

(a) Mr. Ritchie, the Counsel for the lessors of the Plaintiff after the delivery of the above judgment, handed to the Court the following paper in explanation of the admission referred to by the Court, as having been made by him:—"My admission was not intended to extend to an admission of an actual gift of the land by the lessors of the Plaintiff to the Defendants, or to an abandonment of the distinction between the gift of the property in the soil and the gift of a right over it, as might be inferred from the passages of the judgment in question. I fully admitted, on showing cause, that the distinction was not likely to be and was not present to the mind of the executors. But I contended that that circumstance did not of itself give the right in the soil to the Defendants, that the distinction would have been called to the attention of the executors if they had been required to execute an actual grant or gift, in which case they probably would not, without compensation, have parted absolutely and for all purposes with the soil, especially as they were mere executors and trustees for infants; that it was clear that the executors, although they intended to give up to the East India Company full possession of the land for the purpose of making a public road, had no intention of giving it to the Company for any other purpose: that the use of the land for any other purpose would have been wholly unauthorised by what took place between the Lottery Committee and the executors; that if within a month or other short period after the commencement of the road the Defendants had applied the land to any other purpose than that of a public road, as, for instance, by building *go-downs* or enclosing it, the lessors of the Plaintiff might have maintained trespass or ejectment; that the only ground on which they could now be precluded from doing so would be the adverse possession of more than twenty years of the soil over which the actual road passed; and that the legal effect of the Defendants taking possession of the land, and constructing the road without any more definite understanding than that disclosed by the executors' evidence, could not be carried further than a possession for a particular purpose by licence, which possession, it might be admitted, had become adverse by reason of the impression under which the Lottery Committee entered, viz. that the Rajahs intended to give them the land itself, for the purpose of making the road; and which possession having continued for more than twenty years, could not now be displaced by the lessors of the Plaintiff, as proprietors, even if a trespass or encroachment, of which the public could complain, had been committed by the Defendants; and I certainly did urge under another head of the argument, while contending that the rights of the Company, whatever they were, were limited to the particular portion of the ground actually used as a road, that even admitting an actual grant to the Defendants, of the land over which the road passed, that grant would carry nothing with it but the land used as a public road, and would leave the whole land between the road and river not required for the purposes of a road, but used all along by the lessors of the Plaintiff's tenants, the property of the lessors of the Plaintiff, there being, as I contended, no evidence of a grant to the Defendants, except that derived from the user, coupled with the letters of the Lottery Committee, and any grant therefore that could be presumed, being co-extensive with and not more extensive than the user in point of quantity: but this admission was made, or at least

making the road. It was at the trial at first contended that the gift was intended to [149] be merely a gift of an easement, a dedication of a way to the public with a reservation of the right of pro-[150]-perty in this soil itself; but the witness did not state it so, and though he may have meant to give with a reservation of other rights, yet the subject of accretion was not in fact present to the minds at that time either of donor or donees, and the accretion in fact has been attributable to the act and cost of the Defendants. This distinction between the gift of the property in the soil and the gift of a right over it is now abandoned, and it is candidly admitted that the distinction was not likely to be and was not present to the mind of the donor. × Then the question is, what is the validity in law of this gift, and what was its extent? for if it was a good grant and left no space belonging to the donors intervening between the ground given and the then high-water mark, the accretion would then be an accretion to the Defendant's own soil under the circumstances of his case. Now the donors are Hindoos: it is true the donees are the East India Company, that is, British subjects, and [151] they are Defendants, and where the Plaintiff is a Hindoo, and the Defendant a British subject, the law to be applied to the case, in the absence of agreement to the contrary, is the law of the Defendant. By the Hindoo law there is no distinction between moveable and immoveable property as to the mode of granting it. It, therefore, resembles the case of a grant by the English law of chattels real or personal, before the Statute of Frauds, which then might as to both have been without writing or deed. (See *Shepherd's Touchstone*, tit. "Grant.") The grantor, then, has capacity to grant, and the thing is grantable without deed or writing by the law of the grantor, and can pass out of him by such a grant as this: and by the English law a grantee can gain the subject of the grant by his assent to the grant. Here there has been also possession, which

was intended to be made, for the sake of argument only, and without any intention to make an admission of a fact which, on another branch of the argument, I, with Mr. Welsh (the junior Counsel), who was with me, contested."

In consequence of this explanation, the following note was added by the Chief Justice to the judgment:—"Mr. Ritchie, the leading Counsel for the lessors of the Plaintiff, has stated to me, and from the confidence which I repose on his word I have no doubt that he has truly stated, that in that part of the judgment which is marked between the marks × ×, I have mistaken the extent of the admission which his argument involved. I have, therefore, annexed to the judgment of the Court his statement, including an argument in support of it of the extent to which he meant his admission to go.

"The Court adheres to the opinion which it expressed that the grant was of the land itself, and not merely of a right over the land, though no doubt the grantors meant the land to be used for a road. This was intended also by the grantees, and it was not altered until the arrangement took place, by which the land marked by the saul posts spoken to in the evidence was devoted to the purpose of laying the bamboos. As this was done by mutual consent, it worked no breach of condition or forfeiture. And it appears to the Court to be really immaterial whether the grant to the East India Company bore the limited character now contended for, or that which our judgment ascribes to it, because in either view of it, it equally is pregnant with evidence of assent to the road-making, and consequently the construction of the road, that is, of part of it, on the Defendant's own soil, which the evidence for the defence we think clearly establishes, involved no violation of any right of the lessors of the Plaintiff, and unless it did, or unless it could be treated as a mere erection of a river bank or mound, we think the accretion must follow the title to the land in that part.

"Our view may be explained thus:—

"A. gives to B. either the soil itself or the right for the public to pass over the soil as part of a public road between C. and D.; B. incorporates with that for the same purpose, with the assent of both, his land between D. and E.; then a portion of what would have been such public road is taken out of it for the use of A. and his tenants, but leaving on the side towards the river a small portion, belonging to B.; how is B.'s title to that land got out of him by any dealing with the part so taken out, whether that dealing be viewed as founded on right, or as adverse possession?"



*quodam modo* the Hindoo law requires. Whether by the English law delivery, or what is equivalent to it, is essential to the validity of a gift *inter vivos*, must be treated as a doubtful point. *Irons v. Smallpiece* (2 Barn. and Ald. 551) decided that without deed, or delivery, or possession, the grant was invalid against the personal representatives of the grantor. Doubt was always entertained about that decision, and these doubts have been strengthened by the observations of a learned reporter, Serjeant Manning, and by some late judicial *dicta*, for the case does not appear to have been overruled. There are not wanting, however, analogies in the English law to support the decision in *Irons v. Smallpiece*, which is certainly in harmony with the provisions of many bodies of law. But here there is possession under the gift, and, therefore, the requisitions of both laws are fulfilled, supposing *Irons v.* [152] *Smallpiece* to be law. Therefore, it appears to us that the grant, though not in writing or by deed, was valid, notwithstanding the character of the Defendants. We know of no authority opposed to this view, and on principle we think that where the grantor means to grant by his own law, and can grant effectually by his own law in the way in which he makes the grant, and where the grantee can take by his law under a grant, without execution of any deed or writing whatever, that the oral gift is valid, though the law of the grantee is to regulate the matter. Every court should labour to support rather than to defeat the acts of the parties *inter se*, where they involve no violation of the law. Parties may waive their own law, and act under another by mutual consent, where the law contains no prohibition to such a course of dealing. And it cannot be laid down as any part of the English law, that a British subject cannot accept a gift unless it be made him by the donor in that mode in which he himself, if donor, must grant a thing of the like nature. The gift, then, being in our opinion valid, what was the extent of the land given? We pay all proper attention to the argument, that there was no consideration for this transfer, and certainly we should not be justified in stretching it. But the contemporaneous acts of the parties afford, we think, a sufficiently clear light as to the extent of the grant. The cases cited by the Defendant's Counsel have much reason for their support, and they are undoubtedly law. The making of this road was one continuous act, and the line marked out above and below this particular land, and the acts done on that line in laying down the guns which were to be the support of the lamp-posts, are all im-[153]-portant; there is no ground for imputing encroachment, for the evidence shows enough in the propinquity of the grantors, the interest they took in the matter, and the publicity of the matter, to forbid any such supposition. Mr. Gray speaks to the foundation being made for these guns, and the object of them. The argument as to the width of the road, and the evidence also furnished by the inspection of the map, both lead to the conclusion, which is also confirmed by the evidence as to the making of the road, that the road, as it was originally designed and made, really passed beyond the limits of the land, which was the subject of the gift, and that it was made partly on the given land, partly on the land adjacent.

"It is in evidence that soil was brought from a distance, and thrown down where the water ordinarily flowed; the road was a raised road, formed so as to be safe from the assaults of the river; in any proper mode of making such a road, it would be made as the evidence for the defence says that it was. Consequently we think that in reality the road, as marked out, extended beyond the given land, and that no intermediate space belonging to the Plaintiff existed, to form a nucleus for an accretion, as the lessors of the Plaintiff contend. Then the subsequent possession of the lessors of the Plaintiff as to the land covered by the bamboos is explained by the evidence. It proceeded on an arrangement made after the line was traced out, by which part of that which was taken for road, and would, if dedicated, have become so, was reserved for the lessors of the Plaintiff. The public, in fact never acquired a right to pass over the soil where the bamboos have been placed, for the arrangement and the use preceded, from the evidence, the [154] opening and occupation by the public of the road; but this arrangement cannot be extended beyond its object, and the use is the measure of that right; the use, however, is not over ground co-extensive with the ground originally taken and marked out; so that in any way of viewing this matter, either as a regrant of the soil, or as an adverse possession by the lessors of the Plaintiff, still the soil so occupied, not reaching down to the water line, but having another boundary, cannot be the nucleus for an accretion.

"We have viewed this case, adopting the version of the lessors of the Plaintiff as to their original ownership, which the evidence in our opinion confirms. The Defendants contend, that the lessors of the Plaintiff had no land along the river line here, unless it were the old road. But that is quite inconsistent with the acts of the Lottery Committee. A particular complainant complains to them that he has been wronged by their taking part of his ground for the road; they write to the lessors of the Plaintiff to this effect:— We consider his claim as groundless, and thought he had no title in it, and appeal to you whom we consider as the proprietors." But would they have answered in this way on the application of a man like this Petitioner, had he put forward the impudent assertion, that he was proprietor of the old road, which now the Defendants say was all that the lessors of the Plaintiff possessed? Very probably the rights between the Talookdar and the Pottahadars were not undisputed, or at all clear; indeed, the case quoted seems to show as much; but if the Committee had recognised the lessors of the Plaintiff as having a bare seignory, or nothing in the character of land but the bare soil in an old road, they would hardly have ex-[155]-pressed themselves as they did. Probably there was much land occupied along the line, and probably some under disputed title, and probably some vacant, or disputed as to its being vacant or occupied. The grant of the Company, in our opinion, confers a title, in express terms, to all lands within the limits of the Talook, which were in the nature of waste or unoccupied lands over which no right existed in any persons occupying or claiming by title derived from or superior to the preceding Talookdars, that is, the grantors. This is, at all events, good against them, and it would be vain to attempt to struggle against the words of such a grant by arguments founded on the original or present character of Zemindarry or Talookdarry rights, even if well founded. The deed of grant and the acts of the grantors, the East India Company, show that they treated the Talookdar, their grantee, as having some rights in the soil: and neither a Talookdarry or Zemindarry right has anything in its nature repugnant to such a supposition." Rule absolute, and verdict entered for Defendants.

The present appeal was from this judgment.

Sir Frederic Thesiger, Q.C., Mr. Bovill, Q.C., and Mr. Paterson, for the Appellants.—The accretion in question pertained to land which was, at the time the accretion began, the property of those under whom the Appellants claim. It was an imperceptible accretion, and, therefore, belonged to them as proprietors of the adjoining soil. This is so by the Hindoo law, *Mussumat Iman Bandi v. Hargorind Das* (4 Moore's Ind. App. Cases, 403), as well as by the law of England. *The King* [156] *v. Lord Yarborough* (3 Barn and Cr. 91; S.C. *nom. Gifford v. Lord Yarborough*, 5 Bing. 163), Woolrych "On waters," p. 26. Before the new land was gained by accretion, the lessors of the Plaintiff, the Appellants, had a right to the soil of the land along the river Hooghly, a navigable river, and that included the river bank. No evidence has been given to show that such right had ever been taken out of them. It was necessary for the Respondents, in order to displace the Appellants' right, to have shown either a valid grant of the soil of such land, or an adverse possession thereof for twenty years and upwards, which they failed to do. The verdict was the result of a misapprehension of the Court as to the admission by Counsel of the grant (see *ante*, p. 147). There was only a consent to the taking and using the land for a road, and a dedication of it to the public for that purpose, and the acts of ownership done by the Respondents and relied upon by them as acts of ownership, were done only with the consent of the lessors of the Plaintiff, and were not adverse to their title to the soil of such land. The verbal grant to the Respondents, even supposing that the grantors intended to convey to them an interest in the soil, is invalid by reason of its not being a conveyance by deed or writing, or founded on any consideration to pass the proprietary right in lands situate in Calcutta to the Respondents, a British corporation; the law of England being the law applicable to the case. It is true that by the Hindoo law land is considered as a chattel, there being no difference in that law between real and personal estate, 1 Strange's "Hindu Law," p. 17; yet, by the English [157] law, a verbal gift of a chattel without actual delivery does not pass the property to the donee, *Irons v. Smallpiece* (2 Barn. and Ald. 551). Assuming it to be a valid gift, it was only a grant of land for making a public road, and would carry nothing with



it but land actually used as a public road, and would leave the whole of the land not so used the property of the lessors of the Plaintiff.

Mr. Wigram, Q.C., Mr. Forsyth, and Mr. Melvill, for the East India Company, Respondents.—The chief and only question really is, to whom the ownership of the bank and soil immediately adjacent to the land which has been gained by accretion, belongs. The East India Company, as representing the Indian Government, are owners of the freehold of the bed of the river Hooghly, subject to such rights as the public have to the use of a navigable river. They are also owners of the land under the grant of 1824, adjoining to the land in question, and as the accretion was imperceptible, the land so acquired would belong to the Respondents as owners of the adjoining soil. Ben. Reg. XI. of 1825, sec. 4; Hale's "*de Jure Maris*," pp. 5, 142, who refers to Bracton, lib. 11, cap. ii.; Woolrych "*On Waters*," p. 26, Instit., lib. ii. tit. 1. In fact, the ground, which was part of the bed of the river Hooghly, was formed by the acts and works of the Respondents. The onus of proof lay upon the lessors of the Plaintiff, who having failed to prove a title, the verdict ought not, upon a question of fact, to be disturbed.

Sir Frederic Thesiger replied.

The Right Hon. Sir William H. Maule.—This is a case apparently of considerable intricacy, [158] and has the appearance of raising some questions of difficulty, both in point of law and of fact. But ultimately, upon being closely looked into, and the documentary and parol evidence being considered, particularly with reference to the judgment of the Court below, the question appears to their Lordships to turn upon a matter of fact which was the subject of inquiry in the Court below, and of the most unhesitating decision of that Court.

The land claimed has become land by way of gradual accretion. A question of law was raised, whether, supposing the accretion (granting it to be gradual) was one which had been contributed to, or even purposely contributed to, by the act of the Defendants, that would not take the matter out of the ordinary law with respect to the accretion. The Court below thought, and we think rightly, that that made no difference. If there were a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law.

The question, then, comes to this: assuming it to be such an accretion as that it belongs to the proprietor to whom the adjacent land belongs, who was the person to whom the adjacent land belonged in this instance? Now, with respect to that point, the Court below in their judgment have given a clear opinion, particularly taking into consideration the explanatory part of the judgment; for some doubt having been raised, or some difficulty expressed by the Counsel for the lessors of the Plaintiff as to some concession, or supposed concession, in his argument, being misapprehended, an explanation is given by the Court with respect to that circumstance, and the Court takes that opportunity, apparently, of describ[159]-ing explicitly, and so as to be unmistakeable, the ground upon which their judgment actually depends, showing, that any misapprehension which there might be, of such concession, did not make any difference in their judgment; for even granting the Court had misapprehended this supposed concession, their conclusion ought to have been the same, and that for two reasons: the first, that notwithstanding Counsel retracted or explained, the concession which the Court supposed he had made, the Court would have come to the same conclusion whether that concession was made or not, because they themselves would infer from the evidence, that there was a grant on the part of the Rajahs of the land to the East India Company, that is to say, about the year 1824, a grant of the land which is the subject of the transaction between the Rajahs and the East India Company. The Court came to the conclusion that if such a grant or Hindoo transfer of the land had taken place, it would make no difference in their judgment, upon the supposition that the land to which the accretion took place was land that never was the land of the Rajahs, but was the land always of the Defendants, the East India Company; and they say, the evidence shows that the new road and the new embankment, which was made about the beginning of the year 1824, by the East India Company, was made extending westward beyond the western boundary of the old road, and beyond the high-water mark. They say the evidence, combined partly with measurements and partly with the statements of the witnesses,

shows that the new work, that is, the upper surface of it, including that part which is used as a traffic road, and that which was constructed in continuity of the traffic road, and which [160] now is used for bamboo *golahs*, the whole of that land was shown by the evidence to extend considerably to the westward of high-water mark. The perpendicular retaining wall was itself built upon land between high and low water mark, that is, upon the East India Company's land; a portion, therefore, as to the rest, which may properly be called a wall (because a wall made against a river on the sea very commonly has, and ought to have, on the side which is next the water, a slope more or less gradual), would still more be upon the East India Company's land.

Then the Court discusses the question, whether the East India Company, who must be taken to be the owners of the soil, could properly do this; the answer is, that they might properly do it except so far as they might interfere with the navigation of the river (which no one seems to have suggested), and except so far as they might interfere with the rights of parties adjoining the river. Now it appears that they dealt with some private persons and paid them for their land; as far as the Rajah had any interest in respect of their being the owners or lords of the Talook of Sootalootee, they obtained their consent probably because their property would be improved by the new works. That is the way in which the Court explains the East India Company's doing this, and shows that they did it rightfully; and that being so, the case then is, that the East India Company, being the owners in fee of a certain portion of land lying between the high and low water mark which was subject to certain curvatures for navigation and otherwise, with the leave and consent of those who were interested, altered the character of the land. Instead of making the land a portion of the bed of the river, they made it permanent [161] dry land: there is, therefore, a portion of permanent dry land westward of high-water mark, which is now part of the bed of the river, forming a part of what was anciently the bed of the river, and that portion of land, according to the judgment of the Court below, which we think is well supported by the evidence, is the part to which the accretion in question has taken place.

The question, therefore, is reduced to this: who is the owner of the land immediately contiguous to the high-water mark in the river at this place? The answer is, those persons who were owners of that portion of the bed of the river which now constitutes dry land, and they are the Respondents, the East India Company.

We think, therefore, it is clear enough that the Court below came to a right conclusion upon that matter of fact; at any rate Sir Frederic Thesiger could hardly in his reply carry the case so far as to say, that it was clear the other way. When we find that a Court having jurisdiction to try matters of fact have determined a matter of fact in a certain way, particularly a matter of fact of a local description, and to which their local knowledge might very much assist them, we should not be disposed to reverse the decision of the Court in determining that fact because we do not quite see our way to the same conclusion. Taking the evidence as it stands, illustrated as it is by the argument of the learned Chief Justice in the judgment, and more particularly by the explanation which was elicited by Mr. Ritchie, and by the argument before us, their Lordships have no doubt that it is their duty to advise Her Majesty that the judgment in this case should be affirmed, and with costs.

[Mews' Dig. tit. INDIA, 1. ADMINISTRATION AND GOVERNMENT; tit. SEA AND SEA SHORE, 1. OWNERSHIP OF, ETC. S.C. 6 Moo. Ind. App. 267. See *Hindson v. Ashby* (1896), 2 Ch. 1; *Eccroyd v. Coulthard* (1897), 2 Ch. 554, 569; (1898) 2 Ch. 358].



## [162] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

HARRIOT LAWSON and Another.—*Appellants*; THOMAS CARR,—*Respondent* \* [Feb. 9, 1856].

THE "JAMES."

Two ships were lying-to: A. with her head towards the north, and B. to the south, going slowly with the tide, when a collision took place between them. Both ships being held equally to blame, A. in neglecting to port her helm in time; and B. in not throwing back her headyards to avoid the collision. The Admiralty Court decreed the damages to be equally divided between them.

Such decree reversed upon appeal; the Judicial Committee holding, that the rule of the Admiralty Court, that in case of mutual blame the damage was to be divided, was superseded by Statute, 17th and 18th Vict., c. 104, sec. 298, and that the penalty of a party neglecting the rules enjoined by section 296 of that Statute, was to prevent the owner of one vessel recovering damages from the other vessel, although also in fault.

Held also, that the above sections, 296 and 298, were not confined to vessels strictly proceeding on their several voyages, but were equally applicable to vessels lying-to [10 Moo. P.C. 172, 173].

This Court is reluctant to entertain an objection to a decree not pleaded or argued in the Court below [10 Moo. P.C. 174].

This was a case of collision, and the principal question raised upon the appeal was, whether, since the passing of the Merchant Shipping Act, 17th and 18th Vict., c. 104, sec. 298 (for this section, see *post* [10 Moo. P.C.], p. 172), damages, civil and maritime could be recovered in the Court of Admiralty by the owner of one ship against the owner of the other, both ships being equally in fault, and mutually causing the collision.

The action was instituted by the Respondent, the [163] Master and sole owner of the late ship *Confucius*, against the ship *James* and against the Appellants, the executrixes of the late owner, to recover the amount of damages occasioned by a collision off the Yarmouth roads, whereby the *Confucius* was totally lost. The action was entered in the sum of £7500. The libel brought in on behalf of the *Confucius* stated, that that ship was of 178 tons burthen, navigated by the Master and a sufficient crew, and sailed from Grangemouth in North Britain, on the 5th of October, 1855, bound for Woolwich, Kent, with a cargo of sheels. That on the 10th of that month, at 6 o'clock, P.M., off the coast of Norfolk, Cromer point, and the night being dark, and as the wind was fresh from the west, the Master determined to lay-to till daylight. That accordingly, the mainyard of the *Confucius* was laid to her mast, with a single-reefed foretopsail, foresail, and foretopmast staysail, and the helm was lashed a-starboard to keep her to, and a bright signal lantern was lashed on the port cathead, which showed a good light, and a good look-out was kept by the Master and three men. That about 1.45 on the 11th of October, the second mate reported a vessel without light on the port bow, which afterwards proved to be the *James*, proceeding for Yarmouth roads, distant rather less than half-a-mile, and approaching the *Confucius*. That the helm of the *Confucius* was accordingly put hard a-port, and she answered such her port helm. That the Master and rest of the watch on deck hailed loudly to those on board the *James* to port their vessel's helm, but no attention was paid to such hailing, and instead thereof The *James* ran down with the wind free, and came stem on under the influence of her star-[164]-board helm, and struck the *Confucius* a violent blow on her port bow, carrying away the port cathead, and stove in her port side. That the two vessels, after lying entangled together for some time, separated, and shortly afterwards The *Confucius* sunk, and was totally lost; and it further alleged that the collision and losses consequent thereon was imputable solely to those on board The *James* for not having

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir John Patten, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

kept clear of *The Confucius* as she ought to and could have done, and from having starboarded her helm, and run into *The Confucius*, and was not in any way owing to the misconduct of *The Confucius*.

It was admitted that *The James* was of the value of £1200, and bail was given for her to the amount of £1400. The allegation on behalf of *The James* stated, that she was a brig of about 236 tons, with a crew of eight hands, and that she sailed from Hamburg, on the 5th of April, in ballast, bound to Shields in the river Tyne; that on the 10th of October, she bore up for Yarmouth roads, and was laid-to on the port tack, with the intention of waiting till daylight; but at midnight, the Master's watch came on deck, wore ship, and laid *The James* to, on the starboard tack, with the mainyard to the mast, under double-reefed topsails, foretopsail, and trysail, the foresail being hauled up, and the helm secured hard-a-lee with the tiller rope, and a lighted signal lantern, burning brightly, was hanging over the port bow, and a good look-out kept; that the wind was at that time about west-north-west, and the night dark, but free from haze. That about 2 o'clock on the 11th of October, one on the look-out observed a light on board another vessel, apparently approaching *The James*, and about one point on her lee or port bow, and instantly [165] reported the same to the Master, who came forward at once to the weather bow, and one of the watch held the lantern which was hanging alight over *The James's* port bow up to the strange vessel in such a direction as she could be best seen by those on board of her. That they kept watching the vessel approaching them, and one of the watch of *The James* called out as loud as he could, "Do you intend to run into us?" To which some one on board *The Confucius* called out, "Keep your helm a-port." To which it was replied, "It is hard a-port," and the Master gave directions that the helm should not be moved. That *The James* at such time was lying south west by south, and as close to the wind as she could, and her helm was kept hard-a-port without any alteration whatever; notwithstanding which, *The Confucius*, who had ported her helm, and was passing leeward of *The James*, caught the jibboom of the brig with her larboard forerigging, broke the jibboom, and taking *The James's* bowsprit between her masts, hauled her round before the wind with her head to the eastward, and that after lying alongside each other they separated, shortly after which *The James* put on the port tack, when she again wore, and put to the southward to find *The Confucius*. The allegation then denied the statements in the libel that the collision was solely imputable to her, and submitted that *The Confucius* was bound to have kept clear of *The James*, and allegation further denied the statements contained in the libel. Witnesses were examined on both sides: and so far as their testimony is material is noticed in the judgment.

The learned Judge of the Admiralty Court (The Right Hon. Dr. Lushington), assisted by the elder [166] brethren of the Trinity House, were of opinion that *The Confucius* was to blame, there being culpable neglect in not porting her helm: they were further of opinion that *The James* was also to blame for not doing all in her power to avoid the collision; that she ought to have thrown back her head-yards when she saw that a collision was likely to take place. By an interlocutory decree the Court declared, that the parties had, in part only, proved the contents of the libel and allegation by them respectively given in; that the collision in question in the cause was occasioned by the default of the Master and crew of *The James*, and the Master and crew of the late ship *Confucius*, that the damages, therefrom, ought to be borne equally by the owners of *The James* and *The Confucius*, and declared for a moiety only of the damage proceeded for, and condemned the Appellants in such moiety, referring the accounts, etc., to the Registrar and Merchants.

The Appellants, the owners of *The James*, appealed. No appeal was entered against the decree by the owners of *The Confucius*.

The appeal now came on for hearing.

Dr. Bayford, and Mr. Forsyth, for the Appellants. —This decree cannot stand. First, we submit that *The James* was nowise in fault, and that the action against her ought to have been dismissed. There is however a serious objection to the decree. From the evidence it is clear that *The Confucius* was to blame in not porting her helm. Now the ground upon which the Court below pronounced her culpable was not alleged in the pleadings, or ever set up by *The Confucius* as a defence, nor was



there any evidence to [167] that effect. The established rule is, that a case is to be decided *secundum allegata*. The Appellants are at least entitled to go into evidence upon that point, and it is not too late to give them the opportunity, *Vaux v. Sheffer* (8 Moore's P.C. Cases, 75). It was the duty of The *Confucius* to have got out of the way, and have avoided the consequence of any negligence on the part of The *James*, and, as she disregarded preparing for such misconduct on the part of The *James*, and exercised no ordinary care to avoid it, the owner of The *Confucius* cannot recover damages against that ship, *Davies v. Mann* (10 Mee. and Wels. 546). Secondly, if it be held that both vessels are to blame, then we contend that by the Merchant Shipping Act, 17th and 18th Vict., c. 104, which applies to and regulates the Admiralty Court, her owner is precluded from recovering damages against the Appellants.—[Mr. Pemberton Leigh: This is an important point, and it appears to be brought forward here for the first time; why was it not pleaded as a defence ?]—The Act of Parliament is of public notoriety, and can be set up at any time. Now, as the Court below has held that The *Confucius* was to blame, in not porting her helm in time, that finding in point of law prevents her owners recovering at all, even assuming that The *James* was equally to blame. The rule of the Common Law Courts in collision cases is, that neither party can recover when both parties are in the wrong. *Fennell v. Garner* (1 Crompt. and Mee. 21), *Morrison v. The Steam Navigation Company* (8 Exch. Rep. 733), *Martin v. The Great Northern Railway Company* (16 Com. Ben. Rep. 179; see also *Dowell v. General Steam Navigation Company*, 5 Ell. and Bla. 159), [168] and this rule of the Common law is extended in the Admiralty Courts by the 14th and 15th Vict., c. 79, *Valentine v. Cleugh* (8 Moore's P.C. Cases, 167), and the 17th and 18th Vict., c. 104. The 296th and 298th sections of the latter Act enacts, that whenever any of the rules there laid down are infringed, the party so infringing shall not be entitled to recover any compensation for any damage sustained by such ship in any collision, and we submit that these sections are applicable not merely where one party alone is to blame, but also to the case where both parties are at fault.

Dr. Addams, and Dr. Twiss, for the Respondent.—The Statute, 14th and 15th Vict., c. 79, relied upon by the Appellants as altering the general law of the Admiralty Courts in cases of collision, where both parties are mutually blameable, to apportion equally the damage between the respective owners of the vessels, *Vaux v. Sheffer* (8 Moore's P.C. Cases, 75), Abbott "On Shipping," p. 202 (6th Edit.), does not apply. The Admiralty Court has so held it in the case of *The Sylph* (2 Ecc. and Adm. Rep. 75). Neither does the 17th and 18th Vict., c. 104, which we submit cannot here be taken notice of, as it was never pleaded as a defence in the Court below, nor the case argued there upon that point, or there would have been a different judgment. If the Court, however, is disposed to entertain it, we submit the sections relied upon do not apply. The collision in question is not within the terms of the 296th section. This is a case of two vessels lying-to, a position not contemplated by that section, which is expressly confined to sailing-vessels under weigh, pursuing their regular [169] courses in the prosecution of their voyages.—[Mr. Pemberton Leigh: In the case of *The Alival* (1 Ecc. and Adm. Rep. 96) there was no exhibition of lights by either party, and the Court held that it was bound to notice the Statute, 14th and 15th Vict., c. 79, though not put in plea, and dismissed both vessels; and so in *The Wansfell* (1 Ecc. and Adm. Rep. 269).]—In *Vaux v. Sheffer* (8 Moo. P.C. 75), heard subsequently to the passing of that Act, the established law of the Admiralty Court in dividing damage was acted upon by this Court.

Judgment was delivered by

The Right Hon. T. Pemberton Leigh (12th Feb., 1856).—In this case, the ship *James* is sued for the total loss of the ship *Confucius*, and her cargo, occasioned by a collision, which is alleged to have occurred entirely through the misconduct of The *James*.

The damages are laid at £7500. The *James* being worth only £1200, bail was given in for £1400, beyond which sum the Plaintiff cannot recover in this suit.

The law of the Court of Admiralty, subject to the alterations introduced by the 14th and 15th Vict., c. 79, and 17th and 18th Vict., c. 104, is, that where both vessels are in fault the damages are to be divided equally between them.

In this case the Court of Admiralty held, that The *Confucius* was in fault by not porting her helm in due time; that The *James* was also in fault by not throwing back her head-yard, that, consequently, the loss must be divided between the two vessels. One half of the loss will greatly exceed the whole value of The *James*, and it is, therefore, indifferent, as it is said, to the owners of The *Confucius*, whether they [170] are or not properly held to be in fault. At all events they have not appealed from the judgment. The parties interested in The *James* have appealed, and they have raised these points:

First. They say that they were not in fault at all, and that, consequently, the action ought to have been dismissed with costs.

Secondly. That the matter in respect of which they have been proved guilty of fault is one not alleged in the pleadings, nor proved in the evidence; and further, that it is one which is quite inconsistent with the case actually alleged, and attempted to be proved against them.

Thirdly. That, whether they are in fault or not, the fault of which The *Confucius* has been found guilty is one which not only by the general law precludes them from recovering more than half the damages, but by the effect of the Statute, 17th and 18th Vict., c. 104, ss. 296, 298, precludes them from recovering at all against the Appellant.

If the last point be in favour of the Appellants, the others are immaterial.

It is found as a fact in the cause, and is now undisturbed, that The *Confucius* neglected to port her helm in due time. This default is one which, if the vessel is proved to have been within the meaning of section 296, precludes her from recovering under section 298.

It is said, however, first, that this case is not alleged by the Respondent in the pleadings or evidence, and that the point was not raised in the Court below.

But the fact that The *Confucius* did port her helm in due time is a necessary part of her case. Unless she had done so she could not possibly have claimed the whole loss of the Appellants, which, in fact, she does claim. It was her duty to port her helm [171] quite independently of the Act of Parliament: accordingly she alleges in her libel, that she did duly port her helm, as soon as she saw the risk of collision.

The fact, therefore, is clearly put in issue it is alleged, and attempted to be proved, but in the result the contrary is established by the decree of the Court not complained of.

But then it is said these ships were not in the position of ships contemplated by section 296: that this section was intended to apply to vessels under weigh pursuing their respective courses in the regular prosecution of their voyage—that these ships were not proceeding on their several voyages when the collision took place, but were lying-to, and that, therefore, the Statute does not apply.

The result of the evidence appears to be, that both ships were lying-to, *i.e.* were not at anchor, but were moving as little as they could from their position, desiring to avoid the dangers of a difficult navigation during the night. The one was with her head towards the north, the other with her head towards the south. When they first descried each other, they were at the distance of about half a mile, or something less, opposite to each other, or nearly so, approaching each other, though very slowly, one going with the tide at the rate of about two and a half knots an hour, the other against the tide more slowly, but still in such circumstances that each was in motion, and proceeding on a course which would bring, as it actually did bring them into collision.

The 296th section of the Statute, 17th and 18th Vict., c. 104, enacts that "When-ever any ship, whether a steam or sailing ship, proceeding in one direction meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships [172] were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steam ships, and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of naviga-



tion, and as regards sailing ships on the starboard tack close-hauled, to keeping such ships under command."

Section 298 enacts, that "If in any case of collision it appears to the Court, before which the case is tried, that such collision was occasioned by the non-observance of any rule for the exhibition of lights or the use of fog signals issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ships, or of the foregoing rule as to a steam ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship, by which such rule has been infringed, shall not be entitled to any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary."

Now these words are sufficient to extend to such a case as this, and the object of the Act of Parliament appears to be to provide a fixed rule by which in all cases vessels approaching each other in different directions are to adopt a certain course in order to avoid a collision.

Their Lordships are of opinion, therefore, that the [173] collision in this case took place under such circumstances as to bring the vessel within the meaning of these clauses of the Act.

Then it is said that not only The *Confucius* must be shown to have committed the fault of neglecting to port her helm, but it must be shown that such fault occasioned and was the sole cause of the collision, that here the collision was occasioned, in part at least, by the fault of The *James*.

First, as to the fact, that the collision was in part occasioned by the fault of The *Confucius* in neglecting to port her helm, is, we think, established by the judgment by which upon that ground she is made liable to half the damages. That judgment is entirely in accordance with the opinions of the nautical gentlemen who assist us. To hold therefore that the Statute meant that the collision must be occasioned solely by such fault on the part of the claimants would be to make the Act quite inoperative, for under no circumstances could a claimant have recovered either in the Admiralty or at Common Law, if the loss had been occasioned solely by his own fault. The intention of the Act obviously was to enforce the observance of certain general rules considered as essential to the security of shipping by additional penalties to those already in existence; one of those rules is, that when there is danger of collision each vessel shall port her helm: the penalty for breach of it, if the neglect contributes to the collision, is, that the vessel shall not recover (what otherwise she might in the Admiralty Court have recovered) any portion of the damage from a vessel also in default.

This is the only construction which can reasonably be put upon the Act, and it is the construction put by Dr. Lushington, in the case of The *Alival*, cited in [174] the argument, and other cases; upon the Act of the 14th and 15th Vict., c. 79, which for this purpose may be considered as the same with the Act now under consideration.

In the case of The *Alival*, cross actions had been instituted on behalf of the two ships, and both appear from the judgment to have been in fault; the damage, therefore, would have been divided: but in the course of the evidence it appeared that lights had not been exhibited in compliance with the Act of Parliament by either vessel, and the learned Judge, therefore, held that neither party could recover. The same construction appears to have been put upon the same Act by Lord Campbell, and the Court of Queen's Bench in the case of *Dowell v. The Steam Navigation Company* (5 Ell. and Bla. 159).

Their Lordships think, that upon this ground the suit, in this case, cannot be maintained.

It is true, that this point was not argued in the Court below, and their Lordships regret that in this, as it has happened in some other cases, they are obliged to decide a point on which, in truth, no opinion has ever been expressed by the learned Judge from whose sentence the appeal is brought. Some explanation of the reasons for not taking this ground has been offered at the bar, but it is not satisfactory to their Lordships. They cannot, however, deprive the party of the right to avail himself of the objection, and they must, therefore, recommend that the sentence complained of be reversed, and the action dismissed with costs in the Court below.

They have some doubt whether they ought not to make the Appellants pay the costs of this appeal, but they think, upon the whole, that justice will be satisfied by giving no costs of the appeal to either side.

[Mews' Dig. tit. SHIPPING, A. XX. COLLISION, 2. *Presumption of Fault, a Infringement of the Regulations*; ii. under 17 and 18 Vict., c. 104. S.C. Swab. 60. See *The Vera Cruz* (1), 1884, 9 P.D. 94; *The Bernina* (2), 1887, 12 P.D. 89; *The Rosalie*, 1880, 5 P.D. 245.]

# [175] ON APPEAL FROM THE ROYAL COURT OF APPEAL OF THE ISLAND OF MALTA.

GIUSEPPE FRIXIONE,—Appellant: BIAGIO TAGLIAFERRO and Sons.—  
Respondents \* [Feb. 12, 13, 1856].

Action by agent, in Malta, against his principal, to recover the amount of damages sustained by him, in a suit brought in Genoa, upon a breach of contract which he had defended on behalf of his principal, upon appeal upheld, and damages decreed against the principal.

In order to entitle an agent to recover from his principal, under such circumstances, he must show:—[10 Moo. P.C. 196]

First, that the loss arose from the fact of his agency.

Secondly, that he was acting within the scope of his authority. And

Thirdly, that the blame was not attributable to any fault or laches on his part.

Although an agent exceed the scope of his authority, yet, if the principal waive or ratify the excess, the act of the agent is binding on the principal [10 Moo. P.C. 200].

In reversing the decree of the Court below, costs were awarded the Appellant, of the Colonial as well as the appellate Court [10 Moo. P.C. 201].

This was an action brought by the Appellant, a merchant in Genoa, against the Respondents, also [176] merchants, residing in Malta and at Berdianski, to recover the sum of £1076 19s. sterling, under the following circumstances:—

The Respondents were engaged in the Black Sea corn trade, and were in correspondence with the Appellant, as their agent at Genoa, receiving advices from and effecting sales through him there. Having, in the month of December, 1846, received advices from the Appellant of various sales of wheat having been effected at Genoa, for delivery there in the months of March, April, May, and June, 1847, they authorised the Appellant to sell a cargo on their account, to arrive in those months by a vessel called *The Genio*, then on her way to Malta from Alexandria. This authority was given by a letter dated the 15th of December, 1846, of which the following were the material portions:—"We have been favoured with your esteemed of the 1st inst., and we are obliged for the continuation of your advices respecting 'grain.' We have also been favoured by your Signor Emmanuale with the catalogue of sales of grain made at your place, and we thereby observe that many parcels, as well of hard as of soft quality, deliverable in the months of March, April, May, and June, have been sold. Encouraged by similar sales, and for as long periods, and being desirous also of insuring the sale of some of the cargoes which we shall receive in those months, we this day address to you the present, and we hereby authorise you to endeavour to effect for our account the sale of a cargo of soft wheat,—Berdianski quality,—when you get the price of £29 or £30, or better, if possible, without engagement as to weight and measure, to be delivered at your place in all the month of June, 1847, [177] such cargo to be conveyed to you at your place by our

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.



Russian Brigantine *Genio*, with the burthen of which you are already acquainted. Our intention is, however, that if through unforeseen circumstances the said vessel should not reach you by the time specified, we should not be liable to make any compensation, not even to any obligation, or expenses whatever, but for us, as well as the purchaser, to be entirely free: we however give the latter the option of refusing or accepting the same, as should best suit him, in case the said vessel should arrive out there even one day later than the time specified, always however after the stated period should have elapsed, pursuant to this authority which we give you: we shall write to-morrow, *via* Constantinople, to Senor Giacomo di Berdianski, and order him to buy immediately this cargo, and to keep the same ready for the time The *Genio* reaches him at Kertch. That vessel has left us some time ago for Alexandria, and we hope we shall not see her long delayed. Soon after arrival and discharge we shall at once despatch her to Kertch, to the intent that she may be among the first to enter the Black Sea." In a postscript to this letter the Respondents authorised the Appellant to sell for them another cargo of hard wheat, adding,—“In case you succeed in placing also the cargo of hard quality above mentioned, you can fix the same by a foreign instead of a Sardinian or Russian vessel. We should even be content if you obtain 20 to 25 soldi per mina less for the wheat, and, if so, you will avoid chartering the vessel aforesaid. In such case we shall send it you by one of our vessels under the English flag, which suits us much better, always for delivery in the months of April, May, and June, at [178] your option, and with the obligation on our part to make known the vessel upon which the grain may be laden by the month of April, so that there may be no liability on our part to deliver, should any accident happen to the vessel in the course of the voyage, or from uncontrollable events.”

The Appellant, acting upon these instructions, sold the cargo of The *Genio*, at Genoa, to Bartolomeo Passano, (reserving one fourth of the speculation for the Respondents,) by the following contract, dated the 28th of December, 1846: “Signor Giuseppe Frixione sells and promises to Signor B. Passano about 7000 mine of wheat; that it to say, the cargo of the Brigantine called The *Genio*, under the Russian flag, Captain Fortunato Tagliaferro, or whosoever in his stead, carrying about 3200 mine of soft Berdianski wheat of good merchantable quality and in good condition, to be delivered between the 1st of April and all June next; besides about 4000 mine of hard Berdianski wheat, also of good merchantable quality and in good condition: the name of the vessel which is to convey the same, also her Captain and flag, to be given within all April next for the government of the buyer. The price mutually agreed upon is twenty-nine lire and ten soldi fuori banco, equal to twenty-four new lire of Piedmonte, and fifty-nine centesimi for every mina measure of Genoa in bond, as well for the hard wheat as for the soft; less, however, twenty-five centesimi per mina allowed to the buyer for the usual brokerage and guarantee. The payment for the said wheat to be made four months after delivery and approval of the said two respective cargoes, which the buyer engages to receive from the customary lighters as usual. The seller must make delivery [179] within the months of April, May, and June next. Should the vessels, or any one of them, bringing the said wheat not arrive within the month of June, after that date the buyer shall be at liberty to receive or refuse the said wheat. If on the arrival of the above-mentioned cargoes in Genoa it should suit the buyer to let them proceed to Marseilles, paying a freight of fifty centesimi per mina, he will be at liberty to do so, on condition, however, that the seller within forty days from this date does not negative the last-mentioned condition of this contract, nor manifest his intention in that particular by a separate note to the buyer.”

The Appellant transmitted to the Respondents a copy of the above contract, and on the 1st of January, 1847, wrote to them, stating that the reason why the Appellant had reserved for the Respondents an interest of one fourth in the transaction was because the buyer, Passano, at first refused to sign the contract, upon the ground that no weight was mentioned in it, and, therefore, the Respondents might send wheat of an inferior quality; but that upon the Appellant suggesting that an interest should be reserved for the Respondents, Passano consented to sign it.

The Respondents, by a letter dated the 15th of January, 1847, wrote to the Appellant, as follows:—“By your last above-mentioned letter you advise us the sale you

succeeded in effecting of two cargoes of wheat, one hard and the other soft, at the price of £29½, as per copy of contract sent us, which we keep. We note your obligations in that respect, and hereby inform you that we approve of what you have done, knowing already how much you have our interest at heart. You state that in order the more to facilitate that sale you were obliged to agree with the buyer that the fourth share in this affair should remain for our account, in order also the better to persuade him as to the good quality of the wheat, which we hope to set at rest when the time comes. However, as we would wish that the two cargoes that we shall send you be entirely sold, we should wish you also to sell the reserved share; and so it would be a business wholly finished as far as we are concerned, you will, therefore, do your best in that respect. And we hope you will obtain a better price, which we leave to your friendship, without limiting you in that respect. You know the quantity to which the fourth share reserved by the buyer of the soft wheat per *Genio* will amount to. Being acquainted, as you are, as near as possible, with the burthen of that vessel, we think it useless to mention it."

The Respondents transmitted orders to their correspondent at Berdianski for the purchase of a cargo for The *Genio*, and on her arrival at Malta, from Alexandria, she was despatched to Berdianski to load: but suffering some detention there, she did not arrive at Genoa during the month of June, 1847.

On the 5th of July, 1847, the Appellant wrote to the Respondents as follows:—"While at the Advocate Morasso's, brother-in-law to my brother, I heard that Signor B. Passano, a client of the said Advocate, went there to consult him about bringing an action against me for the cargo of the *Genio*, which I did not deliver in the month of June, claiming the price of £37, which he effected by the re-sale of that cargo, and which he now loses, owing to the delay in the arrival. He contends that you have promised him there that the wheat should reach Genoa before the [181] month of June, because you should have loaded her by the lighters sent to Kertch, instead of which the vessel went to Berdianski, where, instead of loading at once, she stayed a certain time, so that she could not arrive here at the fixed time; that this delay having been occasioned on your part, or that of your correspondents, you, gentlemen, are responsible for the damage he has suffered therefrom. The Advocate being my friend, and related to my brother, does not undertake to defend Signor Passano, but I know that he has been to the Advocate, Gerini, who absolutely wished to bring the action and take the matter into Court. I am very concerned at this business, and my position is such, that I beg you will relieve me from my engagement to defend you, and you will empower some other person of this place to represent you, because, should you unfortunately lose the cause, it might be said that in consequence of the interest I have therein I did not exert myself in it. Therefore, I would rather not appear in the dispute. I have to add, in order to prove the affection I bear to your interest, that the share I have taken in the two cargoes of The *Oriente* and *Genio*, to carry out your desire of finishing that transaction, remains entirely at your disposal, and I consider it, if you please, as not having taken place. I have not as yet received any legal document from Signor Passano. I doubt not, however, that I shall have such, and immediately on being received I shall communicate the same to you. Meanwhile, come to my assistance with authority for the sale of this cargo, and endeavour, for your defence, to prove that from the 9th of May, upon which day The *Genio* arrived at Berdianski, you did all you could to expedite the same, [182] the quickest possible; that the delay has been caused by bad weather, which prevented the loading and sailing; and as they will in opposition say that other vessels loaded, sailed, and arrived here, find out if those which arrived here on the 22nd of May had arrived at Kertch before The *Genio*: in short, provide me with good documents."

On the 12th of July, 1847, the Respondents wrote to the Appellant in reply to the above letter, as follows:—"By the last steamer you will have heard from your Signor Emmanuele, that on the 2nd instant, our *Genio* passed from our neighbourhood bound for your port: we hope, therefore, that when this reaches you she will have arrived safely. Should the cargo she has on board be refused by Signor Passano, the buyer, or should he say it is not convenient for him to receive the same, you may sell it, if you can realize about the price formerly obtained, or a better one; but if you see that you cannot obtain such price, you will warehouse the same, if you think proper, until the duty rises. In the one as in the other case, we confide the



care of this cargo to your friendship, being certain of your endeavours on behalf of our interest. Signor Passano's pretensions respecting the difference in price are of no real weight in the face of our letter of the 15th of December, 1846, by which we authorize you to sell, and in the face of the contract stipulated, to which you will please refer. Everything has been done by ourselves as well as by the captain and the house at Berdianski to the intent that this vessel and cargo reach you by the stipulated time. Had it reached sooner, we should have had less ship's expenses, and the vessel would already be on her voyage for her second cargo. If the wind did [183] not allow her to be with you sooner, we certainly cannot act against the elements: should, therefore, Signor Passano be disposed to cause expenses at the Tribunal unjustly, he is his own master. In that case you will inform him, and tell him, if necessary, that we shall send you hence or from Berdianski a document on the subject. However, before effecting the sale of this cargo, you will let him know more than once, and tell him, that in case he should wish to have it he is still in time, on the terms of the contract. If, on the contrary, you will conform to the instructions given you, you will recommend to Captain Lisano to do his best; and we also recommend to your friendship his earliest possible departure from your port." On the 14th of July, 1847, the Respondents sent to the Appellant a duplicate copy of the above letter, with the addition of the following postscript:—"Being in doubt whether the original of what precedes may have miscarried, we hand you by this opportunity a copy thereof, and, in addition, recommend you at the same time that so soon as Captain Lisano arrives at your port, you tell him, that neither he nor his crew must give any answer respecting his delay, and this, in case the buyer should employ persons to obtain from their mouths words calculated to prejudice us, which would be most easy to get from seafaring men in particular, as they little know the subtrefuges and the cunning of the people of your place. By the enclosed letter, which we request you to forward to him, we also make the same recommendations to him. Besides which we solicit from your friendship not to let this vessel lose any time there, but to despatch her as soon as possible, having also strongly recommended 'he [184] same to the captain, and to proceed direct for Constantinople."

The *Genio* arrived at Genoa with a cargo of wheat on the 22nd of July, 1847, and on the same day the Appellant wrote to the Respondents, informing them that she had arrived, and that Passano had refused to accept her cargo.

On the 2nd of August, 1847, Emmanuale Tagliaferro, one of the Respondents, wrote from Berdianski to the Appellant as follows:—"I am sorry for the delay in the arrival at your port of The *Genio*, and it will depend upon your friendship to arrange the matter for the best with Passano."

On the 5th of August, 1847, the Respondents wrote from Malta to the Appellant as follows:—"We heard by your favour of the 21st ultimo, that The *Genio* had arrived. By your next we shall learn what you have agreed with the buyer. At any rate, he has no right to claim anything whatever, our contract being the clearest. He could at most refuse it."

On the 14th of August, 1847, the Appellant wrote to Simone Tagliaferro, one of the Respondents, who was then at Berdianski, as follows:—"I received your dear letter of the 12th ultimo, and this day a certificate from your place, dated the 13/25th, which states that Captain Lisano arrived the 29th of April: that owing to the tempestuous weather which impeded the loading, he could not get ready before the 13/25th of May; and that, besides, after being ready to leave, he remained there four days longer, owing to the same bad weather. This certificate I have not yet shown to your Counsel, but it appears to me to be contrary to the one granted by the Sardinian Vice-Consul of your place, which states that on the 3/15th of May last, [185] Captain Lisano loaded 1825 chetwerts of wheat, while the one sent me says, that he could not get ready to load before the 13/25th. It therefore seems that from the 13th to the 25th he has loaded more wheat, and it would not do to produce it. However, the one from the consul has a good effect. But at any rate, if you can, get very clear certificates, which say that scarcely had Captain Lisano arrived and the weather permitted, than he loaded and sailed; and that if he was detained, it was owing to the bad weather, and nothing else; that if other vessels left, it was owing to their position, and that they were of small tonnage, and they could take advantage

of the light winds and the currents, which *The Genio* could not do, being of a large burthen; in fine, a certificate not opposed to the one of the consulate."

On the 21st of September, 1847, Emmanuale Tagliaferro wrote from Berdianski to the Appellant as follows:—"I possess your two favours of the 14th and 28th ultimo. It is useless to say anything respecting the delay you mention of our *Genio*; the time she lost here was caused by bad weather, and not from any motive as Signor Passano thinks. I believe, therefore, that his pretensions are absurd. I should have got the vessel ready hence earlier if it had been possible, because it was also to our interest to do so; but as the wind and rain, and, in one word, the bad weather, have not permitted it, how does Signor Passano pretend to things without reason?"

On the 6th of August, 1847, Passano commenced proceedings in the Tribunal of Commerce, of Genoa, against the Appellant, to recover damages for the non-delivery of the cargo within the specified period provided for by the contract of the 28th of December, [186] 1846. The Appellant in accordance with the instructions received from the Respondents, in the before-mentioned letters, defended the action, pleading, that if by the contract of the 28th of December, 1846, it was stipulated that the wheat laden on board *The Genio*, was to have been delivered by the seller in all June then next, it was also agreed that, should the vessel not arrive at Genoa within the time fixed, it should be at the option of the buyer to receive or refuse the said wheat; and the terms being such, that the wheat having been refused by the buyer after the month of June, he could not pretend to the payment of damages and interest from the seller, as it was not the latter's fault that the vessel did not arrive within the prescribed time for delivery. And by way of subsequent pleas, the following articles were added by him, to be proved, if necessary; first, that the Russian Brigantine, Captain Giuseppe Lisano, arrived at the roads of Berdianski on the 29th of April last, consigned to Signor Simone di Biagio Tagliaferro, who had the charge of wheat ready for shipment on board the same; and secondly, that at that time the weather and winds were continuously boisterous, which first impeded the loading, and afterwards the immediate sailing, of the Brigantine on her way to Genoa, where she arrived on the 21st of July last, having weighed anchor at Berdianski about the end of May preceding.

On the 22nd of December, 1847, the Tribunal of Commerce of Genoa gave the following judgment in this action:—"Whereas the condition inserted in a contract of sale, by which the option is left to the buyer to fulfil or cancel the contract if the goods arrive at the place of delivery at a time later than the one [187] fixed for the same, has for immediate consequence the exoneration of the seller from the payment of damages in case the buyer prefers cancelling the contract; and, that this is in conformity with the principles of justice; because admitting a different principle, the clause above-mentioned would not then possess any distinct meaning, if it is held according to law the buyer always has liberty to refuse the goods, or wait their delivery whenever they are not offered him within the fixed time, and always with the indemnification of damages; so that in the clause in question there should not be found the same principle sanctioned in a case where no such condition occurs in the contract that would tend to establish that the clause above set forth is inconclusive, and incapable of producing any result whatsoever; which must never be said of the clause of contracts, which must rather be understood as having a meaning than as having none at all; that is at all events the commercial understanding and usage as regards this clause: Whereas, on the other hand, it is incumbent upon the honour of the seller to prove that the non-performance of the condition was owing to events independent of his wish and fault, and that the pleas by Frixione in his pleadings would tend to such effect, and they must in consequence be admitted: Therefore, first declare that Passano has no title to an action in damages against Frixione, for the non-execution of the contract in question, provided the same was not the effect of the latter's fault or negligence: that we have admitted Frixione to prove by means of documents and witnesses the allegations contained in his foregoing pleas and orders: that both his witnesses, and those Passano may wish to [188] examine in contradiction, and who reside within the jurisdiction of this tribunal, must be cited and particularized: that



they may be heard eight days after service of this sentence, which the usher, Lorenzo Casamara, is ordered to do."

On the same day (27th December) as the above judgment was given, the Appellant wrote to the Respondents as follows:—"I have already told you, Signor Passano brought an action against me, in order to see me condemned to make good on your account the damages for not having delivered him in time the cargo of wheat by *The Genio*, that is to say, in all June. This very day the tribunal decided that I should pay nothing, but only prove that the vessel was detained at Berdianski by bad weather, and that the cargo was ready on arrival of the vessel there. I think, that when Signor Passano is satisfied of that fact he will not insist any more: otherwise our Tribunal will probably delegate our Consul there to receive evidence to prove the above facts. Your son, Signor Simone, being there present, will be able to do so in opposition to Passano, supposing he goes there; but I believe that it will remain a settled point. I shall know this whether he gives me notice of the sentence or not, and should he not do so I may give him notice thereof, so as at once to terminate the matter. However, I shall not do anything without your advice.

On the 7th of January, 1849, the Appellant wrote to the Respondents as follows:—"I confirm you my last of the 27th ult., especially as to what concerns Passano's matter, that is to say, to write to Giacomo and Simone Tagliaferro to cause the Sardinian Consul, Reguagli, at Kertch, to make the examinations [189] which were decreed by our Tribunal of Commerce by the sentence which you already know, and of which your Signor Giacomo took a copy when he was here, and which he undertook to show you, in order to do what was ordered thereby, but which sentence you have not noticed ever since. I warmly recommend you this matter, that you may not prejudice the cause yourselves."

Upon the 12th of January, 1849, the Respondents wrote to the Appellant as follows:—"In answer to your esteemed favour of the 27th of the last month and year, we can, for the present, but assure you that we have used every possible exertion, in order to obtain from Berdianski the documents which you would fain have, in order to meet Signor Passano's unjust claims, pursuant to the decision pronounced by your Tribunal. We had thought that the certificate we sent you, some time back, was sufficient for the purpose; but, as the Tribunal has considered that other documents were necessary, they shall also be produced, and that, we hope, before long. In the meantime, should the term that has been allowed you expire before those documents reach you, we are certain that you will obtain an ulterior delay, nor will the Tribunal refuse the same, seeing the right is with you. Signor Passano only seeks to profit by that which he is not entitled to, either in justice or equity, and it is really astonishing to see him persevering in his unjust course."

Subsequently to the date of the above letter, Passano continued the proceedings in the Court at Genoa, and adduced before it evidence, which showed that eight Sardinian vessels had arrived at Berdianski after *The Genio* arrived there, and left with full cargoes [190] before she left. The Respondents did not furnish the Appellant with any satisfactory evidence that *The Genio* had been detained by stress of weather, or other cause, over which the Respondents had no control.

In consequence of this evidence, that Court, on the 25th of June, 1849, gave judgment against the Appellant, upon the ground that it was owing to the negligence of the Appellant, or of his principals, the Respondents, that *The Genio* did not arrive during June, according to the terms of the contract of the 28th of December, 1846, and sentenced the Appellant to pay to Passano all the loss and damages sustained by him in consequence of the breach of the contract, together with costs.

The Appellant appealed against this decision to the Royal Court at Genoa, but the judgment of the Tribunal of Commerce was affirmed by a decree of that Court, dated the 7th of January, 1851, and the Appellant had to pay the amount assessed.

On the 28th of October, 1851, the Appellant made a formal demand upon the Respondents, for the sum of 26,911 liras and 58 cents, being the amount of his demand against them in respect of the above decree; and payment of this sum being refused by the Respondents, the Appellant, on the 8th of November, 1851, brought an action against the Respondents in the Court of Commerce, at Malta; and by his plaint, after setting forth the contract, correspondence, and the proceedings and

sentences in the Courts at Genoa, he prayed that the Respondents might be cast in payment to him of the sum of 26,911 new lire and 98 centesimi, equal to £1076 9s. sterling, being the amount of damages paid by him, at Genoa, and for [191] dishonouring a draft drawn on them, together with interest.

The Respondents, by their answer, referred to their letter of the 15th of December, 1846, as expressive of the precise terms upon which they had authorised the Appellant to sell the cargo in question, and alleged that they expressly intimated to him that they would incur no responsibility, but would remain entirely free; giving, indeed, to the buyer the option, if the Brigantine should arrive at Genoa even one day after the time fixed, to receive or refuse the cargo, as might best suit him. That the Appellant, in writing to them that he had effected the sale according to the instructions received, handed to them a copy of the contract, wherein it was expressly stipulated, that should the vessels, or either of them, conveying the wheat in question, not arrive within the month of June, after that period the buyer was to be at liberty to accept or refuse the wheat. That it, therefore, appeared to the Respondents that their instructions had been carried out; but if, on the other hand, the Appellant did not know how to perform his duty (as it was incumbent on him to know everything relative to the place where the contract was entered into), he alone should bear the consequences.

In the replication, the Appellant alleged that the contract was carried into full effect, so far as depended on him, and that the defence to the action in Genoa was overruled because the Respondents did not furnish him with evidence that they were prevented by uncontrollable events from performing their obligation. That the Appellant could not, and was not bound to, furnish that proof.

Evidence was entered into, consisting of extracts [192] from the registry of Sentences of the Court in Genoa; and the before-mentioned correspondence between the parties. On the 6th of July, 1852, the Court of Commerce, considering, first, that from the correspondence produced, the right of indemnification claimed was not justified; second, that the Sentences produced without the acts which were the cause of the same, were of no weight whatever in law, decided that the Respondents should be liberated from the observance of judgment, with costs.

From this decision the Appellant appealed to the Royal Court of Malta. The Respondents also appealed, on the ground that the Royal Court of Commerce should have absolutely released them from the Appellant's demands, and not merely have released them from the observance of the judgment.

On the 8th of November, 1852, the Royal Court gave judgment, as follows:—  
 "The Court having considered that the commission entrusted to the Plaintiff by the Defendants for the sale of the wheat in question, obliged the agent to stipulate the principal condition, that in the event of the non-arrival and non-delivery in all June, 1849, they would not be liable to anything whatever, but that it would remain optional for the buyer to accept or refuse receiving the wheat: that the sale according to such commission was in fact effected by the Plaintiff in conformity with those instructions; that the cargo having arrived after the said time, viz., on the 22nd day of July following, and having been duly offered to the buyer, he thought proper to refuse the same: that in so doing, the buyer only availed himself of the option given him, and from that moment all liability of the sellers ceased, and particularly any responsibility for damages [193] and interest: that the Plaintiff having been sued by the buyer for such damages, instead of resting his right upon the terms of the agreement, went further by engaging to prove the necessary cause of the delay, and by so doing he exceeded the limits of the commission, and infringed upon what he himself stipulated for his principals; and it does not avail him as an excuse, either the Defendants' letter in answer to one from the Plaintiff before the action, which letter is far from containing an undertaking on the part of Tagliaferro contrary to the position in which they were placed by the said contract, or the mentioning in the order of 'unforeseen circumstances,' because, whatever could and should be in this case the meaning of that expression, that which must have guided the acts of the Plaintiff towards the buyer was the contract entered into between them, and fully approved by the Defendants: that in case it does not result that Tagliaferro shall have ratified this excess, it is not sufficient to construe as an approbation the fact of their having assisted the Plain-



tiff by sending him documents in support of his exception : considering the manner in which these documents were asked for by him, and the way in which they were furnished him, it would, as alleged, be much more than a ratification, it would amount to an assumption without reason of the responsibility, which it was particularly the object of the Defendants to avoid, and respecting which the Plaintiff himself had given them full assurance, which no act on their part seems to have been able to alter,—decides for the exclusion of the Plaintiff's demand, and, consequently, for the variation of the sentence passed by the Royal Court of Commerce, the 6th of July last, appealed against, without costs, with the [194] exception of those of this and the preceding sentence, which shall be paid by the Plaintiff."

The present appeal was brought from this judgment.

Sir Frederic Thesiger, Q.C., and Mr. C. Pollock, for the Appellant.—It is not in dispute but that the Appellant was the authorised agent at Genoa of the Respondents. We admit that the Appellant may have departed from the express instructions originally sent to him in the letter of the 15th of December, 1846, yet we contend that the Respondents have, both by their correspondence and conduct, fully ratified and adopted the contract made by the Appellant as their agent, and they are bound by it. Story, "Comms. on the law of Agency," ch. ix. sec. 239; *Code Civil*, Art. 1998. Troplong, *Droit Civil Expliqué*, tit. "Du Mandat," Art. 608-10, 12. Pothier, *Traité du Contrat de Mandat*, ch. iii. (by Dupin), 4 tom., p. 238. *Code of Genoa*, Art. 617. That being so, according to all known principles of law, the Appellant having incurred damages by reason of his having acted as agent in defending, with his principal's consent, the action, he is entitled to be indemnified against his loss by the Respondents, *Code Civil*, Arts. 1999, 2000. The Appellant's failure in the action brought against him in Genoa was solely caused by the neglect of the Respondents in not furnishing him with the necessary evidence to establish the defence that the delay was occasioned by unavoidable circumstances, *Code Civil*, Arts. 1610, 1611. The finding of the Royal Court at Genoa is conclusive, and that judgment ought not to have been questioned [195] in the action founded upon it by the Court in Malta. *Tarleton v. Tarleton* (4 Mau. and Sel. 20), *Martin v. Nicolls* (3 Sim. 458), *Houlditch v. Marquis of Donegal* (8 Bli. 301; and see authorities collected, *ib.* p. 351), *Price v. Dewhurst* (8 Sim. 302).

Mr. W. H. Watson, Q.C., and Mr. W. Field, for the Respondents.—By the terms of the letter of the 15th of December, 1846, the Respondents were to be under no responsibility to any one, by reason of the non-arrival of the vessel within the given time. That letter only gave the Appellant authority to sell wheat to arrive at a specified time; and if it did not arrive at that time the Respondents were not liable in law to Passano. *Johnson v. Macdonald* (9 Mee. and Wels. 600), *Lovatt v. Hamilton* (5 Mee. and Wels. 639), *Stockdale v. Dunlop* (6 Mee. and Wels. 224). Even if the contract executed with Passano did not, by the law in force in Genoa, exonerate the Respondents from all liability in the event of the non-arrival of the vessel, yet the Respondents are under no liability to the Appellant, whose duty, as agent, it was to have caused such a contract to be executed as he was instructed by the letter of the 15th of December, 1846. Therefore, the Appellant's liability, as decided by the Courts in Malta, was created by himself in his own wrong, and gave him no right of indemnity from the Respondents. Again, too, he omitted to carry the decision of the Court at Genoa, to final appeal, which fact also discharges the Respondents from any liability under that judgment. But the decision of the Royal Court at Genoa was not binding as a foreign judgment at Malta; and the Court [196] there should have examined such judgment, as the judgment was in itself erroneous in law, and not warranted by the facts of the case. *Johnson v. Macdonald* (9 Mee. and Wels. 600). The mere existence and production of the Sentence of the Court at Genoa was not sufficient to entitle the Appellant to recover against the Respondents, and the Court rightly held that the extract from Registry of the Sentences itself was no evidence of the judgment. The Appellant himself, in such an action, could not be examined, as he was not a competent witness. *Green v. The New River Company* (4 Term. Rep. 589).

The Right Hon. T. Pemberton Leigh.—Their Lordships entertain no doubt upon this case, either as to the facts or the law. It is a simple case of an action brought

by an agent against his principals, to recover the amount of damages sustained by him in a suit which he defended on their behalf.

In order to entitle an agent to recover from his principal, under such circumstances, he must show, first, that the loss arose from the fact of his agency; secondly, that he was acting within the scope of his authority; and thirdly, that the fault was not attributable to any fault or laches on his part. If the Appellant can establish these facts, it is plain that he is entitled to recover, as there is no reason to doubt that the Sardinian law in this respect is the same as the law of all other civilised countries.

Now, it is not disputed that the Appellant was the agent of the Respondents, and was authorised by them to enter into some contract; nor is it disputed that the contract was not performed by the Respondents, [197] and that the Appellant has, in consequence of such non-performance, been defeated in the action; but it is said that the Appellant has failed to establish that he was acting within the scope of his authority. It appears that the contract was founded on the letter of instructions of the 15th of December, 1846, which letter it is contended bore this construction, that it gave authority to sell wheat "to arrive" at a certain time, and that if it should not arrive by the specified time the Respondents were not to be liable. No such construction, however, can be put upon the letter. Then it is contended that by the subsequent clause of the letter, the Respondents had provided that in no event were they to be responsible. But the letter contains no such provision. It guards the Respondents against liability if the vessel should not arrive by the specified time, "through unforeseen circumstances"; by which they mean, as expressed in the postscript, "that there may be no liability on our part to deliver, should any accident happen to the vessel, or from uncontrollable events"; the intention being that if, from the thousand accidents which might happen not within the control of man, they were prevented from performing their engagement, they were not in consequence to be liable. The Appellant sends a copy of the contract to the Respondents, and after it has been signed sends another copy, and directs attention to some points wherein it differed from their instructions. They might then have repudiated the contract if they thought fit, but they did no such thing.

Then it is said they did not understand what the effect of the contract was, as they were unacquainted with the law of Sardinia; but the question really has [198] nothing to do with Sardinian law, and whether they understood the effect of the contract or not; the contract was their own, and they were as much bound by it as if they had signed it themselves. Again, it is urged that the Appellant so mis-conducted himself in this transaction that he incurred a loss which ought not to be thrown upon the Respondents. But what does he do when he is first threatened with an action, from the vessel not arriving in the month of June? Why, he writes to the Respondents, tells them that he is threatened with an action, and asks them to transfer the conduct of it to some one else. This he does in his letter of the 5th of July, 1847 (*ante* [10 Moo. P.C.], p. 180).—[The learned Judge here read the letter, and proceeded.]—This shows that he treated it as their action, and that if he defended the action, he would defend it for them. What answer do they send to this? Do they say, "This is no action of ours"? No. They reply as follows:—"Passano's pretensions respecting the difference in price are of no real weight in the face of our letter of the 15th December, 1846, by which we authorised you to sell, and in the face of the contract stipulated, to which you will please refer. Everything has been done by ourselves, as well as by the Captain and the house at Berdianski, to the intent that this vessel and cargo should reach you by the stipulated time. Should, therefore, Signor Passano be disposed to cause expenses at the tribunal unjustly, he is his own master. In that case you will inform and tell him, if necessary, that we shall send you a document on the subject" (*ante* [10 Moo. P.C.], p. 182). Here we find a complete adoption of the contract by the Respondents, and a recognition [199] on their part that the action was substantially brought against themselves.

On the 6th of August, 1847, the action was commenced by Passano. The Appellant pleaded the terms of the contract, and denied that it was owing to the neglect of the sellers that the vessel did not arrive within the prescribed time; he subsequently put in two additional pleas. On the 22nd of December, in that year, the



cause came on for decision, and the decree of the Tribunal of Commerce, so far from being an adverse one to the Respondents, was, in the opinion of the parties, directly adverse to Passano. On the same day the Appellant writes as follows:—"I have already told you Signor Passano brought an action against me, in order to see me condemned to make good on your account the damages for not having delivered him in time the cargo of wheat by *The Genio*, that is to say, in all June. This very day the Tribunal decided that I should pay nothing, but only prove that the vessel was detained at Bardiasski by bad weather, and that the cargo was ready on the arrival of the vessel there. I think that when Passano is satisfied of the fact he will not insist any more. I shall not do anything without your advice." Do the Respondents complain of the course taken by the Appellant in this matter? No such thing; it is not pretended that they at any time complained till they were called upon to pay him that which they ought to have paid him at once.

Passano was dissatisfied with this decree, and further evidence was gone into. During the interval between the years 1847 and 1849, when the cause came on for final adjudication, there was a good deal of cor-[200]-respondence between the parties. The Respondents undertook to procure evidence to show that the delay in the arrival of *The Genio* arose from circumstances beyond their own control. However, they produced no satisfactory evidence, and on the 25th of June, 1849, judgment was given against the Appellant. It appears from a letter of the Respondents of the 6th of August, 1849, that the Appellant had been continually writing to them on the various steps taken by him in the progress of the cause. In 1851, the decree of the 25th of June, 1849, by the Tribunal of Commerce, was affirmed on appeal by the Royal Court of Genoa. It is clear, therefore, that in all these proceedings the Appellant was acting as agent on behalf and with the authority of the Respondents: that if he exceeded their instructions, such excess (if any) was waived; that the contract entered into was ratified by them; that there was due communication to them of all that transpired; that they never complained of the part which the Appellant had taken; that they undertook to furnish him with the necessary evidence, and that, failing to do so, an adverse decree was pronounced. If so, the Appellant has made out all that is necessary to establish his claim.

It is said that the Sentence of the Court at Genoa was erroneous in law, but this is immaterial; nor is it material to consider the effect of a Sentence of a foreign Court on the Court at Malta. Be that Sentence right or wrong, the Appellant thereby sustained a heavy loss on behalf of the Respondents, and they must bear the consequences.

Their Lordships regret that, in a case so clear in law and in justice, the Appellant should so long have been kept out of the money to which he was un-[201]-doubtedly entitled. The Respondents, when first called upon to pay it, turn round and repudiate the transaction, which was neither fair nor honourable. This repudiation has been maintained by the two Courts at Malta, and their Lordships regret that such Sentences should ever have been pronounced. They must advise Her Majesty that the judgments of both these Courts ought to be reversed; that the amount of damages be ascertained and paid by the Respondents, together with interest thereon from the time when judgment was entered in the Court of Genoa, and that all the costs, both of the Courts at Malta and those of this appeal, be paid by them likewise.

[*Mews* Dig. tit. PRINCIPAL AND AGENT: I. D. 11. RIGHT OF AGENT TO INDEMNITY AGAINST LOSS. On point (i.) as to ratification of act, cf. *Bristow v. Whitmore*, 1861, 9 H.L.C. 391; *Keay v. Fenwick*, 1876, 1 C.P.D. 745; (ii.) as to amount of damages, cf. *In re Wells*, 1895, 72 L.T. 359; *The James Seddon*, 1866, L.R. 1 Ad. and E. 62.]

## ON APPEAL FROM THE VICE-ADMIRALTY COURT OF SAINT HELENA.

THOMAS HARRISON and THOMAS ROGERSON,—*Appellants*; OUR SOVEREIGN LADY THE QUEEN, THOMAS MILLER, and Others,—*Respondents* \*  
[Nov. 29, 30, 1852; Feb. 8, 1856].

## THE "LEVIN LANK."

A vessel employed on the coast of Africa, in the palm oil trade, belonging to British owners resident in England, was seized by a British cruiser, on the ground of having false papers on board, and being otherwise fitted up for the purposes of the Slave trade. The Commander sent the captured vessel with a prize crew to Saint Helena for condemnation. The master, mate, and crew, being compelled by the captors to go on board the cruiser, did not accompany the vessel to Saint Helena. The Vice-Admiralty Court at Saint Helena condemned the vessel as being engaged in the Slave trade, contrary to the Statute, 2nd and 3rd Vict., c. 73. The proceedings in that Court were *ex-parte*, no one being present to represent the owners, who were not informed of the seizure or subsequent condemnation till some months afterwards, when they asserted an appeal to the Queen in Council. In these circumstances, a libel on their behalf was admitted in the appellate Court.

Upon appeal: Held by the Judicial Committee (reversing the Sentence of condemnation),—

First. That the seizure was unwarranted, there being no probable grounds to justify a careful Commander making such a seizure; and the vessel decreed to be restored, with costs and damages [10 Moo. P.C. 212].

Second. That the proceedings relating to the condemnation were wholly irregular, as the captor was bound by the Admiralty Instructions (Sec. i., Art. 21) to have sent the chief mate, supercargo, or boatswain, with the captured vessel, for the purpose of giving evidence; and that as the captor took them away and prevented them giving evidence, the condemnation was in consequence wrong [10 Moo. P.C. 210, 211].

The Order in Council reversed the sentence of the Court at Saint Helena, with "costs, charges, losses, damages, detriments, demurrages, and expenses." Held: that as it appeared that there was an error in the Registrar's office in preparing the report containing such directions, upon which the Order in Council was framed, and as it was contrary to the practice of the Court to allow consequential damages, the Order in Council must be construed to mean "restitution with costs and damages," and a report of the Registrar and Merchants rejecting a claim for consequential damages confirmed [10 Moo. P.C. 222 *et seq.*].

This was an appeal from a decree of the Vice-Admiralty Court at Saint Helena, brought by the [202] Appellants, the owners of a vessel called *The Levin Lank* and cargo laden therein, against Her Majesty the Queen, and Thomas Miller, the Commander, and the officers and crew of the Sloop of war *Ranger*, the seizers of *The Levin Lank* and cargo, for an alleged infraction of the provisions of the Statute, 2nd and 3rd Vict., c. 73, for the suppression of the Slave trade.

The facts of the case out of which this appeal arose were as follows:—

The Appellants, merchants at Liverpool, were for many years extensively engaged in importing palm oil from the coast of Africa into the port of Liverpool, and were the owners of several vessels, some of large burthen, engaged in that trade. For the purposes of [203] their trade they had a factory at Benin, on the coast of Africa, under the superintendence of a resident agent, wherein the oil was collected for shipment: but there not being sufficient depth of water over the bar of the Benin

\* Present: The Right Hon. Dr. Lushington, the Right Hon. Lord Cranworth, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



river for ships of any burthen to pass when fully laden, it was customary for such vessels to cross the bar partly laden, and anchor outside the bar, when the remainder of their cargoes was conveyed to them in open boats, if the weather permitted, and if not, in a vessel of small burthen, especially provided and used for that purpose. In the month of April, 1849, *The Levin Lank*, an American schooner of ninety-three tons American measurement, which had shortly before arrived at Benin, was purchased by the Appellants' agent there to serve as a tender, in lieu of one, called *The Maria Louisa*, which was then supposed to have been lost; there being at such time several vessels belonging to the Appellants' firm waiting outside the river to complete their cargoes of palm oil, and which the state of the weather rendered it impossible to have conveyed to them in open boats, and *The Levin Lank* was employed in such service.

The fact of the purchase was communicated by the Appellants' agent to Lieutenant Forbes, then at Benin, in command of Her Majesty's Brigantine *Bonetta*, who inspected her papers, including her American register and the other official documents wherewith she had cleared from Baltimore, and who thereupon gave her a pass in the following words: "This is to certify to all it may concern, that I have this day visited the purchase (ex American) schooner *Levin Lank*, Richard Euclid Tyrell, master. I am of opinion [204] that she is a legal trader, wherefore I give to the said master, or other the owners' agent may place in command, this warrant in the absence of higher authority, to enable him to proceed with orders from the owners' agent at this port to any of the trading ports on the coast of Africa."

On the 5th of January, 1850, *The Levin Lank* was despatched in charge of Joseph Tuzo, her then master, to Aeera, for the purpose of bringing therefrom workmen and materials for the repair of *The Maria Louisa*, which had been recovered, though in a dangerous state, and was then lying on the beach at Benin. Her crew consisted, besides the master, of Clements, the mate, and a seaman named Wallman (who had belonged to the steam-sloop *Heccla*, but had been sent by her commander to serve on board *The Levin Lank*), together with seven Kroomen, and one Benin boy. She had no cargo on board, with the exception of twenty casks of palm oil, and it did not appear that she had any article on board which could have rendered her suspicious as a slaver. She had no open gratings, but closed hatches; neither were there any notches cut in the combing of the hatchways, for the purpose of fitting gratings or open hatches; no divisions or bulkheads (save one to the cabin and part of one to the fore-castle), no planks on board, or shackles or bolts, and only two pair of handcuffs, of the description usually found in merchant vessels for the restraint and correction, if necessary, of any of the crew. She had only five casks of water, containing in the whole 600 gallons; no more empty casks or mess tubs than actually required for the crew; no boiler or cooking apparatus (with the exception of a small caboose, only large enough to cook for half of the crew at a time); one tierce of beef; only one bag of rice, holding about 200 lbs.; 600 yams and about 20 lbs. of bread; being in the whole not more food than was necessary for the use of her crew. She arrived at Aeera on the 15th of January, having been boarded on the 8th of that month by brig *Wingfisher*. The six casks of palm oil were landed and sold to Mr. Bannerman, a magistrate and merchant at Aeera, to pay for the Schooner's expenditure at that place. On the 19th, the day she left Aeera for Benin, six empty casks (in the room of the six with oil, sold to Mr. Bannerman on the 17th), and four dozen ducks, two dozen turkeys, and sundry small articles which had been purchased at Aeera, were put on board the schooner, and she shipped there three coopers and two others, to act as cook and steward respectively, for whom passes had been obtained by the Governor, as also a certificate for the six casks from Bannerman; and at the time of *The Levin Lank* leaving Aeera two only of her five water casks contained water, the beef had been reduced to half a cask, and the rice to half a bag; only a few of the yams remained; there were only six bushels of corn and two loaves of sugar on board; and no more fire-wood than was sufficient for two days' consumption. On the next day, the 20th of January, *The Ranger*, Thomas Miller, Commander, came alongside *The Levin Lank* with the first lieutenant and purser, who boarded her, and to whom were shown all her papers, and they left her and returned to their vessel. On the next day, Com-

mander Miller, accompanied by the master and carpenter of *The Ranger*, again [206] boarded her, and seized and put a prize crew on board of her, removing therefrom to *The Ranger* the seven Kroomen and five persons who had been shipped at Aeera; and having filled the three empty water casks on board *The Levin Lank* with water from *The Ranger*, and supplied her with firewood, despatched her with Tuzo, Clements, Wallman, and the Benin boy for Saint Helena. The officer in charge of *The Levin Lank* missed Saint Helena, and being short of provisions, bore up on the 10th of March to return to *The Ranger*, and fell in with her on the 21st of that month. On the 22nd, *The Levin Lank* was again despatched for Saint Helena with Wallman, who had volunteered as a common seaman on board *The Ranger*, but without either Tuzo, Clements, or the Benin boy, who had been all compelled to quit her by reason of Commander Miller having refused to supply them with provisions for the voyage.

On the arrival of *The Levin Lank* at Saint Helena, proceedings were instituted in the Vice-Admiralty Court there against her and her cargo, as having been at the time of seizure equipped for and engaged in the Slave trade. It appeared that the owners of *The Levin Lank* had no knowledge of the seizure, and there was no one in the Island to represent them, consequently no appearance or claim was given in on their behalf, and they were not represented in the suit. The only evidence in support of the condemnation was the affidavit of Tarraway, the master's assistant of *The Ranger*, as to the fitting up of *The Levin Lank*.

By the decree of the Vice-Admiralty Court of Saint Helena, dated the 30th of May, 1850, *The* [207] *Levin Lank* and her cargo were condemned as prize to Her Majesty, as having been at the time of the seizure thereof equipped and engaged in the Slave trade, contrary to the provisions of the Statute, 2nd and 3rd Vict., c. 73, and that Court decreed that the cargo should be sold, and the vessel (not being taken into Her Majesty's service) should be broken up and be entirely demolished, and the materials thereof publicly sold in separate parts, as by law in such case provided.

In pursuance of this decree, *The Levin Lank* was broken up, and the materials thereof, together with her cargo, having been sold, the nett proceeds arising therefrom amounted to the sum of £88 1s. 7d.

Upon the fact of the seizure of *The Levin Lank*, and her subsequent condemnation, being known to the Appellants, they asserted an appeal and gave in a claim for the vessel and cargo, which claim was supported by an affidavit of the Appellants, which verified the foregoing statement. A libel of appeal was given in on their behalf, which pleaded facts to the same effect. This libel was admitted by the Respondents without opposition. Three witnesses were examined by the Appellants upon the libel, consisting of the agent at Benin, and the master and mate of *The Levin Lank*. Their evidence established the fact of the purchasing of the vessel and the service she was employed in, and of the seizure. No counter-plea was given in on the part of the Respondents, and their case rested chiefly on the affidavit of Tarraway in the Court below, the averments in whose affidavit tending to impugn the character and employment of *The Levin Lank* were nega-[208]-tived by the witnesses produced on the part of the Appellants.

The appeal was argued by Mr. Rolt, Q.C., and Dr. Addams, for the Appellants; and The Queen's Advocate (Sir John Harding), and the Attorney-General (Sir Frederic Thesiger), for the Respondents.

Their Lordships called upon the Respondents to support the decree of the Court below.

The Queen's Advocate insisted, that the evidence of the character of the vessel was not satisfactory. *The Union* (1 Hagg. Adm. Rep. 32), there being no ship papers on board, no log-book or manifest, as required by Maritime law, Abbott "On Shipping," p. 330 (6th Edit.). The papers found on board belonging to another vessel, and the suspicions raised by her having three coopers on board, lying close to a notorious slave coast, and sailing under American colours, justified the seizure.

\* At the conclusion of his address, judgment was delivered, as follows, by

The Right Hon. Dr. Lushington.—The Appellants in this case are merchants, and pray to have the ship restored with costs and damages. The original seizure



took place on the ground, that this vessel had false papers, and was engaged in the slave trade on the coast of Africa.

It appears that *The Levin Lank* was a vessel of small burthen of about 93 tons, equipped at the port of Baltimore, and employed in carrying on trade in [209] palm oil, and that the Appellants have a factory at Benin, on the coast of Africa. She had American papers on board her, and some discussion was raised at the Bar, that at the time of the seizure these papers were false, and belonged to another vessel. If she was improperly furnished with these documents, it is clear that that circumstance alone would not justify the captors in the course of proceedings they adopted. Now, it appears, passing by for the present moment the evidence in the cause, that the ship was boarded by Her Majesty's sloop *Ranger*, commanded by Commander Miller: and he having examined the vessel, thought fit, on the ground of absence of papers on board the vessel, to cause her to be seized, and sent to Saint Helena for condemnation. The seizure took place in the month of January, 1850, off the coast of Africa.

The ship papers were shown, and examined by Commander Miller, and among them a pass by the commanding officer of Her Majesty's ship *Bonetta*, which was in these words.—[The learned Judge here read the pass (*ante* [10 Moo. P.C.], p. 203).]—Independently of this document and the other papers, the vessel underwent an examination: and Commander Miller was not deterred by these papers from adopting the measures which were subsequently taken by him. By his orders the Kroomen and five other of the crew were taken out of *The Levin Lank* and sent on board *The Ranger*, and *The Levin Lank*, with the master, mate, a common seaman named Wallman, and a Benin boy on board, was despatched to Saint Helena. The vessel had to put back for want of provisions, and having fallen in with *The Ranger*, the [210] master and mate were taken out of *The Levin Lank* and put on board *The Ranger*, and *The Levin Lank* with a prize crew again sent to Saint Helena, without any person whatever belonging to her on board to represent the interest of the owners; the only person being the common seaman, who had volunteered and become a seaman on board *The Ranger*. These facts appear in the affidavit of the owners, and are not disputed. I must observe, upon a careful perusal of that affidavit, that it is positively sworn, that the master and mate were compelled to quit *The Levin Lank* by the positive refusal of Commander Miller to supply them with provisions for the voyage. It is however unnecessary to enter minutely into that fact, as there is no doubt that the master was prevented from going with the vessel to Saint Helena by some means or other. Now, it was clearly the duty of Commander Miller to have sent them with *The Levin Lank* for the purpose of giving evidence in the Court at Saint Helena, because the Admiralty Instructions in this respect are plain and positive, that when a vessel is taken, two persons at least of her crew ought to be taken with the ship to give evidence for the owners, of its legal character. As it happened in this case, there was no person whatever to represent the owners at Saint Helena, and the result was, that the condemnation took place as a mere matter of form. It is well known that in strict conformity with the Instructions in cases of seizure for alleged infraction of the Slave Trade Act, there is a positive direction, that two persons at least of her crew must be sent, together with the vessel, to be produced before the Court, as necessary witnesses in every case, and one of those persons should [211] be the chief mate, supercargo, or boat-swain (a); and that course has not been followed by the captor in this case.

Now, these facts were not before the Court below, the only evidence before that Court being an affidavit by one of the seizers. Of course there could be no opportunity for the owners or their agent in the Island to put in any claim for restoration, but as soon as the facts came to their knowledge they asserted an appeal from such sentence of condemnation. The general statement contained in the affidavit filed on behalf of the owners in support of the claim, is, that they had been very extensively engaged in importing palm oil from the coast of Africa to Liverpool, which trade is carried on to a very great extent; that they had a large factory at Benin on that coast, with a resident agent: where the oil was collected and the casks for containing it

(a) Instructions for the guidance of Her Majesty's naval officers employed in the suppression of the Slave Trade, Sec. I., Art. 21. (1844.)

coopered; that inasmuch as there was not above ten feet of water over the bar of the Benin river, vessels of large tonnage were obliged to cross the bar partly laden, and then to anchor outside of it, and take in the rest of the cargo in open boats; that the Appellants bought The *Levin Lank* to serve as a tender, and that she was so employed at the time of the seizure; and the affidavit then goes on to say, that there was nothing suspicious on board the vessel to justify the seizure, and that the master and mate were obliged to leave the ship by the positive refusal of Commander Miller to supply them with provisions.

It has been very properly argued by Her Majesty's [212] Advocate, that the vessel had more coopers and carpenters than her size could justify, and a want of papers. Now, supposing that fact to be so, it really appears to their Lordships that it is not of any serious importance when the nature of the trade the vessel was employed in is considered. She was employed on the coast of Africa, partly as a trader and partly as a tender, and it cannot be expected in a small vessel of this kind that they had all the usual and necessary papers.

Now, taking all the facts of this case into consideration, it really does appear, without going further into the evidence, that there was not only no just ground for the seizure, but that there was no probable ground for warranting a careful man making a seizure. The only decree their Lordships can make is, that the decree below be reversed and the vessel restored, with costs.

By their Lordships' report, dated the 30th of November, 1852, which was confirmed by an Order in Council, dated the 28th of December, 1852, the sentence of the Court below was reversed, the principal cause retained, and the schooner and cargo ordered to be restored, or the value thereof paid to the Claimants, the owners thereof; and it was ordered that Thomas Miller, the Commander, and the rest of the officers and crew of The *Ranger*, should be, and they were thereby condemned in all "costs, charges, losses, damages, detriments, demurrages and expenses," which might have arisen by reason of the seizure and detention of the schooner and cargo.

Upon this Order there was the ordinary reference [213] to the Registrar and Merchants to report the amount in the usual form.

It was not till the 22nd of April, 1855, that the Appellants brought in their claim for costs, charges, losses, and consequential damages, which claim amounted in the whole to the sum of £20,108 0s. 5d. The Registrar and Merchants allowed the sum of £1593 9s. 10d. only, rejecting the claim for consequential damages with the various items comprised therein. These items, with the reasons for their disallowance, were set forth by the Registrar in his report, which report, after stating the facts relating to the seizure, the proceedings, and the decree of their Lordships reversing the sentence of the Court at Saint Helena, proceeded thus: "The first question that has been raised is, as to the extent of the damages to which the captors are liable under this decree, and whether they are bound to make good not only the losses directly occasioned by the capture and detention of The *Levin Lank* and her cargo, but those also indirectly arising therefrom, and which are commonly called 'consequential damages.' The Messrs. Harrison state, that soon after the capture of The *Levin Lank*, several of their vessels arrived at the mouth of the Benin river to take in palm oil; that they had abundance of oil at the factory, but were obliged, in consequence of the loss of The *Levin Lank*, to ship the casks at great risk in small open boats of the country, and that their vessels were in consequence detained for a considerable time; and they claim compensation both for the damage of their vessels and for the loss which they conceive they have sustained by the depreciation in the market at Liverpool of the price of palm oil, between the time when the cargoes might have been [214] delivered there, had The *Levin Lank* not been taken from them, and the time when the cargoes were actually delivered. They also state that some articles of merchandize, which were a mere drug at some of their settlements, would at the same time have fetched a high price at another, and that had they had The *Levin Lank* at their disposal they would have realised very large profits by conveying in her the goods to those settlements where they were most needed, and they, therefore, claim compensation, not only for losses actually sustained, but for the profits which they were prevented from making by the loss of The *Levin Lank*. They claim, in fact, for losses of this description from the time of the capture of The *Levin Lank* until the 31st day of October, 1852, when another tender called The



*Visitor*, which had been purchased by them and sent out from this country, ultimately arrived at Benin to supply the place of *The Levin Lank*. Such is the general character of Messrs. Harrison's claim, amounting in the whole to no less a sum than £20,408 0s. 5d., although the vessel itself is valued at only £1400. Now the first question which presents itself in considering the claim, is, how it came to pass, if the want of a small tender on the coast occasioned the Messrs. Harrison such heavy losses, and prevented them from realising such large profits,—how it came to pass that they did not send out another tender to supply the place of *The Levin Lank* at an earlier period than the 3rd of October, 1852. Mr. Harrison stated at the reference, that the first intimation which he received of the capture of *The Levin Lank*, and of her being sent to Saint Helena for adjudication, was on the 8th of July, 1850. He knew the number of vessels his firm had [215] despatched to the coast of Africa for palm oil, and yet it is not until about two years after he knows of the capture of *The Levin Lank*, that he takes measures to supply the place by purchasing and sending out another tender. Is it right, then, that the captors should be condemned in these enormous damages, which are said to have arisen from the want of a tender on the coast, when that want might have been supplied by Messrs. Harrison at a much earlier period than it was? Mr. Harrison stated at the reference, that the reason of their not having sent out another tender sooner was, that it was not convenient to them at that time to provide the funds necessary for the purpose. But are the captors responsible for this, and are they liable for all damages that may have arisen from the want of a tender, until it became quite convenient to the Messrs. Harrison to provide one? The principles which govern cases of this description are clearly laid down in the judgment of Dr. Lushington, in the case of *The Columbus* (6 Notes of Cases, 674). The learned Judge there says, 'I take the rule to be this: in case of a total loss, you calculate the value of the property destroyed at the time of the loss, and pay it to the individual as a full indemnity to him for all that may have happened to him, and you never can by possibility enter into an examination of what might have been gained by an adventure of this description. I see no limit to the principle: if once admitted, it would not be simply in cases where it was confined to the value of the ship, but there would be all kinds of ramifications, the profit to be derived from the voyage, or, indeed, from the return voyage, which might be said to have been defeated by the collision. I am of opinion, [216] on that ground alone, that I cannot maintain this claim.'

"Such, then, are the principles which must guide us in dealing with this claim, unless indeed there be anything in their Lordships' judgment which would show that it was their Lordships' intention to give the claimants consequential damages, and for which we must refer to their Lordships' judgment.—[The Registrar here referred to the judgment (*ante* [10 Moo. P.C.], p. 212), and proceeded.]—Not a word is here said about the consequential damages claimed by the Messrs. Harrison: it is a simple decree of restitution, with costs and damages, and as such should come under the principle laid down in the case of *The Columbus*.

"Much stress was laid by the Claimants upon the words of the decree itself, as it is found entered in the Court Assignment Book, and by which the captors are condemned 'in all costs, charges, losses, damages, detriments, demurrages and expenses which have arisen by reason of the seizure and detention of the Schooner and her cargo.' It must be confessed that these words are extremely wide and general, and would, at first sight, seem to carry with them consequential damages; the more so, as they are not the words usually employed in cases where restitution takes place with costs and damages. Indeed, there is no instance that I am aware of, of any judgment having ever before been entered in these terms, either in the Court of Admiralty, or the Court of Appeal, and I am quite at a loss to understand how it came to be so entered. It occurred before I was appointed Registrar: I cannot, therefore, speak from my own personal knowledge on the subject; but from the best [217] information I have been able to obtain, I am inclined to think that it arose from a mistake of a clerk in the office, who took the words of the Claimant's prayer as his guide in entering the decree, and not the terms of their Lordships' judgment. Under these circumstances, and looking at the very clear and decided opinion expressed by Dr. Lushington in the case of *The Columbus*, that, 'you never can, by any possibility, enter into an examination of what might have been gained

by an adventure of this description,' we are of opinion, that there is not sufficient evidence before us to show that it was their Lordships' intention to award consequential damages to the Claimants.

"Such, then, being the general principle upon which the claim of the Messrs. Harrison must be dealt with, let us now proceed to consider its details. The first item is a charge of £1400, as the value of the Schooner at the time when she was captured. It has been objected by the Queen's Proctor that this item is excessive in amount, the vessel being only 93 tons burthen; but it must be remembered that the value of the vessel is to be taken, not at the price at which a similar vessel might have been purchased in this country, but her value on the coast of Africa. Now it appears from the affidavit of Mr. Henry, the agent at Benin of Messrs. Harrison and Co., that *The Levin Lank* was purchased by him of the then supercargo and captain on the 7th of May, 1849, for the sum of £1400 sterling; but that, not having sufficient specie in possession, it was agreed between them that she should be paid for in goods to that amount, and accordingly the various articles enumerated in the schedule A., annexed to Mr. Henry's affidavit, were taken by the supercargo in satisfaction of his claim, and at the [218] prices stated therein. And as this person was as fully cognizant as Mr. Henry of the value of the several articles enumerated, it may reasonably be presumed that the goods in the schedule were fairly priced, and that *The Levin Lank* was purchased by him of the then supercargo and captain on the evidence offered, on the part of the Crown, in opposition to these facts, nor is there anything to show that the vessel had, in any respect, deteriorated, or that her value had fallen between the time of the purchase and her capture by *The Ranger*. Under these circumstances we are of opinion that the value of *The Levin Lank* must be taken at the price stated by the Claimants, namely, £1400. With regard to the second, third, and fourth items, the value of the cargo, stores, and provisions on board at the time of the capture, they are sworn to, and are not objected to, and as they appear to be reasonable in amount, they must be allowed. The next item is that marked No. 8, being the wages of six Kroomen, from the 4th day of January, to the 1st day of March, 1850, the day on which they got back to Benin. The wages of these men are charged at the rate of £1 5s. per man per month, and should be allowed in full. Item No. 9, being the wages of the seaman Joseph Wallman, from the 4th of January, to the 21st of March, 1850, the day on which he volunteered to *The Ranger*, must also be allowed in full. As must also item No. 10, being the wages of Charles Clements, the mate of *The Levin Lank*, from the 4th of January, to the 15th of April, 1850, the day on which he got back to Benin. Item No. 11, is a charge for the wages of Joseph Tuzo, the master of *The Levin Lank*, from the 4th of January, to the 20th of August, 1850, at the rate of [219] £12 per month. From Henry's affidavit it would seem that the master returned to Benin with Clements on the 15th of April, 1850, but that Henry was not able to find any employment until the 20th of August following, when he put him in charge of *The Druid* as master; and accordingly a claim was made for his wages during the time he remained so unemployed. This, it appears to us, must be allowed, as must also item No. 12, being the cost of his board and maintenance at 3s. per day, from the 15th of April, 1850, the day of his arrival at Benin, to the 20th of August following, when he took charge of *The Druid*. We shall also allow item No. 29, which is a charge of £1 10s. for postages and other petty disbursements.

"With regard, however, to all other items, we are of opinion that none of them can be allowed. Most of them are for consequential damages arising out of the capture of *The Levin Lank*, and for which we are of opinion that the captors cannot be held responsible. The rest of the items are for expenses of the witnesses during their detention in this country to give their evidence in the cause. These charges also cannot form any part of the present claim; if chargeable at all, they must be included in the Proctor's bill of costs, and be taxed in the regular way, as a part of the expenses attending legal proceedings. And as the Messrs. Harrison and Co. have lost the services of *The Levin Lank* from the 4th of January, 1850, interest would ordinarily be allowed at the rate of 4 per cent. per annum, from that time until the day of payment. But as a period of between two and three years were allowed to elapse from the time of their Lordships' report, before the Claimants thought proper to bring [220] in their claim for damages, we shall only allow interest from the 4th of January, 1852."



This report was objected to by the Appellants, who brought in an Act on Petition relying upon the Order in Council made upon the appeal, which awarded "costs, charges, losses, damages, detriments, demurrages and expenses by reason of the seizure," and submitted that the items rejected ought to have been allowed; and as regarded the delay, the Act on Petition alleged that it had been occasioned by the difficulty in procuring evidence from the coast of Africa, and prayed that the report might be referred back to the Registrar and Merchants to be amended. In the reply to the Act on Petition, it was alleged by the Respondents that at the hearing of the appeal their Lordships only reported to Her Majesty in favour thereof, that the sentence appealed from ought to be reversed, and the principal cause retained, and therein that the Schooner *The Levin Lank* and her cargo ought to be restored to the Appellants with costs, and denied that it was reported or agreed to be reported to Her Majesty "that the Respondents ought to be condemned in all costs, charges, losses, damages, detriments, demurrages and expenses as had arisen by reason of the seizure and detention of the vessel." And it was further alleged that such last mentioned words did not form part of their Lordships' judgment: and they submitted that the Registrar and Merchants had in their report rightly disallowed the items in the Appellants' claim for consequential damages, untruly alleged to have been caused to the Appellants by the capture of the Schooner, as also the expenses of the witnesses detained in this country to give evidence, which, as the costs had not been taxed, [221] it was submitted, were not damages. That the claim of the Appellants for damages was not made till April, 1855, although the Order in Council was made in December, 1852, and they contended that the Appellants were not entitled to interest for any longer period than for that which the report of the Registrar and Merchants allowed, and after stating that the claim was extravagant and unreasonable, prayed that the report might be confirmed, with costs of the reference and the petition.

The appeal upon this further question now came on for hearing (Feb. 8, 1856 \*).

Mr. Rolt, Q.C., and Dr. Addams, for the Appellants.—Our claim is first for positive damages, and, secondly, for consequential damages. The latter claim has been altogether disallowed by the Registrar and Merchants, because, as they contend, it was not given by the judgment of your Lordships. This objection, we submit, cannot however be maintained: it is the Order in Council made upon the appeal, and that alone, that we have to look to, and by that Order the appeal is reversed, "with costs, charges, losses, damages, detriments, demurrages and expenses," which clearly includes consequential damages. There is nothing contrary to the practice of the Court allowing consequential damages. Lord Stowell, in *The Acteon* (2 Dod. 51), says, "The natural rule is, that if a party be unjustly deprived he ought to be put as [222] nearly as possible in the same state as he was before the deprivation took place:" and, in *The Betsey Caines* (2 Hagg. Adm. Rep. 28), a collision case, compensation was awarded for consequential damages. Here the Registrar and Merchants have in fact constituted themselves a Court of appeal, from a final Order of the Queen in Council, and refused to carry out the Order which gave the Appellants consequential damages. They were bound to carry out the terms of the Order in Council like a Master in Chancery upon a reference to him by the Court of Chancery. It is not within the jurisdiction of your Lordships to alter the Order of the Queen in Council.

The Queen's Advocate (Sir John Harding), and Dr. Jenner, for the Respondents, supported the finding of the Registrar and Merchants, contending that their Lordships' report had been prepared by mistake by a Clerk in the Office taking the Claimants' prayer, instead of referring to the judgment of the Court, and that mistake had been erroneously embodied in the Order in Council: the judgment referring to costs and damages only.

The Right Hon. Dr. Lushington.—Their Lordships concur in the argument of the Appellants, that in this case the decree must be construed as it now stands, and that it is not competent to us to make any change or alteration in the decree at the present time. It is perhaps to be regretted that any decree was entered in the terms

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir William H. Maule.

in which this decree is couched, because it is contrary to the ordinary and accustomed usage, and it is especially [223] the duty of the Proctors to take care that a decree is not entered in extraordinary terms, and if they see anything objectionable, to bring it to the notice of the Court in due time, that the mistake may be rectified. But this decree having been confirmed by Her Majesty in Council, the first and only question for their Lordships' consideration is, what is the true meaning to be applied to it?

Now, notwithstanding very many words are introduced into this decree, such as "costs, charges, losses, damages, detriments, demurrages and expenses," their Lordships are of opinion that it amounts only to this, that the ship and cargo are to be restored with costs and damages, and that they must give it the same or a similar construction to what they would give a decree which was made according to ordinary and accustomed usage. If that be so, their Lordships must then consider whether the report of the Registrar and Merchants is correct or not, according to the practice which has prevailed in carrying into effect a decree awarding costs and damages. Their Lordships are of opinion that the Registrar and Merchants were correct in the conclusion to which they arrived, and that it would not have been competent to them upon any fair construction of this decree to have taken into their consideration, or allowed, the various expenses which are enumerated in the claim, and for this reason; they are not losses which were necessarily incurred in consequence of the capture of the ship, or her subsequent condemnation, for they are losses which are not necessarily incident to the destruction of the ship.

Now, the usual principle on which such decrees have been carried into effect is this: Supposing a [224] vessel is run down in the Channel on a voyage, for example, to the West Indies, you allow the whole value of the vessel and her goods and the nett freight upon the voyage out, but you never give consequential damages, that is, damages in consequence of any estimated profit which might or might not have been made in consequence of the voyage having been completed and the detention not taken place.

It is not necessary to enter into the consideration of the items contained in the Appellants' claim, because each of them is of the character which I have already ascribed to them; indeed, some hardly come within the definition in those cases of losses or damages which possibly might accrue from a detention of this nature. It seems that an attempt has been made on the present occasion to include in the claim all possible contingencies which might have happened, not only in consequence of the vessel having been detained, but in consequence of any measures which might have been adopted by the Claimants for carrying on their trade. As for instance, "Value of oil to ransom boat, and oil seized by the natives." Why, the very statement in this case shows that they are accustomed on very many occasions to convey the oil by means of boats, and not by means of a vessel of ninety-three tons burthen, as this vessel appears to be. And it may happen on certain occasions that such boats may be captured by the natives, and that the boat may be restored afterwards by a cask of oil being given in exchange for it. These are matters which the Registrar and Merchants were perfectly justified in rejecting from their consideration of the case, and their Lordships entirely concur in the opinion they [225] passed upon it. Some of the claims here are really of so preposterous a nature that it is scarcely possible to notice them without expressing condemnation that such an attempt has been made to claim compensation for them. Here are some of the items: "Losses sustained by the owners of *The Levin Lank* in their trade at Benin, from the 29th of January, 1851, when they were officially informed of her condemnation until the arrival of the tender *Visitor* at Benin on the 31st of October, 1852, £9233 18s. 6d;" then they claim £2000 for extra detention of their vessel and cargo; and £2000 more for not being able to keep up a communication with their agents at a particular place. Thus there is a sum of £13,000 odd, attempted to be charged against the Captors, or against the Crown, on account of having been deprived of the use of a vessel, according to their own estimate, valued at £1400 only.

Upon the whole their Lordships are of opinion, that the Registrar and Merchants rightly interpreted the decree which was made in this case, and that, therefore, we must confirm the report which they have made; and looking at the exorbitancy of these claims, and the very large amount which has been rejected, and the consequence being that there has been a long discussion before the Registrar and Merchants upon



the reference to them in order to ascertain what the Claimants were truly entitled to, their Lordships are of opinion they ought, according to the usual practice, to condemn the Claimants in the expenses which they have themselves occasioned by their unjust demand. They must, therefore, pay the costs of the reference and also the costs of this petition.

[Mews' Dig. tit. SHIPPING; A. XXVI. ADMIRALTY LAW AND PRACTICE; 22. *Practice*; d. *Arrest*. S.C. Swab. 45. As to the Slave Trade Acts, see note to *The Amedie*, 1810, 1 Acton, 251. See also Prize Rules, 1898 (Stat. R. and O., 1898, p. 905).]

[226]

*In re* LEE'S PATENT \* [June 16, 1856].

Letters Patent comprised three separate subjects. Upon an application for an extension of the term of the Patent, one only of the three subjects (that relating to Railway breaks) appeared to the Judicial Committee to be deserving of a renewed grant. Prolongation granted under Statute, 15th and 16th Vict., c. 83, sec. 40, for such part only of the Letters Patent as related to Railway breaks, and not to the other subject-matters of the Patent.

This was a petition by the Patentee for a prolongation of the terms of Letters Patent, consisting of three parts, in the specification described as "improvements in wheels and axle-trees to be used on railways, and in machinery for stopping on, or preventing such carriages from running off, railways, which improvements might also be applied to other carriages and machinery." Evidence was given to show the great utility of that part of the patent which related to Railway breaks; by which it appeared that the breaks acted directly from the axle and box of the wheels, with a wedge-power shoe, which bore against the wheels and rails. That the breaks commonly in use produced only five-eighths, or, at most, one inch of bearing or friction from the wheel on the rail, which greatly destroyed the wheel-tyre and rails, without a sufficient stopping power. It was also shown that the stopping power or friction on the rail of the Patentee's break had the advantage of eighteen to one over other breaks, by securing a certainty of biting the rails in wet, foggy, or slippery weather; and that it was free from the frame of the carriage and the unpleasant tilting motion and nephitic stench of the old breaks. That the breaks were brought into action by one revolution of a powerful screw, and by another half turn of the screw the whole weight of [227] the carriage was thrown upon the wedge-block bearing of the break against the wheel and rail, thus freeing the tyre of the wheels from friction, and raising the wheels clear of the rails one sixteenth part of an inch but no more, (further rise being prevented,) thereby saving the expensive wear and tear of the wheels' tyre and rails, a matter of great consideration in the current cost of the stock of Railway Companies. The breaks were also capable of being brought into action on inclines, and relieved again without stopping the train. A witness was also examined to show the advantages of the axle-trees. It further appeared from the evidence of the Petitioner, that he had been at great expense in perfecting his Patent, and had incurred losses to the extent of £4000, without any profits. There was no opposition.

Mr. Edmund F. Moore, for the Petitioner. Mr. Welsby appeared for the Crown.

The Right Hon. Sir William H. Maule.—This is a petition for a prolongation of the term of a Patent obtained by the Petitioner in the year 1842, for a variety of inventions, two only of which have been brought distinctly before the notice of their Lordships. One for improved breaks, and another for improved axles. In respect to these two, their Lordships have taken into consideration the propriety of recommending to Her Majesty an extension of the Patent, and with respect to one of them, namely, the axles, their Lordships do not see any ground for recommending any extension. This part of the Patent does

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir William H. Maule.

not appear to have been used, nor to be at all likely to be used. It is much more expensive; so much so, as to [228] be very unlikely, in the judgment of the only witness called upon that subject, to be practically useful (to say nothing of what he also mentions of its greater complications and weight). With respect to that, and with respect to those parts of the Letters Patent regarding which no evidence has been offered, their Lordships do not propose to make any recommendation; but with respect to the improvements upon railway breaks, the evidence which has been brought before them has led them to the conclusion that it is an invention of great ingenuity and likely to be extensively adopted, as it is of great public utility. It appears also that it is an invention from which the ingenious inventor has hitherto derived no profit, and in respect to which he has incurred considerable expenses. It seems to have various advantages over the breaks ordinarily in use, and there is nothing which appears to their Lordships with respect to the expense of using it, which ought to outweigh the great importance of the safety of the lives and limbs of persons travelling by Railways, from an improvement in the mode of stopping trains. It seems that by this mode a stoppage can be effected in a quarter part of the space which is required for stopping by ordinary breaks. It further appears that the wheels of railway carriages in the ordinary system of stoppage are ground down by being pressed when not revolving against the rail, and consequently having the particular section of the circle of the wheel ground flat: the wheels are by that process easily deprived of that circular character which is essential to the free, easy, and efficient operation of the wheel. It seems very evident that a wheel so dealt with must be worn quicker, and must also be much more inconvenient [229] in travelling, to say nothing of the effect of the jolting upon the carriage which a wheel so ground down and flattened would be likely to produce, and which, it is quite evident, will render it less useful, and much less pleasant to be used than in its ordinary state. It appears that such a wheel would jump upon the rail. I should have thought, if we had not the evidence of a Railway superintendent to the contrary, that a wheel which was jumping along the rail was more likely to go off the rail than if it went smoothly on, but it appears that that is contrary to the experience of persons employed on the Brighton Railway. It certainly is to be regretted that some reason, it does not appear what that reason is, has hitherto prevented Railway Managers and Directors availing themselves of the very useful invention which the evidence proves the Petitioner to have made. It may probably be the increased expense which would be incurred; but certainly, if the benefit is at all like what the evidence seems to show it to be, a considerable increase of expense would probably be found to be the best economy in the end. Very likely one cause may be that, successful as this invention is, it is one which addresses itself exclusively to Railway Companies, who are in point of number a limited class, and it may be, that there are reasons which may not continue to operate, but which do at present operate, to prevent the invention being remunerative to the inventor. Considering that the inventor has not derived any adequate benefit hitherto from his invention, their Lordships feel that they should be justified in recommending to Her Majesty to extend the term of this Patent for five years, in so far as relates to the invention of improved breaks, [230] and to that extent only. With respect to the rest of the invention, for the reasons already mentioned their Lordships will not recommend an extension. We, therefore, propose to recommend to Her Majesty that the term of the Patent should be extended for five years from the expiration of the Patent, so far only as the same extends to the improved breaks, but not otherwise.

Mr. Moore.—The Petitioner will disclaim the other parts.

The Right Hon. Sir William H. Maule.—There seems some doubt about that. By the 40th section of the 15th and 16th Vict., c. 83, provision is made for the insertion in the new Letters Patent of "any restrictions, conditions, and provisions" as may be contained in the Order in Council. Now, whether these words confer power on their Lordships of making an Order recommending the Patent to be extended only so far as relates to a particular subject, whether such power is comprehended in these words, may be a question.—[Mr. Moore: *In re Russell's Patent* (2 Moore's P.C. Cases, 496; see also *In re Normandy's Patent*, 9 Moore's P.C. Cases, 452), the Committee made it a condition in prolonging the Patent that an annuity should be granted to the inventor, and that power was upheld by the House of



Lords, *Ledsam v. Russell* (1 H.L. Cases, 687).]—No doubt that could be done under the Statute, 5th and 6th Will. IV., c. 83; but here the question is, whether the words in the Statute, 15th and 16th Vict., c. 83, sec. 40, "restrictions, conditions, and provisions," [231] mean more than a condition such as that a Patentee should not charge more than such a sum, or whether it enables the Judicial Committee to do, by means of a condition, that which was formerly done by disclaimer. However, if you think proper to disclaim, you will take that course (see *In re Bodmer's Patent* (8 Moore's P.C. Cases, p. 287), where the Committee, before recommending an extension of part of Letters Patent, put the Petitioner upon terms of disclaiming the other parts of the Patent).

Their Lordships' report, which was confirmed by an Order in Council, confined the extension of the Letters Patent to the improved Railway breaks.

[See note to *In re Bodmer's Patent*, 1853, 8 Moo. P.C. 287. As to extension of patents, see now s. 25 of the Patents Act, 1883 (46 and 47 Vict., c. 57), and the Privy Council Rules of 1897 (Stat. R. and O., 1899, p. 1837).]

### [232] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

HENRY THOBY PRINSEP and THE EAST INDIA COMPANY,—*Appellants*; THE HONOURABLE MARY ANNE DYCE SOMBRE, and ANNE MARY TROUP, and GEORGINA SOLAROLI,—*Respondents* \* [April 3, 4, 5, 7, 8, 9, 10, 11, 15, and 16, 1856].

The presumption of law is, that the verdict of a jury under a Commission of lunacy, that the party, the subject of the Commission, is of unsound mind, is well founded, and, if the Commission remained unsuperseded, that the party continued a lunatic at his death. Such presumption, however, may be rebutted and displaced by positive proof of entire recovery, or possession of a lucid interval, when a testamentary instrument was executed [10 Moo. P.C. 239, 244].

The *onus probandi* lies upon a party setting up a Will, made during the subsistence of a Commission of lunacy, to establish the affirmation of complete or partial recovery of the lunatic at the time of giving instructions for and executing the Will [10 Moo. P.C. 239, 245].

Insane delusions are of two kinds:—first, the belief in things impossible; and second, the belief in things possible, but so improbable under the surrounding circumstances, that no person of sound mind would give them credit [10 Moo. P.C. 247].

A Testator, against whom a Commission of lunacy was subsisting, made a Will and Codicil, the instructions for which were rational and the testamentary papers properly executed. Such instruments pronounced against, the evidence showing that the deceased had been instructed to conceal the continued existence of the delusions he still entertained, and that he acted under restraint; the evidence of his partial or perfect recovery at the time of giving instructions and execution, being inconclusive and unsatisfactory [10 Moo. P.C. 301].

The Court below condemned the Appellants, who propounded the instruments, in costs. In affirming the judgment of that Court upon the question of insanity, the Judicial Committee reversed so much as related to costs, and directed the Appellants' costs below and upon appeal to be paid out of the estate, as they were of opinion, that the Appellants, as executors and legatees in trust, did right to bring the case before this Court; but as they had

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. the Lord Justice Turner.

prosecuted the case and appealed separately, the Judicial Committee allowed them only one set of costs [10 Moo. P.C. 301-305].

David Ochterlony Dyce Sombre, the deceased in the cause, died on the 1st of July, 1851, the validity of whose Will and Codicil, dated respectively the 25th of June and 13th of August, 1849, was [233] impeached by the Respondents. The question at issue was, whether the deceased was of sound mind at the periods of giving instructions for, and executing, these instruments; a Commission of lunacy against him subsisting at his death. These instruments were propounded in the Prerogative Court by the Appellant, Prinsep, one of the executors therein named. The other Appellants, the East India Company, intervened in the suit as residuary legatees in trust under the Will. Probate was opposed by the Respondents, Mrs. Dyce Sombre, the deceased's widow, Mrs. Troup and the Baroness Solaroh, the deceased's sisters, and next of kin, on the ground that the deceased was of unsound mind when the Will and Codicil were prepared and executed. The facts of the case, the nature of the Will and Codicil, and the evidence, which was very voluminous, are so fully set forth in the judgment of their Lordships, as to render any further statement here unnecessary. By the decree of the Prerogative Court (see judgment reported, 1 Deane's Ecc. Reps., p. 24), the Will and Codicil were pronounced against, on the ground that the deceased was of unsound mind at the time of giving instructions for and execution of these instruments, and the Court further condemned Prinsep and the East India Company in costs. Separate appeals were preferred by Prinsep and the East India [234] Company against this sentence, which appeals were consolidated, and now came on for hearing. The argument on the appeal lasted ten days.

Sir Frederick Thesiger, Q.C., Dr. Bayford, and Mr. Forsyth, for the Appellant, Prinsep :

The Attorney-General (Sir Alexander Cockburn), Mr. Wigram, Q.C., Dr. Haggard, and Mr. Melville, for the other Appellants, the East India Company.

The Queen's Advocate (Sir John Harding), the Solicitor-General (Sir Richard Bethell), Sir Fitz-Roy Kelly, Q.C., Dr. Jenner, and Mr. W. Jervis, for the Respondent, Mrs. Dyce Sombre; and

Dr. Twiss, and Dr. Spinks, for the next of kin, the other Respondents (a).

The arguments were confined to an examination of the medical and other evidence of the state of the deceased's mind, and involved the question, whether the deceased was of sound and disposing mind when he gave instructions for and executed the Will and Codicil. The Appellants admitted that the deceased had been at one time insane, and that a Commission of lunacy was subsisting at his death, but insisted that the delusions which he formerly entertained had been entirely removed. And as to some of the supposed [235] delusions, they submitted they were not of an insane character at all, but were to be attributed solely to his Asiatic habits and feelings, and to his ignorance of the customs and manners of this country. The case of the Respondents was, that the deceased was insane when he gave instructions and executed the instruments in question. The authorities referred to were, *Cartwright v. Cartwright* (1 Phill. Ecc. Rep. 90), *Austen v. Graham* (8 Moore's P.C. Cases, 493), *Waring v. Waring* (6 Moore's P.C. Cases, 341), *Mudway v. Croft* (3 Curt. 675), *The Queen v. Hill* (2 Den. and Peace, Cr. Cas. 254), *McAdam v. Walker* (1 Dow. 178), *Deu v. Clark* (3 Add. 79; and see note to pp. 88-89), *In re Dyce Sombre* (1 Mac. and Gor. 116), Sir Gregory Page Turner's Case (not reported), 1 Williams "On Executors," p. 17 (3rd Edit.); Ray's "Medical Jurisprudence," pp. 94, 103, 123, 219, 245-6; Pritchard "On Insanity," pp. 6, 26-7; Connolly "On Insanity," pp. 172, 334, 337.

Upon the question of costs of the executor and legatees in trust coming out of

(a) Their Lordships, in consideration of the appeals being consolidated, and the magnitude of the papers, allowed a third Counsel to be heard for the Appellants in reply, and as the defence of the widow and next of kin was the same, two Counsel only were allowed for the Respondents. See upon this point, *Castle v. Torre*, 2 Moore's P.C. Cases, pp. 141-8; *Jewa-jee v. Trimbuk-jee*, 3 Moore's Ind. App. Cases, 139.



the estate. *Dean v. Russel* (3 Phill. Ecc. Rep. 334), *Armstrong v. Huddleston* (1 Moore's P.C. Cases, 478), were relied upon.

Judgment was postponed, and now delivered by

The Right Hon. Dr. Lushington (July 1, 1856).—Mr. Dyce Sombre died on the 1st of July, 1851. On the 25th of June, 1849, he executed a Will; and on the 13th of August, in the same year, a Codicil. The Will and Codicil are propounded by Prinsep, one of the executors therein named. After proceedings of [236] almost unexampled length in the Prerogative Court of Canterbury, the learned Judge of that Court, (The Right Hon. Sir John Dodson,) on the 26th of January last, delivered his judgment [1 Deane, 24], pronouncing against the Will and Codicil; on the ground that the deceased was not of sound mind when he executed the same: he also condemned Prinsep, the executor, and the East India Company, who had made common cause with him, in all the costs occasioned by this litigation.

From this decree an appeal has been prosecuted, and their Lordships are now called upon to determine whether the judgment of the Court below is well founded or not: or, in other words, whether the deceased was of sound mind at the times of the execution of the Will and the Codicil.

It may be well to commence our inquiry into this case by stating what facts, beyond all controversy, had occurred preceding the execution of these instruments.

First. In July, 1843, the deceased was found, by the verdict of a jury assembled in consequence of a Commission issued under the authority of the Lord Chancellor, to be of unsound mind, and to have been so from October, 1842.

Second. The deceased, under the care of a physician, was allowed to travel in various parts of England. In September, 1843, he made his escape from England, and went to Paris. Endeavours were made to reclaim him as a lunatic, but the French Government declined to give him up, unless he was, after an examination conducted by the French authorities, found to be of an unsound mind. Such an examination was instituted in October, 1843, under the superintendence of M. Delesert, the Prefect of [237] Police, with the assistance of physicians of the highest character in Paris. The result of that examination was, that he was deemed to be of sound mind, and, consequently, remained his own master in France.

Third. A petition was soon afterwards presented to the Lord Chancellor for the purpose of having the Commission superseded, and the report of the French physicians was laid before him. Lord Lyndhurst, the then Lord Chancellor, gave permission to the deceased to come to England, his personal liberty being secured to him. He was again examined by physicians appointed by Lord Lyndhurst; and Lord Lyndhurst had more than one personal interview with him.

Fourth. The result of these proceedings was, that Lord Lyndhurst, with the fullest information before him, and with the advantage of having seen the deceased himself, pronounced, in August, 1844, a most elaborate judgment, discussing all the facts and circumstances with great minuteness and unrivalled ability, and declined to supersede the Commission.

Fifth. After this judgment, Dyce Sombre went back to the Continent; and he appears to have travelled into every part thereof, as well as to have visited Egypt. With a view to obtain a supersedeas of the Commission, he caused investigation to be made into his sanity both at St. Petersburg and at Brussels, and all the physicians who were consulted by him at those places reported him to be of sound mind. Many applications were made with regard to his pecuniary affairs to the Lord Chancellor for the time being; and in 1847, the whole residue of his income, after the payment of £4000 per annum to Mrs. Dyce Sombre, was left to his sole disposal.

Sixth. Under the authority of the Lord Chancellor, [238] he was examined by English physicians both at Dover and at Brighton; and it appears that a petition, presented in the latter end of the year 1848 for the superseding of the Commission, was refused by the Lord Chancellor in December of that year.

Seventh. In the same month of December, through the instrumentality of a Mr. Mahon, Dyce Sombre was, without the intervention of either his Counsel or solicitor, examined by five of the most eminent physicians in London. Their evidence is now before the Court, and no doubt can exist but that they made a most careful

investigation into the state of Dyce Sombre's mind, and that they availed themselves of all the means within their reach of rendering that examination searching and effectual. A report prepared by Dr. Mayo was eventually signed by them all, and that report certified, in substance, that Dyce Sombre was of sound mind. This report was informally and irregularly introduced to the knowledge of the Lord Chancellor by means of a document signed by certain noblemen and gentlemen: a new petition was presented; and the whole question was fully considered and elaborately discussed before Lord Cottenham, then Lord Chancellor.

Eighth. The result of this investigation was a judgment pronounced by Lord Cottenham, in April, 1849, by which he refused the prayer of the petition, and the Commission remained in force.

It will be observed that the instructions for the Will were given at a short period before the judgment just mentioned; and the solicitor employed was a solicitor not previously engaged on behalf of the deceased, but the solicitor of Prinsep, one of the executors named in the Will.

[239] It may be expedient, before travelling further into the facts of this case, to consider how far the undoubted facts which have been recapitulated will affect the principles upon which this case must be adjudged. We apprehend that, though the opinions of the physicians who so carefully examined the deceased, and testified to his soundness of mind, are entitled to weight and consideration, yet that the Commission not having been superseded, the legal presumption is against the validity of any testamentary instrument; and consequently the onus of proving the soundness of mind of the Testator is imposed upon the party setting up the instrument. We will observe that, though the cases are rare, yet there have been some instances where the validity of a Will has been pronounced for, notwithstanding that the Testator was, at the period of making it, under the protection of a Commission, as in the case of *Cartwright v. Cartwright* [1 Ph. E. R. 90].

Under such circumstances, it is competent to the party setting up a testamentary instrument to maintain—First, either that the deceased was always of sound mind; secondly, that though he may have been formerly of unsound mind, he had entirely and completely recovered; or, thirdly, that the Will was made during a lucid interval. It is evident, from these few observations, that the main question for our decision in this case is, soundness or unsoundness of mind at the periods of giving instructions for and of the execution of the Will and Codicil.

In some cases such questions may be determined by the conduct of the Testator at those particular times; but, in the present instance, it is necessary to take a much wider view: for, to form a just judgment, we must investigate and ascertain, to the best of our ability, the general state of the mind of the deceased. To effect this object; to enable us to form a just estimate of the conduct of the deceased at various times; to satisfy ourselves whether particular actions are to be ascribed to peculiarities and eccentricities, or arose from a diseased state of the mind: it will be necessary to commence our inquiry from a very early period.

First, as to the Testator's birth and origin. The Testator was born at Sirdhana, in the Upper Provinces of Bengal, in 1808, or thereabouts. He was descended from General Sombre, who was a European. General Sombre had, by a Hindoo woman, a son, named Louis Balthazar Sombre, who was the father of Juliana Dyce. There may, perhaps, be some uncertainty as to who was the mother of Juliana Dyce.

Juliana Dyce married George Alexander Dyce, who seems to have been the son of a British officer; and, as far as we can collect, by a native woman. From this connection came the Testator and his two sisters, Mrs. Troup and the Baroness Solaroli.

The Testator was, therefore, by origin, partly European and partly Asiatic. That the conduct and character of a person may, in some cases, be affected by birth, and the blood that flows in his veins, is a proposition which will not be denied. People of every nation have some peculiarities and characteristics. The difficulty is, to form a correct opinion, in particular instances, how far such peculiar constitutions may fairly be ascribed to birth and origin, or justly be referred to ordinary causes. In following up the present inquiry, we shall not fail to bear in mind that Asiatic blood did, and probably to a considerable extent, flow [241] in the veins of Dyce Sombre: and we shall endeavour to give this circumstance its proper weight.



Next, the Testator's early history and education. The Begum of Sirdhana had married the General Sombre, from whom Dyce Sombre was descended. The General died at a period long antecedent to these transactions. The Begum's attachment to him was strong, and she evinced it by her protection of his descendants, though not relatives of her own.

About the year 1826, George Alexander Dyce, who had been in the service of the Begum, was dismissed by the Begum, and does not appear ever to have been reconciled to her. His son, the deceased in this cause, was adopted by her, and, with his two sisters, lived at her palace.

The only fact which transpires as to the education of the Testator is, that for some time (certainly not exceeding three or four years) he resided with a Mr. Fisher, who was a clergyman of the Church of England, and chaplain at Meerut, a large military station about twelve miles from Sirdhana. Whilst under Fisher's care, he acquired a knowledge of the English language. What were his further acquisitions does not appear; but, in his own opinion, strongly expressed by himself, he considered his education as very deficient, and greatly deplored that deficiency.

At what particular time Dyce Sombre quitted Fisher is left in some obscurity; but whenever that might be, he returned to live with the Begum at Sirdhana, and grew in her confidence until he was invested with almost supreme power in carrying on the Government, which was, so far as we know, absolutely despotic.

[242] Then, as to the Testator's society and habits up to the Begum's death. On many occasions during the argument, much was said as to the deceased's ignorance of European society; and much of the deceased's conduct was endeavoured to be accounted for on that ground.

We are now speaking of Indian society, and of Indian society in the Upper Provinces of Bengal. It behoves us, therefore, to be cautious in forming our opinions, and drawing conclusions. Probably, too, society in the Upper Provinces may, in many respects, be very different from that which exists at Calcutta. Dr. Drever says, however, that at Meerut there were many English families, and that at Sirdhana there was very good English society, both male and female. And the evidence shows that the deceased mixed in that society. He must, therefore, have acquired some knowledge of European habits and customs, such as they prevail in the East—in many respects, no doubt, much the same as in England. Dyce Sombre, according to Dr. Drever, had acquired the habits of this society, and conducted himself at all times in a very becoming manner.

As to the personal conduct of Dyce Sombre, it may be described in one sentence—the most unrestrained sensual indulgence of every kind.

With respect to the jealousy manifested by Dyce Sombre as to the women with whom he cohabited, or the entrance of strangers into the Zenana, there is a difference of opinion amongst the witnesses. We think that there is no evidence to enable us to form any decided conclusion either way. We cannot say that he was more or less given to jealousy than persons of his blood, education, and habits ordinarily would be.

[243] In 1836, the Begum died, and left the deceased a very large property, probably £500,000. He went to Calcutta, afterwards to China; and returned to Calcutta. Early in 1838, he left Calcutta for England, and arrived at Bristol in August. Some little experience he must, therefore, have acquired during the two years which elapsed from the Begum's death; some further knowledge of European society.

As to the character of the Testator. From the circumstances already mentioned, some opinion may be formed as to the character of the Testator, though, from the mixture of European and Asiatic blood—from a mixture of habits of each—from the strange combination of the profession of the Roman Catholic religion with Mahomedan practices—from the alternation of at one time acting almost as a Sovereign Prince, and at another in the capacity of a gentleman, wealthy, indeed, but without power or authority—it would be vain to attempt any precise definition.

The important inquiry is, how far that character shall be permitted to put a complexion on the acts of the deceased, a complexion different from that which would be put in the case of an ordinary individual. We think that we may safely conclude that the Asiatic origin and habits of the deceased would probably render

him more prone to jealousy and suspicion than would be the case with respect to Englishmen; that circumstances would excite jealousy and all kinds of suspicion in the mind of the deceased, which would produce no such effect upon an English gentleman of education, accustomed to good society; therefore, many actions of the deceased may fairly be attributed to, and explained by, these peculiarities of character.

[244] There are, however, limits within which this principle of solution from peculiarity of character must be circumscribed. It may be conceded that, in Dyce Sombre's case, circumstances, very slight in themselves, and ordinarily wholly inadequate, might create, and in a violent degree, jealousy and suspicion; but the invention of facts wholly without foundation, the belief of circumstances wholly improbable (if not absolutely impossible), even in a person of such a character, never can be accounted for by similar reasoning.

On the arrival of Dyce Sombre in England, in 1838, he was received into society, and seems to have conducted himself, so far as relates to society, with perfect propriety. In September, 1840, he was married to Miss Jervis, the daughter of Lord St. Vincent.

It is not necessary to refer minutely to the circumstances preceding the marriage; we will proceed with the narrative. In the month of March, 1843, the parties were residing at the Clarendon Hotel. Dyce Sombre's conduct, in the opinion of his medical attendants, rendered it necessary he should be put under restraint, and he was so accordingly. He was removed to Hanover Lodge; a Commission of lunacy issued; and, on the 1st of July in that year, he was found of unsound mind, and to have been so from the October in the preceding year.

Here it may be expedient to pause, and consider what is the effect of such a finding by a jury, acting in pursuance of a Commission. We apprehend, as we have before stated, that the presumption of law is, that the verdict of the jury was well founded, and that the deceased continued lunatic so long as the Commission was not superseded.

[245] It is true that a person so circumstanced may have entirely recovered before the Commission has been actually superseded; it is true that he may have partially recovered; may have had lucid intervals; but the *onus probandi* must lie upon whomsoever asserts the affirmation of complete or partial recovery.

Such would be the presumption if this were the verdict of the jury alone, but on the present occasion the insanity at some period antecedent to the preparing and execution of the testamentary papers propounded is not denied; and, moreover, we are all clearly of opinion that the evidence now produced establishes beyond doubt that the deceased was, in the year 1843, of unsound mind. This being so, we think that the doctrine laid down by Lord Thurlow in the case of *The Attorney-General v. Parnter* (3 Bro. C.C. 442), confirmed by many other authorities, and but slightly modified by Lord Eldon in *Ex parte Holyland* (11 Vesey, 10), strictly applies, where he mentions the case of a lunatic in the management of the estate of his own Committee. The following are the passages alluded to. Lord Thurlow said (p. 443):—"If derangement be alleged, it is clearly incumbent on the party alleging it, to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but if a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches to the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval after derangement at any period has been established, [246] should be as strong and as demonstrative of such fact as where the object of the proof is to establish derangement."

To this doctrine Lord Eldon added (11 Vesey, 10):—"In the case of *Mrs. Barker (Attorney-General v. Parnter, 3 Bro. C.C. 441)*, Lord Thurlow said, that, where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind, as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property, or with reference to such a case as this; for, suppose the strongest mind reduced by the delirium of fever, or any other cause, to a very inferior degree of capacity,



admitting of making a Will of personal estate, to which a boy of the age of fourteen is competent; the conclusion is not just, that, as that person is not what he had been, he should not be allowed to make a Will of personal estate. There may be frequent instances of men restored to a state of mind inferior to what they possessed before: yet it would not be right to support Commissions against them. On the other hand, if lunacy has been satisfactorily established, particularly where there is a tendency to do great personal harm to others, I ought to be sure, by the evidence of persons having competent knowledge upon the whole of the subject, that there is an absence of that disorder, and that those tendencies may not be brought forward, when it may not be generally known that there is any providence of the law thrown over the individual."

No doubt, however, the presumption of law to which we have referred may be rebutted, and the effect of the positive proof which we have mentioned [247] may be displaced by satisfactory evidence proving the entire recovery, or the possession of sound mind, when the acts in question were done.

This, then, is the case we have to consider—entire recovery, or sound mind, at the date of the instruments propounded. Of course the first proposition includes the latter; but if either be proved, the testamentary papers propounded must be pronounced for.

We think that the best mode of arriving at the truth in this inquiry is to examine, in the first instance, the evidence by which the insanity in 1843 was established to the satisfaction of the jury, and to our own conviction; to ascertain in what particular delusions this insanity manifested itself; to trace, by a consideration of the evidence on both sides, so far as we are able, the continuance or disappearance of such delusions: to inquire whether fresh delusions arose in the mind of the Testator, and, in a similar manner, whether they were transient, or continued to affect the mind of the deceased till the periods of the execution of the Will and Codicil.

We do not think it necessary to attempt any definition of what generally constitutes insanity, except so far as is absolutely necessary for the due consideration of this case. We cannot, however, err in saying, that insane delusions are of two kinds; the belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sound mind would give them credit; to which we may add, the carrying to an insane extent impressions not in their nature irrational.

Pursuing the course of inquiry we have laid down, we will commence with the evidence of Sir James Clark. He attended the deceased from the end of [248] February, 1843, till August of the same year, and, occasionally, at various times and places, till the end of November, 1848. He says that the deceased at all times manifested delusions respecting the infidelity of his wife. He asserted that she had connection with her own father in Hyde Park in open day. In 1844, the deceased repeated many declarations of the same insane character, so manifestly insane that it would be impossible to impute them to his Asiatic blood or Eastern customs. In April, 1843, the deceased had, clearly, an insane belief in spirits. In 1848, the deceased declared his conviction that the Baroness Solaroli was illegitimate, but whether this was an insane conception or not must be subject of inquiry presently. The deceased expressed his suspicions that medicine was put into his food, and with a view to diminish his procreative powers. In November, 1848, Sir James Clark reports, in conjunction with other physicians, that the Testator was unfit to be entrusted with the management of his own affairs, a certificate, in other words, that he was not of sound mind. There is no doubt but that the evidence of Sir James Clark is entitled to great consideration; but it may be right to observe that the Judges of the Prerogative Court, where questions of insanity are so frequently mooted, have always held that the most important evidence where medical persons have been examined, is the facts to which they depose, rather than the opinions they have formed; that Court holding it more proper to draw its conclusions from facts rather than from the inferences of others, however skilled in cases of insanity: not that the opinions of medical persons are disregarded, but that the facts deposed to furnish the safest evidence on which a [249] judgment can be founded. Sir James Clark, speaking of the state of mind of the Testator in

April, 1843, expresses his opinion in the strongest terms. He says his whole demeanour was such as to make it marvellous that any one could doubt his insanity.

Dr. Monro, who was a physician of the most extensive practice in cases of insanity, mentions a remarkable fact, that so early as 1840, and in the month of July, before his marriage, the deceased did of his own accord come to consult him (Dr. Monro) about his health. Dr. Monro says, "I do not remember that this visit was with any particular reference to his mind; rather, I think, that he was hypochondriacal." That apprehension, however, savours of mental discomposure. Dr. Monro attended the deceased at the Clarendon, at Hanover Lodge, and was present at the execution of the Commission. As proofs of mental delusion, he mentions that the deceased charged Mrs. Dyce Sombre with incontinency with anybody and everybody, and said that she had herself owned to having received men from her own father down to shopmen. Amongst other proofs of insanity, he mentions that the deceased stated in 1843, that poisonous things had been put with his food for the purpose of producing impotency.

Dr. Conolly was one of the medical gentlemen who signed the certificate, and who saw the deceased in 1844. He speaks to similar facts, and also to the Testator having declared that he had dined upon apples and porter to prevent a levee.

These three witnesses—Sir James Clark, Dr. Monro, and Dr. Conolly—all speak to the years 1843 and 1844. The two latter did not see the deceased afterwards. Sir James Clark frequently did so up to November, 1848. [250] Considering this evidence, we can entertain no reasonable doubt that the deceased was of unsound mind in 1843; that the verdict of the jury was well founded; and that he remained of unsound mind in 1844. Indeed, such insanity has been very properly admitted by the Counsel who have argued in support of this Will and Codicil.

Before proceeding further, it may be well to notice some considerations which necessarily arise from this state of things. It becomes wholly unnecessary to expend time upon the proceedings instituted by the French authorities in October, 1843. That they were conducted with the greatest care and caution, and with the most earnest desire to ascertain the truth, is manifest. Whatever means were possessed to enable the examiners to arrive at a just conclusion were most carefully employed; but a knowledge of the deceased and his habits was necessarily wanting, and especially Dyce Sombre's ignorance, at the time, of the French language; and the examination being carried on by interpretation, probably led them to conclusions different from those arrived at in England. If this examination failed, conducted as it was with so extraordinary a care, it may furnish some reason why greater weight should not be attributed to the reports of other physicians abroad.

The insanity, however, being established in 1844, a new issue arises, namely, whether a recovery is proved.

The whole history of Dyce Sombre, which substantially includes all the important evidence up to July, 1844, is so admirably set forth in Lord Lyndhurst's judgment of the 8th of August in that year, that we will not travel more minutely into the particulars of [251] Dyce Sombre's history up to that time. It is true that Lord Lyndhurst had some evidence before him which is not before us; that we have some that his Lordship had not; that he had the advantage of seeing the deceased personally; but still, generally speaking, the case is the same as it was at that period in all its most important features. Lord Lyndhurst refused to supersede the Commission.

We now proceed to investigate what occurred subsequently to August, 1844.

In the beginning of 1845, Dyce Sombre was at St. Petersburg, and there obtained the opinion of many physicians of high character; but we do not dwell upon what was done upon that occasion, for, independently of other reasons, the very certificate which they signed commenced with a statement of Dyce Sombre, strongly indicative of his insanity. He stated that in March, 1843, he was confined under the pretext of being insane by the intrigues of his enemies; of his having been declared out of his mind by a bribed Commission. In June, 1845, a similar certificate was signed at Brussels, and one of the medical gentlemen who signed it was Mahon, the person who entered into a contract with Dyce Sombre to receive £10,000 if the Commission was superseded within a term specified. We do not think that this evidence materially affects the case.



We now approach a period when it becomes of much greater importance to trace, with accuracy, the evidence produced on both sides as to the state of the mind of the deceased.

The Counsel in support of the Will have contended that the mental condition of the deceased had begun to improve in 1846, or even at an earlier period; and [252] that he had wholly recovered before the preparation and execution of these testamentary instruments: we must look, therefore, with the greatest care to the evidence bearing upon this period, and on the state of mind of the deceased up to the times when the Will and Codicil propounded were executed. We must be satisfied that the delusions, which had previously existed, had ceased—ceased altogether—not merely, that they were not at all times apparent, but that they were not latent. We must be convinced that no new delusions since 1843 had sprung up, and still continued to produce a morbid effect on the mind of the deceased. We are not now inquiring as to a lucid interval, but whether there was a recovery from past insanity.

Before prosecuting this inquiry, it may be proper to observe that Mahon is, at this period, upon the stage, and that he had a great pecuniary interest in proving Dyce Sombre to be of sound mind, and so procuring the Commission to be superseded:—that it is manifest from the evidence in this cause, that Lord Combermere and others were exerting all their influence with Dyce Sombre, to induce him to conceal from his medical advisers, and, indeed, from all whose duty it was to discover the truth, those feelings and those convictions which had been deemed insane delusions; that no effort was left untried to induce Dyce Sombre to represent himself, not that he really was, but as it was deemed most expedient that he should appear to be, to obtain a given end—the superseding the Commission:—that toward the attainment of this object, any opinion he had upheld and declared which was thought inconsistent with the obtaining a favourable judgment from the physicians, was [253] distinctly pointed out to him, and he was cautioned, and urgently cautioned, what to dissemble and conceal; he was urged by every motive most dear to him to assume, without regard to truth, a given character, and to carry out a deliberate scheme of deception.

We characterize these proceedings thus strongly because it is manifest, from all that was done, that truth was not the object in view; that the inquiry was not whether Dyce Sombre was really free from his previous insane impressions, but that the advice was to deny the continuance of those impressions, whether they existed or not. We cannot doubt that all the means so adopted to disguise the truth were most capable as tending to pervert justice, by poisoning the very sources from which justice must spring.

But the question which most calls for our attention is, how far the conduct of Dyce Sombre is to be ascribed to such undue interference, and one of the evils attendant upon such interference is, that this is a question not easily to be solved. That a person still subject to mental derangement may be made to assume, for a time, a different character, may be induced to conceal his delusions, may be perfectly true; but it is difficult to say to what extent this deception could be carried, or how far it could escape detection: suffice it, for the present to say, that, in examining the evidence given in this case, we must always bear in mind that every effort was made to induce Dyce Sombre to adhere to a prescribed course of conduct, and to conceal any manifestation of particular feelings and convictions, even if he really entertained them.

The insanity up to 1846 having been admitted, we [254] have not thought it necessary to refer, in detail, to the evidence before that period, or to do more than advert to the testimony of the physicians who attended Dyce Sombre in 1843 and 1844, and showing that the verdict of the jury was well founded.

Dyce Sombre having presented a petition to the Lord Chancellor (Lord Cottenham) in 1846, praying that a further examination into the state of his mind should be instituted, he, in September of that year, was permitted to come to England, and an examination took place at Dover, under the order of the Lord Chancellor.

We will now refer to Dr. Bright's evidence. He was one of the Visitors in lunacy appointed by the Lord Chancellor to make this examination, his colleague being Dr. Southey. Dr. Bright had visited Dyce Sombre on prior occasions, in June and July, 1844. On the 21st of September, 1846, and the three following days,

he saw and examined him at Dover, with Dr. Southey; again in August, 1847; again in November, 1848. He was, says Dr. Bright, a lunatic, each and every time. This is the opinion of Dr. Bright, formed certainly after ample opportunity of knowing all the circumstances and arriving at a correct judgment. However valuable such an opinion may be, still it is much more satisfactory to know the facts upon which it is founded. Such a knowledge enables us to judge for ourselves.

Upon the present occasion this case has been so conducted, that we have great difficulty in appropriating the facts to their proper time—in ascertaining what the physicians saw in different years. Had the insanity of 1843 been admitted, and the recovery pleaded, all this difficulty might not have arisen. [255] One thing, however, is quite clear, from the facts stated by Dr. Bright, that in September, 1846, the insanity with respect to the infidelity of Mrs. Dyce Sombre continued. It is equally clear that at this time the undue influence practised over Dyce Sombre manifested itself. After having one day charged Mrs. Dyce Sombre with the most abandoned conduct with various men, on the following day he said, rather abruptly, his notions as to her infidelity were all delusions, and that she was the chastest woman living. Soon after, he reverted to the charge against General Ventura, and Colonel Forrester. Dr. Southey confirms the whole of Dr. Bright's evidence, and in all its most important particulars.

We think that this evidence clearly establishes the continuance of insanity up to the period in question, September, 1846. It is right to add, however, that the physicians then reported that there was sufficient improvement to warrant the hope of ultimate recovery, but that Dyce Sombre was still of unsound mind, and it would be unsafe to himself and others to withdraw him from the protection of the Court of Chancery.

This we consider to be important evidence in favour of the result contended for by the Counsel for the Will, that argument being, progressive improvement and final recovery; the physicians depose to the fact of improvement, and express their hope of recovery.

In August, 1847, the same two physicians examined the deceased at Brighton. Dr. Bright says that the power of the delusion as to Mrs. Dyce Sombre's infidelity was less manifest, but he was not free from it. His declarations of conviction that he had been under delusion were the expressions of one acting under [256] restraint, and with a view to a particular end; not the free and sincere expressions of a mind that had thrown off an insane delusion, and was free from it. It was on this occasion that Dyce Sombre said that if he acted upon the impulse of his own heart and feelings, he should never obtain his freedom from the Court of Chancery. All this is confirmed by Dr. Southey. Dr. Bright thinks that it was at Brighton that the deceased spoke of the illegitimacy of the Baroness Solaroli; but whether this was a proof of delusion or not, is a topic to which we need not at this moment advert.

The result of this examination was, to a certain extent, favourable to the asserted recovery of Dyce Sombre from his mental disorder, for the physicians reported that they were unable to elicit any positive delusions; but at the same time they regret to add that they feel no confidence that Dyce Sombre was entirely free from them. They add that, so far as regards the management of property, they entertain no doubt of his competency to take care of it. They advise that he should be entrusted with the surplus of his unappropriated income, which would remove one source of great irritation tending to retard a recovery towards which he seems already to have made some advance. The Lord Chancellor made an Order accordingly.

This, then, according to the evidence of these physicians, was the state of Dyce Sombre's mind in 1847.

It may now be expedient to consider what medical evidence there is applicable to the years 1846 and 1847, which tends to a different conclusion from that which Drs. Bright and Southey arrived at by [257] their examinations under the authority of the Lord Chancellor. We say a different conclusion, because we think that *prima facie*, their testimony establishes the continuance of insane delusions during that period, and we have not thought it necessary to add to the weight of their testimony by referring to that of other persons who can speak to his state of mind



up to that time. To such evidence, however, we may have occasion to resort hereafter.

Of the medical gentlemen resident in England, only one saw the deceased in those years, namely, Dr. Copland. He did see Dyce Sombre in the first week of September, 1846, at Dover. He saw him at the instigation of Mahon. It is very difficult, from a perusal of Dr. Copland's evidence, to collect what did pass in September, 1846. It is all mixed up with the occurrences of December, 1848, but, no doubt, he resorted to all the means in his power to make a satisfactory investigation. But what were those means? and what was the information he possessed, and from what quarter derived? So far as appears, from one source only—from the interested information conveyed by Mahon; a gentleman whom it has not been deemed prudent to examine in this cause.

We think we do no injustice to the sagacity and care of Dr. Copland, when we say that in our opinion the very meagre statements he has made of his interview with the deceased in September, 1846, cannot go far to counterbalance the evidence of Drs. Bright and Southey.

From the physicians resident in France we do not derive the information which might reasonably have been expected, and for a very obvious reason. The pleading has been so framed, that no evidence as to [258] the state of mind of the deceased in 1846 or 1847 could be taken in chief. Dr. Olliffe, who was one of the physicians on the inquiry in December, 1843—was his usual medical attendant from the 6th of May, 1844, to August, 1847. He is examined to the tenth article, which has nothing to do with insanity, and to the execution of his Will, and there his evidence ends; nor from all the interrogatories addressed to him can we extract one syllable of evidence properly applicable to this particular period. Dr. Shrimpton cannot depose at all to what occurred at this time. Dr. McCarthy, though he first became acquainted with Dyce Sombre in May, 1847, says nothing as to the then state of his mind. The same may be said of Dr. Béhier, who though he saw Dyce Sombre in 1846 or 1847, is not examined as to his soundness of mind. The same observation applies to Sir R. Chermiside.

If there really was a recovery in 1846 or 1847, or if there was any progress towards recovery, and there be wanting evidence of such facts to support the argument of the Counsel in support of the Will, that deficiency is wholly to be ascribed to the mode in which this cause has been conducted—to the absence of all averment as to the soundness of mind of the deceased at such periods, and, consequently, many witnesses who were competent to speak to the fact, if fact it were, are wholly silent.

We now approach a much more important period—the year 1848; at the end of which year Dyce Sombre consults Mr. Desborough as to the making of the Will propounded in this cause; important not only on that account, but also especially because that time was shortly antecedent to the instructions for the Will, and the execution of it. We must always [259] bear in mind, that though circumstances long antecedent may have some bearing on the case, yet that the true inquiry is, whether the deceased was of sound mind at the time of the execution of the instrument in question; and that to aid in the investigation of that fact, the state of his mind immediately antecedent and subsequent thereto is of great importance towards forming a conclusion as to what it was at the date of the execution.

It appears that in this year, in consequence of another petition presented to the Lord Chancellor to supersede the Commission, a very solemn investigation took place in November, as to Dyce Sombre's sanity. There were present on that occasion Sir James Clark, Drs. Bright, Southey, and Martin, all appointed by the Lord Chancellor, and competent to discharge the duty assigned to them. Dr. Martin, too, being a retired surgeon on the Bengal establishment, had the advantage of experience in Indian habits and dispositions. The interviews with the deceased took place on the 1st, 2nd, and 6th days of November, 1848. As to what passed, we have the evidence of the physicians before named, and we have also the notes of the short-hand writer employed by the desire of Dyce Sombre, and published by him in his "Refutation."

The book called the "Refutation" is often referred to in the judgment. It

was an octavo volume, printed and published in Paris by the deceased in 1849, as a "Refutation of the Charges of Lunacy brought against him in the Court of Chancery."

Sir James Clark, on his first examination, states in the fortieth article, that he had no conversation with the deceased about the Baroness Solaroli till 1848, and only then; and that Dyce Sombre said [260] that Lord Metcalfe told him that she was illegitimate, and had repeated the same in the presence of Mrs. Dyce Sombre. All this, whether true or false, probable or improbable, is not inconsistent with a sound mind. But Sir James Clark goes on: Dyce Sombre asserted that Mr. Glyn had informed him to that effect, and that he (Mr. Glyn) had stated it before the whole Court of Chancery in London, and that this declaration was made by Mr. Glyn in 1844, he (the deceased) being present in the Court of Chancery at the time. That this statement of Dyce Sombre's was totally false there can be no doubt, but whether it was made under the influence of insane feelings we shall hereafter have to determine. Sir James Clark, in his evidence on the forty-sixth and forty-seventh articles, expresses, in very strong terms, his conviction of the insanity of the Testator at that period. He says: "I was, and am, very decidedly of opinion that the deceased, at that time, continued to be of unsound mind." He states some of his reasons, but he does not go into details, having verified the short-hand writer's notes, to which we must presently refer.

Dr. Bright states that the report is a true and faithful record of what passed at Mivart's Hotel, namely, the examination in question; but on the sixth article he gives a more detailed account of those interviews. He says that the short-hand writer was present at the deceased's own request; that the leading features of the case throughout are quite present to his mind, that is, the leading delusions under which he laboured. Dr. Bright then proceeds to mention what Dyce Sombre said as to the infidelity of Mrs. Dyce Sombre.

Now, though what Dyce Sombre stated to have occurred is not beyond the range of possibility, we [261] cannot doubt that all those statements are false; that it is utterly contrary to all probability that a man of sound mind could have believed that which Dyce Sombre stated to be true; and that such, the belief of the deceased, must have sprung from insane delusion.

The oscillation of the mind of the deceased on this occasion deserves remark: his endeavours to follow up the instructions which had been given him to assent to Mrs. Dyce Sombre's innocence of the charges he had formerly preferred; his inability to persist in the course prescribed. He begins by reiterating all the charges: he charged Mrs. Dyce Sombre with incestuous connection, and being asked if he believed it, he said, with a peculiar expression of countenance, "I shall say no to that question."

The very next day he retracts all the charges: declares Mrs. Dyce Sombre to be one of the chastest women living; and then repeats the charges over again. Dr. Bright is cross-examined. He says, in answer to the seventh interrogatory: "I did, in conjunction with Dr. Southey, report that Dyce Sombre was more obviously of unsound mind than when we last saw him." In answer to the twenty-first interrogatory, Dr. Bright says, that the deceased's expressed belief as to the illegitimacy of the Baroness Solaroli was a principal and avowed cause of the unfavourable opinion formed by us. Dr. Bright was, as he says, well aware that other medical men had come to a conclusion that the deceased was not of unsound mind.

We mention this fact because it must necessarily have induced Dr. Bright and his colleagues to make the most searching inquiries before they came to a contrary conclusion.

Dr. Southey is examined on the sixth, fortieth, and [262] fifty-sixth articles together, a mode of examination which renders it difficult to ascertain with precision what facts apply to any particular period.

Our attention is now directed to what occurred at a private hotel in November, 1848. Dr. Southey says, that the deceased then admitted that he had been under a delusion with respect to Mrs. Dyce Sombre's unchastity, but his manner of making the admission was such as by no means to impress me with a conviction of its sincerity. He manifested other delusions. Dr. Southey then enumerates several—Lord Ward—the illegitimacy of the Baroness Solaroli—which delusion first manifested itself at Brighton, in 1847. He says that his reasons for such belief were varying,



oscillating, and inconsistent. He then refers to what the Testator said respecting Mr. Glyn, and to the conduct of Dyce Sombre in challenging Prince Doria. Dr. Southey expresses his conviction that the deceased was then of unsound mind, and he was of opinion in answer to the twenty-first interrogatory, that, putting out of the question the supposed delusion respecting the illegitimacy of the Baroness Solaroli, there were sufficient reasons for reporting the deceased to be of unsound mind.

Mr. Martin was requested to attend this examination by the deceased himself. He declares his settled conviction of the continued insanity of Dyce Sombre in several particulars: First, as to Mrs. Dyce Sombre's infidelity. Second, as to a conspiracy on the part of Captain Troup, and others, to poison his food. Third, a conspiracy on the part of Sir R. Jenkins. Fourth, as to Lord Ward. Fifth, as to the Directors of the East India Company.

Though it may be expedient to consider some of [263] these particulars in order to form an opinion whether such declarations are evidence of an unsound mind, yet it must always be borne in mind that ultimately, in order to come to a conclusion as to the state of mind of the individual, a combined view must be taken of the evidence as a whole, and some trust must be given to the medical witnesses on both sides, as to the apparent conduct and demeanour of the person examined, for these are matters which cannot be described with precise accuracy.

Having considered the evidence given by the physicians as to this most important period, November, 1848, our next task is to refer to the written report, of what did then take place, and which is sworn by all to be correct. It is impossible to give a compressed view of the contents of the notes of the short-hand writer; all we can do is to state the result. On the first day's examination Dyce Sombre was closely questioned as to his suspicion of Mrs. Dyce Sombre's infidelity, and we think that assuming a delusion on this subject to have previously existed, there is strong evidence to show that Dyce Sombre had been tutored to conceal it, and also that it continued to subsist. Amongst many other matters tending to this conclusion, it may be observed that the deceased still persisted in his belief that Mrs. Dyce Sombre had made the confession to him of her own guilt. Then follows mention of Sir R. Jenkins getting up affidavits against him; the story about Lord Ward; the illegitimacy of the Baroness Solaroli: Prince Doria is mentioned. Dyce Sombre refused to give any answer to these inquiries. These notes confirm, in great part, the evidence given by the physicians.

But there remains an important inquiry. Supposing [264] the facts deposed to by the physicians to be correctly stated, and seeing how they are supported by the notes of the short-hand writer, there is on that head no room for doubt; then arises the question, do such facts, such declarations and conduct on the part of Dyce Sombre, prove that he was of unsound mind?

We cannot carry this investigation through each circumstance separately, we will take one of the leading facts—the conduct of the deceased in November, 1848, when questioned as to the delusion of his wife's infidelity. His belief in the infidelity at one time, is an admitted fact, and that it was a delusion. It is said by the Counsel for the Will, that Dyce Sombre had recovered, and that the delusion was gone, and they account for any soreness on his part, for all want of regard, and for any irritability, upon the supposition that though the delusion was gone, there would naturally remain in Dyce Sombre's heart a feeling of annoyance, a sensation of dislike to the subject, occasioned by all the deprivations and anxieties he had undergone, consequent upon this delusion; and they allege that indifference was one of the results.

We will not question this theory; we will presume that a person entirely recovered from such insane delusions would feel as represented; but we must ask whether the facts bear out the theory, and whether a person so circumstanced did, in fact, conduct himself correspondingly to the theory; whether a person whose mental faculties were become sound, did conduct himself rationally under the circumstances?

What should we expect to be the conduct of an individual who had entertained an insane delusion as to his wife's chastity, who had recovered therefrom, and was asked, as to his present convictions and [265] feelings? Surely, it would not be too much to expect an unequivocal admission, that all the horrible charges before pre-

ferred against his wife, were the effect of delusion, that he was sorry for the same, and that the delusion had passed away. Although it might well be, according to the theory propounded, that such an individual would add, that though he wholly disbelieved the charges and admitted the delusion, still that, considering the anxiety to which he had been exposed, he could not feel that he was restored to his pristine relations towards his wife and others. Now, if such is the conduct which, we might reasonably suppose, a person so circumstanced would adopt, what was the actual conduct of Dyce Sombre, according to the notes of the short-hand writer? Dyce Sombre begins by saying to the physicians that, having reflected upon the disinterested opinion they had given him, "my mind was quite clear, that, whatever I might have thought before, I must have been labouring under delusions and acting on them." So far we conceive that this may be considered a fair admission, though not, perhaps, couched in the most satisfactory terms. Dyce Sombre goes on to state that these erroneous impressions ceased in 1846, though he came to Dover under their influence; this is the period, as we understand, when it is contended that the deceased was restored to a sane state of mind. Dyce Sombre is asked, "You are not satisfied that it was a delusion before that period you were labouring under?" His answer is, "Certainly; what I have just now been saying is, that when I came to Dover, it was with a view to tell Dr. Southey and Dr. Bright that, after consideration, I had come to the determination that I think I might have acted under delusion, that as I [266] had no proofs, the best thing for me was to consider it so. There was no proof of any guilt: but since then, as we are not of the same way of thinking, as our characters are not the same, it is much better that there should be no talk or proposal of our living together."

This answer is pregnant with matter for observations: First. If shrewdness and ability to parry such questions prove soundness of mind, it is evident, that there was no want of those qualities. Second. That this answer is in perfect accordance with the instructions Dyce Sombre had received from Lord Combermere and others. Third. What is most important of all, that this answer is not a *bona fide* admission of previous delusions. It is not the answer of a man of sound mind, conscious that his delusions had passed away, and this is the true test of recovery from first insanity. If any doubts remained as to the effect of this answer, see what follows. Dyce Sombre is asked whether he is satisfied that the alleged confession on the part of Mrs. Dyce Sombre of her guilt was a delusion? He answers, "I believe she denies that." He declares that the confession, or something of the kind, was made to himself, that the denial was made to somebody, he does not know whom, and, therefore, he is content to believe it. He is pressed with a variety of questions, but he cannot be brought to admit that Mrs. Dyce Sombre did not confess her guilt. It may be well to stop here for a moment, and consider how this case stands. Here is a lady, admitted on all hands to have been most irreproachable in her conduct, respecting whom her husband had made the foulest charges. These are delusions: they are said to have disappeared, and the husband will not admit that his wife did not confess her guilt. Is [267] it possible to believe that, at that period, Dyce Sombre was wholly divested of those insane impressions which had previously pervaded his mind? If such impressions constituted insanity, they were present and subsisting in November, 1848.

It seems almost a needless expenditure of time to go further, but we wish to satisfy all parties concerned, that we have not shrunk from a full investigation of this most voluminous case.

Dyce Sombre is asked as to the charge of incest with Lord St. Vincent. He answers, but not till he has been strongly pressed, "I am sorry that I accused him of this." Mark the next question, "Knowing it to be unfounded?" Answer, "Hearing it to be unfounded." Much was said of the Baroness Solaroli on this occasion. We shall not dwell upon this topic now, for we must refer to it hereafter; but it must be remembered that the true issue is not, whether there might not be some probable cause for suspecting her legitimacy, but whether, assuming it to be so, the deceased dealt rationally with the subject.

We have now concluded our examination into the state of the deceased's mind in November, 1848, so far as it is proved by the evidence of the physicians appointed by the Lord Chancellor, and the notes of the short-hand writer. The physicians of



course, reported in conformity to their evidence. That report is to be found at page 463 of the "Refutation."

We think, that a strong *prima facie* case of unsoundness of mind at that time is established: but it may possibly be disproved by showing that these physicians were mistaken, or its effect removed by satisfying the Court that at a subsequent period Dyce Sombre had recovered.

[268] On the 22nd day of December, 1848, the petition to supersede the Commission was dismissed without opposition. Toward the end of December, by the desire of Dyce Sombre, and through the agency of Mahon, a fresh examination into the state of Dyce Sombre's mind was instituted. The assistance of no less than six medical gentlemen was invoked, namely, Drs. Paris, Mayo, Morrison, Copland, Ferguson, and Costello. Persons more distinguished for their knowledge and experience could not be found in the medical profession, and two of them, at least, specially conversant with mental diseases. As might be expected, the examination was conducted with the greatest care and attention; the physicians met five times in consultation, and some of them saw the deceased alone. They possessed themselves of all the information they could procure—the reports of 1847 and 1848, and the short-hand writers' notes before referred to. They made a report as follows: "The decided impression on our minds by these interviews is, that they have not furnished us with any evidence whatever that Dyce Sombre labours under unsoundness of mind." They go through the various heads upon which it was supposed the deceased was unsound, and come to the conclusion before stated, more especially on the ground of the deceased's oriental birth and education. All these gentlemen have been examined, and some have given their evidence at great length in support of their conclusions. We cannot attempt the task of commenting minutely upon this mass of evidence, but some observations occur to us which we think should be stated.

Was the inquiry conducted with due reference to all antecedent circumstances, and to what is the true [269] issue in this cause? Was the inquiry whether the deceased had recovered, or whether, without reference to his previous state in 1843-1844, he was then of sound mind?

Dr. Ferguson had been consulted by Mr. and Mrs. Dyce Sombre before their marriage; he had no other knowledge personally of the deceased till November, 1848. He divides the life of the deceased into three periods—from his birth to September, 1840; then to September, 1843; and then to the period of his examination, November, 1848; and then he says, that if Dyce Sombre was mad in the last five years of his life, he was equally so during the greater portion of the first thirty-two.

We cannot accede to this mode of reasoning. We conceive it to be exceedingly fallacious; for Dr. Ferguson could know nothing, except by vague report, of what the conduct of the deceased was for the first thirty-two years of his life; and secondly, he was equally ignorant of what had in truth occurred in the last five years.

We will cite one specimen in proof of this assertion. Sir James Clark, speaking of the examination of the 17th of June, 1844, says: "The deceased affirmed that Lord St. Vincent had told him that a servant had had connection with Mrs. Dyce Sombre at Dover, before her marriage; that she herself had told him that she had received men, from her father down to tradesmen. He explained distinctly that he meant, by receiving men, having connection with them." He stated, during this meeting, the conditions upon which he would receive back his wife to be—a duel of three paces with Sir Frederick Bathurst; that he himself should have connection with her in Hyde Park, and [270] that he should take her back from thence on horse-back. He first said it should be a roan horse, but afterwards that he would not insist on that point. Now had not Dr. Ferguson been in ignorance of this most decided insanity in 1844, the very period to which he himself adverts, could he by possibility have said that if the deceased was mad during the last five years, he was equally so during the first thirty-two? could he have referred all this to Asiatic origin, education, and habits, as he has the whole of the answers which Dyce Sombre gave to him in reply to his questions? One word more as to this comprehensive mode of accounting for all the deceased said and did. No one of these medical gentlemen had been in the East Indies, or, save from books and accidental converse, had any knowledge of Eastern habits and manners.

We have already expressed our opinion how far weight is justly due to the facts of Asiatic origin and habits. We apprehend that no one would venture to explain the facts detailed in Sir James Clark's evidence, by reference to this topic; but it may be well to look to the opinion of an individual who from intimate knowledge of Dyce Sombre, from his perfect acquaintance, not only with Eastern manners and customs, but more especially with those prevailing in the palace of the Begum herself, and besides, a medical man, is peculiarly competent to give the best evidence on this question. We refer to Dr. Drever, on the sixth article. He states that the suspicions of the deceased as to his wife's infidelity arose in the end of 1841, or the beginning of 1842. He details the account the deceased gave about that period of Mrs. Dyce Sombre's conduct; the confessions of Mrs. [271] Dyce Sombre and Lord St. Vincent; the charge against Mr. Montgomery; the opening in the pavement that he might break his neck, and that his wife might do what she pleased. And does Dr. Drever consider this the conduct of a man of sound mind, and to be easily accounted for by Asiatic origin and customs? does he, who knew the deceased so intimately, his education, disposition, and habits, ascribe all these things to Oriental notions? Dr. Drever says: "I was perfectly convinced of his insanity."

Dr. Ferguson further deposes: "When I saw and questioned him closely on the history of his confinement, he still believed in the infidelity of his wife, but without a trace of accompanying passion." What is the effect of this? Dyce Sombre is proved beyond all dispute, is admitted on all hands, to have entertained an insane delusion as to Mrs. Dyce Sombre's unchastity; there is not, throughout the whole evidence, the remotest ground laid for the suspicion. In December, 1848, according to Dr. Ferguson, Dyce Sombre believes in her infidelity. What is such belief, but a continuation of the same insane belief which had subsisted for nearly six years? What ingenious theory can attribute such belief to anything but insanity? What must be the opposite theory?—that he had abandoned the insane belief, and, without cause or reason, had taken up a notion of infidelity consistent with sanity. It is manifest that Dr. Ferguson either did not know, or believe, that previous insanity had existed.

Consider, however, the consequences resulting from this evidence. The belief in the infidelity still continues, a belief proved to have been insane. What proof is there of a change? or rather, we may ask, [272] what possible proof could there be? But how is this to be reconciled with the repudiation of this belief in November, 1848; and, above all, how to be reconciled with the theory that the delusion had passed away; that the belief no longer existed, but only a soreness remained behind?

We do not deem it necessary to comment at length upon the evidence of each of these physicians. Dr. Paris's evidence is in accordance with the report, and affords no matter for particular observation. He saw the deceased once in 1843, as he believes, but of what then occurred he is wholly silent; he did not see him again till the year 1848.

Sir Alexander Morrison had no knowledge of Dyce Sombre till the period of his examination. His evidence affords no additional information, but we cannot but remark that he comes to some conclusions in which we cannot concur. He says that a belief that Lord St. Vincent had connection with his own daughter is no proof of insanity. We think that, if there be no shadow of truth to justify such belief, it is a proof of insanity, and not the less so when the father was at that time between seventy and eighty years of age; a fact probably unknown to Sir Alexander Morrison. But even this supposition, extravagant as it appears to us to be, would never account for a belief that the father and daughter had confessed such intercourse.

Dr. Copland gives his evidence at greater length. He had seen the deceased once before at Dover in September, 1846; but the allegation has been purposely framed to exclude all evidence at that period, so that we know not what opinion Dr. Copland then entertained, nor what he saw or knew.

[273] Dr. Mayo was first called to the deceased in December, 1848. He says: "I found the deceased very readily admitting the delusions during that period of his case in which they probably existed." It is somewhat unfortunate that we have no short-hand writer's notes to refer to, for we find Dr. Ferguson deposing that he still believed in the infidelity of his wife, one of the main delusions. But what says



Dr. Mayo on interrogatory? In answer to the fifth, he says:—"The deceased expressed his opinion that the East India Company had tampered in the business in relation to his wife and her father. It having been made known to one of us that he had entertained a suspicion or opinion of that nature, the inquiry was made of him, and he admitted it to be so." This seems worth a little further inquiry. Here is an admission that the suspicion has been entertained—a suspicion of tampering, and no retraction. What does the expression purport?

Dr. Winslow explains it in his answer to the seventh interrogatory. He does not say that the deceased on this examination in any degree abandoned this suspicion, but he deposes in the following terms:—"My belief is, that the deceased was a bad man, and that insanity is an excuse for parts of his conduct which he is not entitled to have extended to him. His horrible imputation against the East India Company, his wife, and her father, falling in with the habitual and sane tenour of his mind."

This appears to be a proof that this suspicion continued. Whether the explanation be satisfactory or not is a different question.

We have deemed it right to make these observations respecting the examination in December, 1848, [274] though with no wish to detract from the just weight to be attached to the opinion of gentlemen so eminent in their profession, who, no doubt, exhausted all the means in their power in order to arrive at a just conclusion. Though we may find it necessary to compare their statements and opinions with those of the medical gentlemen appointed by the Lord Chancellor, and who reported in the November preceding; yet the case will not wholly depend upon the result of such comparison, for there is other important evidence to be considered. Hitherto, for facts and opinions as to soundness of mind, or the contrary, we have looked almost exclusively to the medical evidence; before we conclude this judgment we must, as to the years 1848 and 1849, consider other testimony. At present, however, we shall direct our attention to the evidence as to the instructions, the preparation, and the execution of the Will.

We must first advert to the evidence of Mr. Desborough, senior. He attended the deceased on the 28th of November, 1848, through the intervention of Prinsep, whose solicitors his firm were. Desborough was aware that Dyce Sombre had been found a lunatic, and that the Commission was still subsisting, and he told the deceased that, assuming it could be clearly established that he had a lucid interval when he made the Will, in his judgment it would stand. Of the truth of that advice few men can doubt; and Desborough proceeded to state the importance of the attendance of medical gentlemen at the execution of the Will, and he told the deceased that the contents of his Will would be a guide to his state of mind. Other unimportant conversation occurred; and it was agreed that Dyce Sombre should send his instructions [275] in writing. Desborough then goes on to declare that, according to his judgment, Dyce Sombre was then in a sound disposing state of mind.

In estimating the weight to be given to this opinion, we must bear in mind that the deceased was an utter stranger to Desborough till that interview; that Desborough was most imperfectly acquainted with all the circumstances which had previously occurred with respect to Dyce Sombre; that Desborough made no attempt, either to probe the mind of the deceased, or to ascertain whether he was free from past delusions. In answer to the sixth interrogatory, he says:—"The subject of a conspiracy of the East India Company, or the infidelity of the deceased's wife, or the illegitimacy of the Baroness Solaroli, never escaped his lips or mine."

In consequence of this interview, instructions were forwarded to Desborough; they arrived (the deceased being then at Paris) about the 7th of February, 1849, and were put into the hands of a conveyancer to prepare a Will accordingly.

The history of the further preparation and final execution of the Will is detailed by Desborough, junior. Before, however, referring to this evidence, which applies to the month of June, 1849, it is proper to observe that, on the 30th of April in that year, Lord Cottenham having had before him the report of the physicians dated November, 1848, and also the report of Dr. Paris and others of December, 1848, as well as much other evidence, had refused another petition, presented by Dyce Sombre, to supersede the Commission. Lord Cottenham not only refused to grant the prayer of the petition, but accompanied that refusal with some very severe remarks [276] upon the conduct of those who he thought had been chiefly instrumental in those

proceedings, using the following words:—"I shall, therefore, dismiss the petition; and if I had the power to make those pay the costs from whom it originated, I should dismiss it with costs; but as the matter stands, I shall say nothing about costs."

Two observations arise on this judgment: first, the decided opinion of a very eminent Judge, upon full consideration of all the materials before him, that on that day, the 30th of April, Dyce Sombre was still of unsound mind: and, secondly, that if Desborough, junior, was apprised of this judgment—a fact left in doubt by the evidence—it was reasonably to be expected that he would exercise extreme caution in ascertaining the state of the deceased's mind before he was instrumental in the execution of a Will by him, and we see no reason to doubt he did so to the utmost of his ability with the information he possessed.

In testamentary cases the giving instructions for any testamentary instrument is often, we might say generally, the most important part of the transaction, for frequently the execution is little more than a matter of form. It is necessary, therefore, to scrutinize closely the evidence applicable to the instructions—we mean the evidence applying to the state of mind of the deceased when he gave such instructions; not to the contents, of which hereafter.

That evidence in this case, as unsoundness of mind had been previously proved, must, in order to support the testamentary instruments, be sufficient, coupled with other evidence, to show either recovery or a lucid interval.

[277] Desborough, junior, saw the deceased for the first time on the 11th of June, 1849, at Paris. He says in answer to the seventh interrogatory—"I knew that he was a declared lunatic, and I had acquired in the way just mentioned (that is, by casual reading), a knowledge of some peculiar acts done or said to be done by him; but I had never made myself particularly acquainted with them. I was only carrying out instructions given to my father, in whose place I was acting. I took up the matter because my father was unable to attend to it." He was a young man at the time, but he appears to have spared no pains in endeavouring properly to discharge the duty he believed he had to perform. Whether he was adequately instructed as to what that duty was, or accurately comprehended it, is another and a very different question. He had repeated interviews with Dyce Sombre, and the Will was most carefully revised and settled. He says that "the Testator directed with the greatest precision such alterations as would effectually secure the object he had in view." And Desborough concludes his evidence on the thirty-third article with these words:—"During the whole of my interviews with the deceased, each and all of them, being aware of his alleged lunacy, and, therefore, anxiously attentive to the state of his mind, I saw no intimation whatever of any mental malady. On the contrary, I found that he well understood what I said, that his mind was clear, his memory accurate, his remarks pertinent, and the whole tenor of his conversation such as showed him to be perfectly capable of transacting any business, whether it required an accurate recollection or sound judgment." And at the end of the thirty-fourth article he expresses [278] "his unqualified belief of the deceased's testamentary capacity; that he was of sound mind, memory, and understanding." He states that Dyce Sombre occasionally introduced the matter of his lunacy: that when reminded of the manner in which he had expressed himself of his wife's character and conduct, he exclaimed, "Oh! those were all delusions; I have dismissed them from my mind, and do not want to think of them again."

In ordinary cases evidence like this would go very far to establish a Testator's soundness of mind. There was no want of opportunity to ascertain the state of the mind of the deceased, and, within certain limits, abundance of care and caution.

But having examined what Desborough, junior, did do, we must consider what he did not do, what, indeed, he was not prepared to do, and what he was not furnished with sufficient means of doing. It is necessary to bear in mind what is well known to those conversant with disputed Wills, namely, the clear distinction between the examination into the capacity of a Testator, and his soundness of mind. They are very different cases, and though capacity in ordinary language might include everything necessary to prove a power of testation, yet in the more restricted sense used in the Prerogative Court they have been held distinct.

For instance, in cases where no insanity has either existed, or been supposed to exist, the inquiry into the capacity of a Testator in extreme old age or enfeebled



by long illness, or where death is fast approaching, simply is, whether the mental faculties retain sufficient strength fully to comprehend the act about to be done; but when lunacy or unsoundness [279] of mind has previously existed, the investigation is of a totally different character. In such a case, though there may be latent disease, the mental faculties may be apparently in full vigour, the power of apprehension and of memory may be wholly unaffected, and then the object is to investigate and ascertain whether the delusions which had once existed in the mind are wholly removed.

Upon the present occasion Desborough, junior, was not furnished with the information indispensably necessary to carry on the investigation; it was not his purpose to institute any such examination, he was the instrument to forward the doing a particular act; he looked most carefully to ascertain that the deceased fully comprehended and intended the act he was about to do. He was satisfied with the proof of his capability to this extent, but he never attempted to go further, and to probe the mind of Dyce Sombre as to whether his former delusions still retained any existence. What little information he attained on this subject was purely accidental and superficial. Still it must be admitted that the absence of all appearance of delusion during so many interviews is evidence justly entitled to weight, though that weight is diminished by the consideration that no means were applied to the solution of that difficult question, whether the deceased was relieved from his antecedent delusions.

Our next step is to consider the execution of the Will. This Will was executed on the 25th of June, 1849, in the presence of Dr. McCarthy, Dr. Olliffe, and Dr. Shrimpton, who all assured Desborough of their unhesitating and unanimous conviction of the deceased's sanity.

[280] Dr. McCarthy had professionally attended Dyce Sombre on the 12th of May, 1841, on his return to Paris, and until he finally left it. Dr. McCarthy says, "Dyce Sombre placed uninterrupted confidence in me." His character of the deceased is expressed in these terms: "He was totally void of all the conventionalities of society;" and he states disgusting instances in proof of that opinion. He was a man of very weak intellect. It may be well to compare this state of the deceased with what it originally was; for one of the means of judging of a man's mind is to see what change it has undergone, or whether it continues the same without material alteration. For this purpose we refer to the evidence of Dr. Drever.

Dr. Drever, on the forty-eighth article, deposes: "At all times, during my intercourse with him, the deceased was very particular about his dress. He was very neat and clean, and delicate in everything that related to his personal appearance and his habits. In the East there is practised by natives what is not agreeable to Europeans, but the deceased's habits were not those in any respect; he was minutely observant of the refinement of society as well as of all the proprieties of life in his whole deportment."

Contrast this evidence, coming from one so intimately connected with the deceased up to the year 1843, with the description of his conduct in 1847 and 1848, given by Dr. McCarthy and numerous other witnesses, and it is impossible not to perceive that a very great change had come over the deceased; not an immaterial circumstance when our task is to determine whether the mind had continued sound.

To proceed with Dr. McCarthy's evidence: He was asked by the deceased to be professionally a witness [281] to his Will; he consented, and by the deceased's wish desired the attendance of Drs. Shrimpton and Olliffe. He says, "They both knew the state of the deceased's mind, and knowing also that the Lord Chancellor had given to the deceased the disposal of the available part of his property, they concluded with him (the witness) that he was as capable of disposing of it by Will as in any other manner."

We must say that we are surprised at this conclusion, and not less at the argument founded upon it and so strenuously urged at the Bar. Dr. McCarthy does not perceive that there is any distinction between the disposition by Will of the whole corpus of the property, and the disposal during life of a large portion of the income sanctioned by the Order of the Lord Chancellor. But there is a wide distinction between the two cases: after providing for the necessary expense of the Commission

and the maintenance of Mrs. Dyce Sombre, the residue of the income was properly applicable to the comfort and enjoyment of Dyce Sombre. The only question was, or could be, how it should be best applied for that purpose; for the fact of his being a lunatic was no reason why he should not have every comfort and enjoyment his fortune would afford, and he was capable of having. It was the opinion of the medical gentlemen whose advice Lord Cottenham had desired, that the withholding this income from him was a source of great irritation, and that the granting it might tend to soothe his mind, and so indirectly assist his recovery, which at that time, 1847, was not despaired of; and they were also of opinion that the deceased was capable of managing it; not that he would make a proper use of it; that they neither certified nor probably expected. Dyce Sombre being abroad, and so far out of the power of the Lord Chancellor, he deemed it right to give him the control of the available income, under the expectation or for the chance that the consequences might be such as the physicians deemed not improbable. What use he might make of it was comparatively unimportant.

The disposition by Will of the whole fund was manifestly a totally different matter; a power of testation requiring the exercise of sound judgment, which none but a man of sound mind could possess. The mere expenditure of income was comparatively of much less importance; nor was there any very serious consequence to be apprehended from a misappropriation of income. Moreover the income might be stopped at any time; a Will was not so easily to be nullified; the one was remediable, the other not so. But even as to the income, Lord Cottenham observes (speaking in April, 1849): "I am sorry to say that these recent discussions have brought out instances of such reckless expenditure of his income, that it may be matter for consideration whether I have not gone too far in ordering that the whole surplus income shall be paid to him."

See how very differently Dr. McCarthy deals with this allotment of income. It forms a very principal ground on which he consents to attest the execution of the Will; he allows his judgment to be influenced by this consideration: his sense of responsibility is diminished, and so is his care and caution. It is true that he and his associates do go through some form of examination, of what kind we have no intimation whatever from Dr. McCarthy; and he sums it up by saying, "No consultation was required."

[283] Dr. Olliffe was one of the physicians called in, on the escape to France of Dyce Sombre in 1843. For many years this gentleman had ample means of forming an opinion as to the state of the mind of the Testator. He was his usual medical attendant from May, 1844, till the 3rd of August, 1847, when a coldness ensued. Up to that time he might have given important evidence. Like Dr. McCarthy, he is examined on the tenth article, so framed as to exclude all evidence as to the general sanity of the deceased, and, consequently, there is, on that head, an entire blank, and we are introduced at once to the execution of the Will. He says, "We all put several questions to Dyce Sombre. I particularly questioned him as to the delusions under which he was supposed to be labouring; in particular, as to his wife's infidelity. He answered very calmly that he had given up—that he retracted—what he had said. He supposed they must have been delusions, and he gave them up. This is just the way in which he had spoken on the subject at other times, giving me the idea that suspicions remained, though he was not disposed to press an accusation against her. Suspicion I have no doubt there was, but that was very distinct from insanity."

We must stop a moment to examine this evidence. There had been an insane delusion as to his wife's infidelity; the deceased had been specially instructed to deny and retract it; he obeys the instructions and retains the unfounded suspicion. There is no sense of regret for the injustice of the charges preferred, no admission that they were unfounded; not, as has been contended, a soreness after the belief in the delusion has passed away, but a persistence in that very suspicion which, without any adequate cause, constituted [284] his mental aberration. We conceive that this examination, and the results arising therefrom, are wholly insufficient to show that all the former delusions had passed away.

Dr. Olliffe proceeds:—"What influenced me, I must confess, and the others also, was, that the act of the Lord Chancellor, in conceding to him the control of all that was available as income, was a virtual admission of his capability to make a Will."



We need not repeat our observations on this point. The physicians were misled by this mistaken idea. Dr. Olliffe has been examined and cross-examined at great length, and many observations might be founded on his evidence, some favourable to the Appellant, and some the contrary, but we do not think it necessary to enter so minutely into this evidence. He, no doubt, when he witnessed the Will, believed the deceased was competent to execute a testamentary instrument. He was predisposed to believe in his competency, but he did institute some examination. We must hereafter measure its effect, when we compare it with all the other evidence in the cause.

The evidence of Dr. Shrimpton, the third attesting witness, accords generally with the testimony of the other two medical gentlemen, and does not require additional comment.

Dyce Sombre subsequently gives instructions for the preparation of a Codicil, his intention being that certain trust funds should eventually form a part of his residuary estate. Mr. Rendall, the conveyancer employed, writes on the draft, that the Codicil is absolutely useless: it does nothing but what the law would do without it. It was, however, prepared and executed on the 13th of August, in the presence [285] of Dr. Sigmond (in lieu of Dr. Olliffe, who was absent), Dr. Shrimpton, and Dr. McCarthy. Dr. Sigmond entertained some doubt as to attesting this Codicil, and he had no sufficient opportunity of forming any accurate judgment as to the state of Dyce Sombre's mind. He says he was satisfied at the time that the deceased was free from delusion, and he deposes to his belief in the then soundness of mind of the deceased. The evidence of the two other physicians is, as might be expected, in conformity with that given with respect to the execution of the Will.

It may be convenient, at this stage of the inquiry, to direct our attention to the testamentary acts done, or proposed to be done, by the deceased, and what effect is properly to be ascribed to the contents of such instruments.

If any testamentary instrument originate with the deceased person himself, and all the contents thereof are rational, and conformable to his habits and connection, to the state of his fortune and family, and especially if agreeable to former testamentary acts intended when the Testator was undoubtedly of sound mind, then the contents furnish presumptive evidence that the Testator was of sound mind when he did the acts necessary to carry such intentions into effect.

But this is presumptive evidence only; for if it be proved *aliunde* that he was of unsound mind, then the act is void, for a man of unsound mind cannot make a valid Will, even if the necessities of his family rendered it most desirable that he should do the act in question.

The unattested Will, dated the 10th of May, 1843, written whilst the deceased was at Hanover Lodge, and clearly insane, does not require much observa-[286]-tion. It would appear from it, that at that time Dyce Sombre had not taken up the idea that the Baroness Solaroli was illegitimate, for he leaves Rs. 50,000 per annum to the next male heir of either of his sisters. The residue of his property is given for the education of the people of India, and his pensions were to be continued. Some of the contents of this Will and Codicil may in no degree denote insanity; but looking at the general tenor, and especially the appointment of executors, no doubt can be reasonably entertained that the deceased, when he wrote this Will and Codicil, was of unsound mind.

With respect to the Will propounded, we will first notice the charitable bequests. There is a sum of Rs. 125,000 for the support of the blind, lame, and indigent of Sirdhana, and the general residue is to go for the endowment of an institution to be called "Sombre College," for the education of the higher classes in India. There is a strong resemblance between these two bequests, and those to be found in the script written when the Testator was of an unsound mind; but, laying aside this consideration, we do not think that the bequests in themselves denote insanity. We must look to all the circumstances, to enable us to form a just conclusion; to the Eastern origin, character, and probable feelings of such an individual, who had also before him the custom of the Begum to make appropriation of large sums of money to religious and educational purposes. We must remember, too, that the deceased had no issue, nor probability of issue, at that time, and that his sisters were well provided for. Bearing all these things in mind, we do not, from the nature of these

bequests, draw [287] any conclusion unfavourable to the validity of the Will. Neither are we moved by the legacies to the President of the Board of Control and the Directors of the East India Company; for, brought up in India, Dyce Sombre would probably entertain notions of their power and influence which might seem extravagant to us, and he might conceive that he was taking the best means to insure the execution of his wishes. There is a bequest of the interest of Rs. 20,000 to Mrs. Troup for life, and to her children, if any, the capital, and other legacies we need not particularise.

On the whole, it appears to us that it would not be safe, from the contents of the Will, to draw any conclusion adverse to the soundness of mind of the Testator. But we must observe that there is an omission of the Baroness Solaroli altogether, and that omission shows that the feelings, as to her, whether consistent with sanity or not, still remained.

There are traces of Wills executed before marriage, by which the children of his sisters would have been instituted his heirs, and the Will propounded is no doubt a departure from those, but, under the circumstances of this case, great reliance cannot be placed on that fact, though it is not wholly to be rejected.

We have hitherto referred, almost exclusively, to the evidence of the medical gentlemen specially engaged to examine the deceased. To exhaust this inquiry, however, we must address our attention to other evidence applying to the time of the asserted recovery down to the period when the Will was executed. Lord Combermere expresses his opinion that Dyce Sombre was always of sound mind; we have no means of [288] knowing at how late a time his Lordship saw the deceased, but certainly in August, 1847, at Brighton; if, however, the opinion of Mrs. Dyce Sombre's infidelity be an insane delusion, we cannot place much reliance on Lord Combermere's opinion; for in answer to the sixth interrogatory, he states, "That the deceased never would allow her innocence; he never yielded the belief that she had been unfaithful to him." In answer to the tenth he says, "I did say to him, if pressed upon the subject, admit you were under a delusion with respect to her: he was too proud and sincere for that."

In other words, the deceased was advised to say what he believed to be false, to deceive the physicians appointed by the Lord Chancellor, and, consequently, the Lord Chancellor himself; the delusion was too strong to allow him to practise the intended imposition successfully.

Very little is to be extracted from the evidence of Dr. Winslow, and for the obvious reason often before stated; he was not examined in chief as to the state of the deceased's mind, the pleadings excluding such evidence. All that is applicable to the present inquiry is to be found in his answer to the fourth interrogatory. In 1851, the deceased applied to Dr. Winslow to examine him as to his state of mind in case his Will should be disputed, and Dr. Winslow deposes that, at that time, 1851, he entertained no doubt of his competency to make his Will. This would not be very stringent evidence as to the state of mind of the deceased in June, 1849, the date of the Will; but this evidence, such as it is, is further weakened; for Dr. Winslow says that, "in 1848, I declined giving [289] any written statement of his case. My general impression, so far as I could judge from one visit, is, that his state was not satisfactory then."

Dr. Ricord attended the Testator, medically, early in 1848; he says he treated him as a person of sound mind; but it is manifest from his evidence, on cross-examination, that he knew but little of the history of the deceased. Dr. Béhier might have given evidence of importance as to this period, namely, 1846-7, for he attended the deceased in one of those years, but we cannot make any use of his testimony for the reason applicable to so many other witnesses; he has not been examined as to the state of the deceased's mind, and even on cross-examination it is impossible to fix to what period he is speaking, whether to the year 1843 or 1847.

There are some other witnesses who speak to this time, such as Mrs. Stuart, Lady Teynham, Mr. Butler and several more. Their evidence relates to the conduct of Dyce Sombre in society, in 1848-9, and it may be assumed that his general behaviour did not excite any belief of mental derangement in the opinions of those he associated with; several of them say the deceased appeared odd and eccentric. It is obvious, however, that mere common social intercourse, without inquiry, does not, in a case



of this description, furnish very strong proof that previous delusions had ceased to prevail.

The remainder of the depositions taken, and which apply to insanity in 1849, and tend to prove the affirmative, will not occupy much time.

It is proved beyond all doubt, that for several years before his death, Dyce Sombre led a life of the grossest sensuality. Baron Palm states, that at Baden [290] the deceased drank a bottle of Curaçoa in the morning, and three bottles of wine at dinner, or two of wine, and one of porter, and strong wine too. His indulgence with women was unlimited, and so it appears the deceased continued to live to the end. Such a mode of life, such constant excitement, must have been unfavourable to recovery from mental disease, though we must form our opinion from facts, and not from probabilities, however strong. The witness, Campbell, speaking of the year 1849, and subsequently, expresses a decided opinion that the mind of the deceased was not sound. If Campbell be accurate in his evidence, the facts he speaks to manifest delusion. As to his sister (which sister is not stated), the deceased observed, "She is not my sister, but an impostor, in league with my enemies." Campbell, speaking of July and August, 1849, describes the suspicions of the deceased of espionage as a morbid hallucination.

There are some witnesses who were in the service of the deceased between the years 1847 and his death. It is difficult to fix their evidence as applicable to any particular period; but we think that Fuhrberg and Paris do establish the fact of the deceased being extremely alarmed lest he should be poisoned by his food. How far such fear is proof of delusion is a question much disputed in this cause. The gross debauchery in which the deceased indulged is fully spoken to by these witnesses.

The witness Smith, is a surgeon, resident in Paris. He was consulted by the deceased in 1848, and attended him twenty times. He speaks very decidedly to a delusive apprehension of the deceased with respect to being poisoned by medicine. Smith says,— [291] "I think it was insane—it was perfectly groundless. The deceased had the same apprehension as to the water of the house."

The witness, Bailly, speaks to the conduct of the deceased in 1846 and up to 1849. Bearing in mind Dr. Drever's evidence that Dyce Sombre had been neat and clean and delicate in everything that related to his personal appearance and in his habits, we cannot but be struck with the extraordinary contrast presented by the evidence of this witness, especially confirmed by many others. Dyce Sombre was in a state of brutal degradation. Though such habits do not necessarily import insanity, yet they are very frequently the accompaniment of a disordered intellect. The abandonment of self-respect is one of the signs of a diseased mind.

There is much evidence of a similar description, which need not be detailed at length. One witness alone deserves particular mention—General Ventura. Our present inquiry is not as to the insanity of Dyce Sombre in 1843, and the two following years; for that is a proved and admitted fact; but whether there was a recovery in 1848 and subsequently. It is proved that the deceased entertained a fearfully insane suspicion of General Ventura in October, 1842, and desired Mr. Frere to send a challenge to him by special messenger, even to India. General Ventura deposes that after the date of that letter, 1842, (which the General says he never received,) he and the deceased repeatedly met, and were on the most friendly terms; but after all this, in 1846, as the General believes, he received another letter, containing offensive and insulting expressions, insolently abusive, for not having answered the challenge. We apprehend that this conduct [292] shows that, as to General Ventura, the insane suspicion continued to manifest itself up to about 1846; we pass over previous instances of violence.

We have now concluded our review of the evidence given by the witnesses. To bring this judgment within any reasonable bounds, we must of necessity pass over much which afforded an ample field for argument, and confine ourselves to the most important matters.

We think that the Book called the "Refutation," deserves particular attention. Mr. Montucci deposes that on the 4th of March, 1849, Dyce Sombre intrusted him with the preparation of a work for the press, and he continued to see the deceased daily till the 18th of August, when the work was completed. This work was exclusively—save the summary, which was added by Montucci—the deceased's own.

The proof sheets were signed by him. Everything was the deceased's, except the last twelve pages. The deceased had no assistance in the compilation, none in the composition. From the 14th of March to the 18th of August, is a most important period. It contains a history of the times when the instructions were being settled, and when the Will and Codicil were executed. It behoves us, therefore, carefully to consider whether this Book, called the "Refutation," affords evidence that the deceased was of sound mind, or still the subject of mental derangement. At p. 569, "Refutation," there is this date, 15th of April, 1849. Various dates follow up to the 8th of August, 1849, *bon à tirer* in the deceased's own writing; and this last applies to the summary drawn up by Montucci, and so approved by Dyce Sombre. The "Refutation" contains documents, observations thereon, [293] and a nearly chronological statement of the transactions which occurred from 1840, with a short account of Dyce Sombre's early history. The observations and statements show the feelings at the time the Book was preparing, namely, the spring and summer of 1849, and not the less so, because such statements and observations may refer to earlier periods. Considerable ability and ingenuity are evinced in various parts. We will make a few extracts. Commenting on a part of Dr. Drever's evidence on the execution of the Commission, Dyce Sombre declares they are all fabrications. Dr. Elliotson's evidence on the same occasion was important. Dyce Sombre, after saying that he only went to him to ask if Mrs. Dyce Sombre was in the habit of visiting him, adds, "The rest is all a made-up affair." At p. 29, "Refutation," he declares the evidence of Dr. Monro to be false. In the same page, where he is reported to have said at the Commission, that he wished Mrs. Dyce Sombre to challenge any lady she might think fit, because she might be jealous, he writes this note in June, 1849: "I did not exactly say all this." So, in p. 22, he declares the evidence then taken to be untrue. At p. 33, he said, as to what occurred in April, 1843, Sir James Clark "having told Mrs. Dyce Sombre to retire, he put me in charge of three keepers, who kept watch over me all night, and would not let me go to bed. I sat up with them the whole of that night: and about sunrise next day, Sir James Clark came to see me, and upon addressing me, he said, 'No sooner said than done.'" At pp. 155, 156, "Refutation," will be found the account given by the deceased, in this month of June, of his proceedings towards General Ventura. Having heard that [294] the General had received the letter he (the deceased) had written to him, on learning his arrival in Europe, he proceeds to Baden to search for him. It is not necessary to go through the whole; the only question is, whether those feelings which induced him to send the challenge to India, and gave rise to his other conduct towards the General, did not then remain? We will now read the foot note at p. 226, but let us first state the passage it refers to: "He (the deceased) with some abruptness, said, 'But it seems now to be another man.' Both she and Mr. C. F. tried to persuade him that it was Sir F. B. He afterwards said that Mr. C. F. gave him to understand that he, Mr. C. F., had connexion with Mrs. Dyce Sombre. The Chancellor supported Mr. C. F.; so that if he had taken any steps against Mr. C. F., they would have been of no use." This is an extract from a report, made September, 1846, by Dr. Bright and Dr. Southey; and that report Dyce Sombre was then preparing for press. Dyce Sombre's note is: "So says report: but steps were taken about him (Mr. C. F.), but he proved himself a coward."

Is this a proof that the hallucinations he entertained as to Mr. C. F. when he was manifestly insane, were abandoned, or does it not demonstrate that they continued?

Another illustration immediately follows:—"We are unwilling to lay much stress upon mere manner, but certainly there was something ironical in the tone in which these words were uttered, and Dyce Sombre seemed glad to have disburthened himself of a disagreeable task. During the same visit he continued to talk of Mr. C. F. and General V., as persons who had deeply injured him. On the third examination [295] he confirmed in most respects General V.'s narrative, but he stated that the General struck him at Baden-Baden, without previous provocation at that time, and that instead of exposing his person to General V.'s daughter, he himself was desired by General V. in the Hindostanee language, well understood by the young lady, 'to expose his person to her.' He told us that Sir F. B. had given him to understand that he had intrigued with Mrs. Dyce Sombre; but he does not



now believe that Sir F. B. told him the truth, but that the Hon. C. F. was the man.' He added, that Count Nesselrode had told him that everybody talked of Mrs. Dyce Sombre's connexion with Mr. C. F.' At our last interview we thought it right to suggest to Dyce Sombre that, convinced, as on a former occasion he alleged himself to be, that his former suspicions of his wife's infidelity were all delusions, it became his duty to express to Mrs. Dyce Sombre his deep regret that he had so seriously aspersed her character; to which he warmly replied: 'How can I do so, when she has often said, in the presence of her father and Lord M. H., that she was the greatest b.... in England.'"

The account he gives in June, 1849, at pp. 185, 186, is the very same he gave in 1846, when his insanity was beyond all doubt. What but the same insane feelings could give rise to this insane declaration? Again, speaking of the interview with the physicians at Brighton, "Left alone with them, I, of course, said what they wished me to say, for they had often told me in plain words both in London, in 1844, and at Dover, in 1846, that until I denied some facts I should never be out of Chancery."

[296] This is strong evidence that all the disavowals spoken of were insincere, and that the delusions remained.

At p. 251, the deceased introduces some observations as to the Baroness Solaroli, and he refers to Prinsep's letter, and this letter, it is right to say, may have tended to mislead the deceased. Prinsep himself does not now support its correctness or strict conformity with the facts; but, be this as it may, this letter could never have led the deceased, if he had continued of sound mind, to the next averment—"Lord Metcalfe may not have wished to have told all particulars to Prinsep which he did to me, as well to Lord John Russell, and the late Lord Melbourne, yet he did tell him that he had his doubts about her."

Where is the foundation for this but in the morbid imagination of the deceased?

At p. 256, Dyce Sombre repeats this observation, and declares that Lord Metcalfe told him of the illegitimacy of the Baroness Solaroli. "Upon leaving England in 1843, Lord Metcalfe said the only way he could serve me in this matter was to make an affidavit; that he could not leave it with me, but would leave it with Lord John Russell himself." What is this but the fancy of a diseased brain in June, 1849? No one imagines there was the slightest foundation for this statement about Lord Metcalfe and Lord John Russell; and what can be a stronger proof of this delusion than that he fixes this information to 1843, and he never evinced the slightest suspicion of such illegitimacy till years afterwards?

At p. 258, Dyce Sombre carries this very subject back to Hanover Lodge, where he was in the care of keepers. At p. 265, the deceased says, "To give a [297] rough sketch of Signor Solaroli's doings in Europe and India;" and then he prints the memoir, identifying that memoir as if it had been written at that hour.

Is that memoir the composition of a sane man? Was there any provocation to afford a rational ground for it? But it has been said that the publication of falsehoods will not prove a man to be of unsound mind. A proposition so put may be readily granted; indeed, otherwise, the list of insane persons would be very inconveniently enlarged. But it is also true that falsehood, as stated by some of the physicians, is a very common accompaniment of insanity, and that declarations of belief in what has no foundation, are one of the most frequent proofs of such insanity.

At p. 299, "Refutation," we have another proof of the state of the deceased's mind. It is an extract from the examination of the physicians, taken in shorthand. Q.—"Does it not pain you to have made such an atrocious accusation against your own father-in-law?" A.—"I have no objection to say, that under the circumstances in which I was placed at the time, I am sorry that I accused him of this." Q.—"Knowing it to be unfounded?" A.—"Hearing it to be unfounded." Dyce Sombre prints the words "knowing" and "hearing" in italics.

It is manifest that the same idea was still all-powerful in his mind.

At pages 307, 308, and 466, "Refutation," as to Lord Ward at Rome. How does this matter stand? It has been represented in argument, and some of the physicians embraced the idea, that all this was a mistake of identity; that the deceased had been introduced to some person as Lord Ward; that he mistook [298]

another individual at Rome for that person; and that he attempted to employ him, for £200, to arrange as to the monument of the Begum.

We will lay aside some gross improbabilities, such as that the person so addressed should allow himself to be addressed and pass as Lord Ward; that Dyce Sombre should have been informed that Lord Ward was in needy circumstances. Passing by these difficulties, let us consider what the deceased persists in. In June, 1849, he says:—"When I went to Rome (having received the information as to poverty and the readiness of Lord Ward to be employed in Paris), I certainly found the gentleman who had been introduced to me as Lord Ward, and as he had repeatedly said before by Lord Shrewsbury." So that he persists that the individual he addressed at Rome, was the very person introduced to him as Lord Ward, by Lord Shrewsbury.

Here is no ground for mistake, unless it could be presumed that Lord Shrewsbury introduced somebody as Lord Ward, who was not Lord Ward, and who was afterwards found at Rome.

At p. 340, "Refutation," there is abundance more as to the Baroness Solaroli. He says:—"I would have believed no one but Lord Metcalfe, for her Highness the Begum was not very sure about it." At p. 343, Dyce Sombre maintains, that Mr. Elliott was in the Court of Chancery in 1844, despite Mr. Elliott's letter that he had never been in the Court in his life. The letter of January, 1849, to the Lord Chancellor. The charge against Sir R. Jenkins of being the cause of his losing his boxes. The repetition (still more irrational) of the story as to Lord Ward. It is time to [299] stop, not for want of matter, but because we think we have given a number of passages quite sufficient for the purpose.

Then how does this case stand? We have examined the early history of Dyce Sombre; we have duly considered the weight to be ascribed to his Asiatic origin and habits; and in endeavouring to ascertain the state of his mind, have allowed those causes to have the utmost influence which could be reasonably given to them. It is not improbable that, from feelings peculiar to those of Eastern birth, and fostered from early youth by prejudice and custom, the first seeds of insanity may have sprung, being called into life and activity by collision with European manners and observances. But however this may be, most certain it is, and no longer a question of dispute, that in 1843 the deceased had become subject to mental derangement. In 1846, he remained in the same state; and the only question raised is, when did he recover? In 1847, there was some remission. Towards the end of 1848, the ablest physicians were divided in opinion, and strong certificates of sanity were sent to the Lord Chancellor. He, however, adhered to the opinion of the medical gentlemen appointed by his authority to examine Dyce Sombre, and refused to supersede the Commission in March, 1849. It has been our duty to trace the history of the deceased, more especially from his marriage. We have looked to facts rather than opinions; we have endeavoured to form our judgment from what Dyce Sombre said and did, rather than from what others might have thought of him. Great power of memory; considerable shrewdness and dexterity; aptitude to receive lessons, though not to learn successfully to practise them, were frequently displayed by the deceased; but we cannot trace any period during this long interval, at which we could say that the deceased was relieved from all morbid impressions. On the contrary, throughout the interval, whenever we have had the means of examination, symptoms of a diseased mind have shown themselves. We cannot aver that Dyce Sombre ever recovered; and it is not and cannot be denied that, after proved and notorious insanity, the burthen of proving such recovery must rest on those who allege it.

But however this may be, in the year 1849, at the time of the preparation and execution of the Will and Codicil, there is abundant proof under his own hand, that all the former delusions remained in full force and vigour, and this evidence is even more stringent, more undeniable proof of insanity, than if Dyce Sombre had made similar verbal declarations. Such declarations might be the offspring of temporary irritation, liable to be mistaken or explained. This extraordinary production—The "Refutation"—is a deliberate act, speaking in no ambiguous language the feelings of the deceased, when written. We have already made ample quotations to justify our observations; the book proves that there still existed *in*



*viridi observantia* the delusion as to Mrs. Dyce Sombre, as to the Baroness Solaroli, Lord Metcalfe, General Ventura, Mr. C. F., the supposed Lord Ward. It is useless to go further. We want no books of medical science, no legal authorities, to enable us to decide this case; there is no *verata questio* as to partial insanity. The true description of this case is insanity showing itself in divers particulars, and, so far as appears, without any perfect intermission.

[301] We are of opinion that when Dyce Sombre executed this Will, and when he executed the Codicil, he was of unsound mind, and, consequently, that the acts so done by him were null and void; therefore, we shall advise Her Majesty to affirm the judgment of the learned Judge of the Prerogative Court, pronouncing against the validity of these instruments.

There remains, however, another question of great importance with respect to the costs of the suit. The learned Judge in the Court below, has ordered the costs of the suit to be paid by Prinsep and the East India Company, who have propounded or supported the Will and Codicil.

The first question upon this subject is, whether, under the circumstances known to the Appellants at the time when the testamentary instruments were propounded, it was fit that their validity should be submitted to legal investigation and decision, and if so, whether there is anything in the conduct of these parties, either before the institution of this suit, or in its management since, which ought to subject them to the penalty of costs. Upon the first point their Lordships cannot entertain any doubt. Important dispositions of this Will are in favour of persons who could do nothing to protect their own interests; in favour of poor persons in India, dependants and pensioners of the Testator, or of his benefactress the Begum, and the great bulk of the property is directed to the establishment of charitable institutions, for the benefit of the natives of India, of which the East India Company were to be trustees, and of which, independently of the trust reposed in them by the Will, they were, by their position, the natural protectors and guardians. If, therefore, there was [302] reasonable doubt about the sanity of the deceased at the time when these instruments were made, it appears to us that the executor and the East India Company would have scarcely performed their duty, if they had not taken the necessary steps to have that doubt removed by the adjudication of the proper tribunal.

Then, after the history which we have given of this case, is it possible to deny that, before the evidence in this case had been produced, there were doubts, and very grave doubts, as to the testamentary capacity of the deceased at the period when the Will and Codicil were made? Men of the greatest eminence in the medical profession had expressed the strongest opinions as to his sanity; gentlemen who had been in the habit of associating with him, persons of judgment and of unimpeachable honour, had declared the same conviction. The solicitors who had prepared the instruments, and had taken all the precautions which it was in their power to take, to guard against imposition, were entirely satisfied that the Testator was perfectly competent to dispose of his property, and that the dispositions which he proposed to make were the result of his own unbiassed will.

Then, was there any misconduct on the part of the Appellants which should subject them to the payment, not only of their own costs, but of those of their adversaries?

When, as frequently happens in these cases, a Will is brought forward by persons who seek to obtain a disposition in their own favour from a Testator of doubtful capacity, it is very reasonable that, if the decision is ultimately against the capacity, they should pay all the costs which they have thus occasioned.

[303] But in this case there is not the slightest pretence for saying that the Appellants have had anything whatever to do with the inception or preparation of these instruments. It is true that, for the purposes of this suit, the East India Company are admitted to be entirely identified with Prinsep; and Messrs. Desborough, who prepared the Will and Codicil, were Prinsep's solicitors, and were by him introduced to the deceased. But having so introduced them, Prinsep takes no further part in the matter; all the communications of the solicitor take place with Dyce Sombre himself, either personally or by letter; the instructions are in his own hand-writing. Prinsep was neither party nor privy to the Will; he knew nothing of its contents, and he refused to be made acquainted with them.

It is said, however, that Prinsep was guilty of misconduct during the time that attempts were made to supersede the Commission, and that he concurred with other persons in persuading the lunatic to impose upon the physicians and the Lord Chancellor by concealing and misrepresenting, during his examination, his real opinions and convictions on the subjects of his delusions. We feel bound to say that we find no sufficient evidence to this effect.

We do not find any letters written by Prinsep of the same character with those of Lord and Lady Combermere, nor any evidence fixing him with the misconduct with which he is charged. Besides, the material question for the present purpose is, had Prinsep such a knowledge of the real state of Dyce Sombre's mind when those instruments were executed, as to make it unfit that he should propound them for probate? And we are clearly of opinion that he had not.

[304] It is said, however, that the suit has been improperly conducted, and that great expense has been incurred, and the true issue not raised by the case set up in support of the Will and Codicil: for whereas it is now admitted that the deceased was of unsound mind in 1843, when he was found so by inquisition, and for a considerable time afterwards, and the case now alleged at the bar is a subsequent recovery, the pleadings allege that the deceased never was insane at all, and of course could never have recovered.

But much as we regret the expense to which this course of pleading has led, and although we have been, and are, of opinion, that the evidence under the Commission in August, 1843, established a manifest case of lunacy, we feel bound to remember that such was not the opinion of Sir C. Trevelyan, a gentleman who had known Dyce Sombre in India, and whose position and character would give weight to his judgment: and that such was not the opinion of Baron Soleroli who is one of the parties to whom costs are awarded by this judgment, and who insisted in October, 1843, on the sanity of his brother-in-law. We feel bound to remember also that those who were acquainted with the peculiarities of the birth, habits, and education of the deceased, might more readily be led to attribute his delusions with respect to his wife to these peculiarities than to a disordered intellect: and that Prinsep, after his return from India, did not renew his acquaintance with the deceased till the summer of 1844, nearly twelve months after the date of the Commission, and after reports in favour of his sanity had been made by foreign physicians of the highest authority.

We have no hesitation, therefore, in declaring our [305] opinion that the judgment, so far as it awards costs against Prinsep and the East India Company, cannot be maintained. A much more doubtful question is, whether we can give them costs out of the estate. Very great expense has been incurred in this case by the course of pleading adopted by the several parties. There are two distinct parties asserting the validity of these papers; there are three separate parties opposing them. The case is in many respects very peculiar: though the Commission of lunacy against the deceased was never superseded, he was treated under it in a manner in which no other lunatic in our experience ever was treated; he was entrusted with the whole income of his large property after making a provision for his wife: and the circumstances altogether were such as in our opinion to make it essential to the purposes of justice that the validity of these papers should be submitted to judicial decision.

Upon the whole, therefore, we have decided humbly to advise Her Majesty to vary the decree of the Court below with respect to costs; to give no costs against the Appellants, but to allow them out of the estate one set of costs only between Prinsep and the East India Company, including the costs of this appeal. With respect to the Respondents, they will each have their own costs out of their share of the property.

[Mews' Dig. tit. LUNATIC, VII. WILLS; tit. WILL, I. TESTAMENTARY CAPACITY, 2. *Soundness of Mind*. S.C. 4 W.R. 714. See note to *Waring v. Waring*, 1848, 6 Moo. P.C. 341, where the authorities as to testamentary capacity in relation to mental disease are collected.]



## [306] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

SUSAN CATHERINE BREMER,—*Appellant*: DANIEL ALEXANDER FREEMAN and JAMES GRIGNON BREMER,—*Respondents* \* [Feb. 4, 5, 6, 24, 27, 28, and Mar. 7, 1857].

The forms and solemnities of a Will are governed by the law of the domicile of the Testator [10 Moo. P.C. 357, 358, 362].

The maxim, "*Mobilia sequuntur personam*," is part of the *jus gentium*. It follows, therefore, that the post-mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, and it equally follows, that if the law of the country allowed the deceased to make a Will, the Will must be in the form and executed with the solemnities which that law requires [10 Moo. P.C. 358].

An Englishwoman resided uninterruptedly in France for a period of fifteen years, without any business or occupation in that country; renting apartments upon lease, and making declarations never to return to England; providing, moreover, a vault in the cemetery of Père la Chaise in Paris, where she expressed her wish to be buried. In 1842, she made a Will in Paris in the English form, executed according to the Wills Act, 1 Vict., c. 26, but not in accordance with the requirements of the French law. By this Will she bequeathed personal property, the bulk of which was in the English funds, to parties resident in England. The deceased at the time of making the Will and at her death was not naturalized in France, nor had she obtained any authorization as required by the 13th Art. of the Code Napoleon. Held,—

First, that by the *jus gentium* the deceased was *de facto* domiciled in France, and that the authorization of the French Government was not necessary in order to give the right of testacy [10 Moo. P.C. 359, 361, 366.]

Second, that the Will not having been executed in conformity with the requirements of the law of the domicile, was invalid, and probate refused.

The *onus probandi* lies upon a party impeaching a Will to show that it ought not to be admitted to proof; but where the party impeaching [307] the Will establishes the fact that a Testatrix had lost her English domicile, having gained another elsewhere, and died in the acquired domicile, the *onus probandi* is in such circumstances shifted, and it lies upon the party propounding the Will to prove that the law of the acquired domicile was such as to authorize a Will in the form propounded [10 Moo. P.C. 357].

The Wills Act, 1 Vict., c. 26, applies only to persons who have an English domicile [10 Moo. P.C. 359].

Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but where the evidence of the experts is unsatisfactory and conflicting, the appellate Court, not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign Courts and the text writers, in order to arrive at a satisfactory conclusion upon the question of foreign law [10 Moo. P.C. 361, 362].

The case of *Collier v. Rivaz* (2 Curties, 855) observed upon and questioned [10 Moo. P.C. 374].

The question at issue in this case, was the validity of the Will of Fanny Allegri, otherwise Calcraft, [307] late of the Boulevard des Capucines in the city of Paris, in France, who died in Paris, in the month of April, 1853, after a fixed and uninterrupted residence there for fifteen years. The Will was in the English form, prepared by an English solicitor, and executed in Paris in the year 1842, according to the provisions of the Wills Act, 1 Vict., c. 26. It was impugned by the Appellant, on two grounds, first, that at the period of executing the Will, and of her

\* Present: The Right Hon. Lord Wensleydale, the Right Hon. Dr. Lushington, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

death, the deceased was domiciled *de facto* in France, according to the *jus gentium*; and secondly, that the Will was not executed according to the requirements prescribed by the law of France in Articles 967 to 977 of the Code Napoleon, relating to the execution of Wills, and was, therefore, void as a testamentary disposition.

The Respondents, the executors, proved the Will in the Prerogative Court in June, 1853; but doubts having subsequently arisen respecting the domicile of the deceased, the Appellant, one of her next of kin, on the 28th of October in that year, called in the probate.

The Will was then propounded by the Respondent, Freeman, one of the executors, in an allegation in common form, in which he alleged the due execution of the [308] Will, and the testamentary capacity of the deceased. The allegation on the part of the Appellant, pleaded, in substance, that the deceased left considerable property in England invested in her name as Fanny Allegri, and also in the East Indies, where she had a freehold estate of the value of £300 per annum, and that the property in France was very small, consisting only of the furniture of the apartments at Paris; that she was the daughter of General Calcraft, an officer in the service of the East India Company; that she was born in Calcutta in 1795; that she came to England in 1805, and continued to live there till 1825, when she left England and never afterwards returned; that she went to Rome and other places in Italy, and that in 1830 she contracted a clandestine marriage with one Signor Allegri, and lived and cohabited with him in Rome for six months, when he died; that the marriage was kept secret from her father and family, and that it was not mentioned to them till she admitted the fact in a letter, dated the 1st of October, 1840, sent by her to the Respondent, Bremer; that the deceased, after the death of her father, which occurred in April, 1834, was known and passed by the name of Allegri; that after the death of General Calcraft, the deceased's sister, Emily Calcraft, left England and resided with her at different places on the Continent until the summer of 1838, when they took up their final and permanent abode in Paris; that in the year 1840, the deceased's sister died, and the deceased continued in the same apartments, which they had furnished; that she had taken successive short leases of the apartments, the last being for three years; that she had expressed her fixed determination by letters and otherwise never to return to England; [309] and that upon the death of her sister, she purchased a vault in perpetuity, sufficient for the interment of two persons, in the cemetery of Père la Chaise; that her sister was buried there, and she declared her intention to be buried in that vault with her sister; that the deceased was at the date of her Will and death domiciled in France, and that no testamentary instrument was valid unless executed according to the forms required by the French law. The allegation then set out the French law relative to the due execution of a Will, and pleaded that such law applied equally to natural-born subjects of France, as to foreigners who had become domiciled in France, by fixing their residence with an intention of permanently remaining, and concluded by alleging that the Will propounded was not valid, as it was not executed according to the law of France.

A further allegation was brought in by the Respondent, Freeman, pleading that the deceased was never married to Allegri; and alleging the constant state of ill health of the deceased after the death of her sister in the year 1840; that she frequently expressed her determination to leave Paris, as soon as health would allow her; that she had a very small property in France; that she had great dislike to the climate of France, and habits and manners of the French people; that she had formed a resolution to leave the country; that she declared her intention to take a small apartment in Paris, that she might occasionally return to visit her sister's grave, and, if she died elsewhere, she declared her body should be brought to be deposited in the same grave as her sister's; that in her letters she always wrote of England as being her own country, and although in some of her letters she de- [310]-clared she had no desire to return to England, she always spoke of England as being her country; that she never applied for letters of naturalization in France, or even for authorization to establish her domicile in that country, or did any act to acquire a domicile of succession according to the law of France, or the right to make a testamentary disposition according to the law; and the allegation further pleaded that by the law of France the succession to personalty of all deceased persons, whether testamentary, or *ab intestato*, was dependent upon and was governed and



regulated by the law of the place of the domicile of the deceased; that the laws of France in force at the time of the death of the deceased, with respect to the validity of testaments, did not apply equally to natural-born subjects of France as to foreigners who had become domiciled there by fixing their residence with an intention of permanently remaining, but that the succession, whether testamentary, or *ab intestato*, of a foreigner, who was neither naturalized nor authorized to establish his domicile in France, was governed by the law of his own country.

Upon these allegations witnesses were examined on both sides on the facts pleaded. Mr. Freeman was also himself examined,  *viva voce* , and deposed to the deceased having stated to him that she was never married, but that she would not use her maiden name. He proved also the instructions for and execution of the Will. Upon the question raised by the pleadings, whether the deceased, not having been naturalized nor having obtained the authorization from the French Government to establish her domicile in France, without which the Respondent contended a foreigner was considered by the French [311] law as a mere resident, could make a testamentary disposition, three members of the French bar were examined for the Appellant, namely, Messieurs Frignet, Senard, and Paillet, and five members of the French bar, for the Respondent Freeman, namely, Messieurs Marie, Blanchet, De Lisle, Hebert, and De Vatismesnil. These witnesses were examined upon interrogatories regarding the decision of the French Courts on the questions of domicile, and reported decisions were specially and generally referred to by them both in their examination in chief and cross-examination. Their evidence was conflicting. The effect of these cases as well as the opinions of the witnesses are stated in the arguments.

By the decree pronounced by the Judge of the Prerogative Court (The Right Hon. Sir John Dodson) (see case reported, *nom.* " *Bremer v. Freeman and Bremer*," 1 Deane's Ecc. Rep. 192), the Will was admitted to probate, on the ground that although the deceased had a domicile *de facto* in France, both at the time of making her Will and at her decease by the *jus gentium*, yet that it was necessary, in order to establish a domicile in France, so as to effect the succession of the deceased and the mode of making her Will, that her domicile should be by authorization of the French Government; that in this case there was no domicile by authorization, and consequently that the deceased's Will being in accordance with the English form, was perfectly right and proper; more especially as all the relations and parties who were benefited by the Will, with some trifling exception, were English people, and domiciled in England, where all the deceased's property with the exception of the goods in her apartments was situate.

[312] From this decree the present appeal was preferred, and was argued by The Attorney-General (Sir Richard Bethell), and Dr. Jenner, for the Appellant; and The Queen's Advocate (Sir John Harding), Sir Fitz-Roy Kelly, Q.C., and Dr. Phillimore, for the Respondent, Freeman (*a*).

The Attorney-General.—The question of domicile in this case is a conclusion of fact; and the true inquiry is, where was the deceased domiciled at the time of her death? Such conclusion of fact must be determined by an English Court in accordance with English and not French law. The rule "*mobilia sequuntur personam*" is the true test. Domicile is merely an expression of that rule. Here the deceased's domicile was *de facto*, French; she had a fixed and permanent residence in France for fifteen years without any *animus revertendi*. The Court below, therefore, rightly decided that she had acquired *jure gentium*, a French domicile by residence, and, consequently, it was the duty of that Court to consider the effect of such domicile as applicable to the Will in question. If the judgment of the Court had stopped there, we should have had no reason to complain; but the judgment is based on the proposition that an English Judge is concluded by the criteria of domicile, not according to the ordinary rules of domicile, but according to the criteria afforded or supplied by the country where the domicile *de* [313] *facto* exists; and that the French law having introduced a number of incidents wholly

(*a*) The other Respondent, Bremer, appeared by a separate proctor, but did not appear by Counsel. In the proceedings in the Court below he supported the case of the Appellant, who was his sister. See 1 Deane's Ecc. Rep. p. 197.

unknown to the law of England, in order to constitute citizenship, a foreigner must be clothed with the rights of a French citizen by letters of authorization in order to be domiciled in that country; the consequence of which is, that in the absence of such requisites the Will of a party domiciled in France according to the *jus gentium* cannot be interpreted or executed by the French Courts, but must be referred to the Courts of the domicile of origin to be carried out. The Court below was bound by the law of England to decide that the Will was valid or invalid according to the law of France. As regards the French domicile, the case is, by the judgment of the Court below, made to depend on the 13th Article of the Code Napoleon. That article provides that a foreigner who shall have been admitted *par l'autorization* of the Government to establish his domicile in France, shall enjoy in France *de tous les droits civils*, so long as he shall continue to reside there. What those civil rights are, neither that article of the Code nor the Royal Ordinance, which, it appears from the case of *Curling v. Thornton* (2 Add. 9), is granted under it, show; but it is contended that from the preceding Articles 8 and 10, and the Ordinance referred to, testacy is one of them. Now, Article 8, concerns only the civil rights of Frenchmen; Article 11, relates to foreigners and introduces the international law; it provides, that a foreigner shall enjoy in France the same civil rights as those which are or shall be granted to Frenchmen by the treaties of the nation to which the foreigner belongs. Article 12, regulates the *status* of a foreign woman who shall have married a [314] Frenchman. Then comes Article 13, already stated, followed by Article 14, which declares a foreigner amenable to the French tribunals for engagements made in France with a Frenchman. But these are not the only Articles of the Code Napoleon which must be looked at. There is Article 17, relative to the deprivation of the civil rights of a Frenchman, which declares those rights lost, by foreign naturalization, acceptance of office of a foreign government without the authority of the French Government, or establishment in a foreign country without the intention of returning. Then Article 102, concerning domicile, declares that "the domicile of every Frenchman, as to the exercise of his civil rights, is that place where he has his principal establishment." By Article 103, the same rule is declared regarding the change of domicile as prevails in this country. "The mutation of domicile shall be effected by the fact of really inhabiting another place, jointly with the intention to fix therein one's principal establishment." By Articles 104 and 105, the proof of such intention is to be collected from declarations made to the magistrates by the party quitting his former domicile; or in default of express declarations, proof of intention is to depend upon the circumstances of the case. These provisions are most important as showing that domicile may be changed without even any declarations of intention to do so. Then follow the Articles, 106 and 107, regarding the effect of the acceptance of a public office, and then Article 110 provides that "The place where the succession is to be opened is to be determined by the domicile." Added to which is the authority regarding foreigners acquiring property, declared by Article 1 of the law of the 14th of July, [315] 1819, upon the abolition of the *Droit d'aubaine et de detraction*, which repeals Articles 726 and 912 of the Code Napoleon as to the disqualification of foreigners to succession, and declares that "Foreigners shall be entitled to succeed and to dispose, and to receive in the same way as French subjects in all the extent of the kingdom."

Thus much regarding the provisions of the Code Napoleon. Now foreign law being a fact to be proved as such in evidence, we have pleaded certain decided cases, and examined witnesses to prove what the French law is, and, therefore, what interpretation is put upon these Articles of the Code Napoleon by the French Tribunals and authorities. Let us see, then, what these witnesses depose to on this point. First, Frignet, a Doctor of Law and an Advocate of the Bar of the Council of State, and of the Court of Cassation. He states the universal rule as to a person domiciled in France, thus: "The Will of a person domiciled in France, to be considered valid there, must be made in conformity with the laws of France, in virtue of the principle, '*locus regit actum*,' and more particularly so when the Will is brought under the cognisance of the French Tribunals"; and he cites the case of *Browning v. De Veine*, decided first by the Court of Appeal of Paris and reported by Sirey, 1852, and affirmed by the Court of Cassation and reported by Dalloz, 1853, 1, p. 217, by which it was declared in the first instance, that "the succession of a foreigner as



to moveables situated in France, is regulated by the French law when the deceased had his legal domicile in France, and his succession claimed by a French heir against foreigners as universal legatees," and that, "a holograph Will made by a foreigner in France, of which [316] execution is demanded before the French Tribunals, cannot be declared valid unless it unites all the conditions of form recognised as essential in French legislation, and whatever may be in that respect the state of the legislation of the country to which the Testator belongs; consequently such a Will is null if it is not written entirely in the hand of the Testator, or if it is not dated, Code Napoleon, Arts. 970 and 999"; with regard to which case the Court of Cassation upon appeal (*nom. Connelly's Case*, Dalloz, 1853, 1, 217), held, that holograph Wills, like other acts, whether public or private, were subject to the rule '*locus regit actum*,' Code Napoleon, Arts. 970 and 999, and consequently, that a "holograph Will made by a foreigner in France, and to carry out which recourse is had to the French Tribunals, cannot be declared valid unless it fulfils all the conditions as to form which are required by the French law, and especially if it is not entirely in the handwriting of the Testator, and if it is not dated"; and the witness further says, that "the laws of France as to execution of Wills apply as well to foreigners domiciled in France as to French subjects, in as far as the country to which they belong requires them to conform to the law of the country in which they are domiciled. It is necessary (he continues) to attend to the distinction between the law as to property, and the law as to persons. The law attaching to property is always the '*lex loci rei sitae*,' the law as to persons is determined by his national character; and this law follows him wherever he may be. The making a Will being a personal act, is to be adjudicated upon according to the law, not of property, but of persons." Then, after noticing an incongruity in the French law respecting the Will being a personal [317] act as regards a foreigner, in which case the Courts there would only pronounce for the Will when it was in conformity with the French law, he adds, "The French Courts attach no importance to the question of domicile in considering the validity of a Will, because by the French law none of the conditions for making a valid Will are affected by the domicile of the Testator"; and, therefore, if a foreign Court held that a Will of a foreigner was valid by the law of his domicile, the French Courts would *quoad hoc* adopt that decision. Thus much for this witness's opinion on the general principles of French law applicable to the case. But his further evidence is of great importance; for on being examined as to the operation of the 13th Article of the Code, he says, "It is the opinion of very eminent French advocates and writers of eminence on French law, and it is also my opinion, that by this Article foreigners who have not obtained the authorization of the Government for establishing their domicile in France, are considered in law not domiciled, though resident, in France; but (he adds) the French, not the English, signification of the term 'domicile' must here be carefully borne in mind"; and he thus expresses his meaning: "In France the term 'domicile' carries two meanings, or rather, is divisible into two classes, one domicile in its strict sense (*proprio sensu*), the other domicile in its broad sense (*lato sensu*). Domicile in its strict sense, is that applicable to questions as to the rights of a party, such as the place where he may legally exercise his municipal rights; and this domicile is determined exclusively by the declarations at the Mairies as to the place the party desires to be considered as his legal domicile. The party makes a formal de-[318]-claration on this head at the Mairies of the Communes, from which he came and to which he goes, and the place set forth in these declarations is then, for the purposes I have above stated, held in strictness to be his domicile; and as regards a Frenchman, if no such declarations have been made, the Court will infer his place of domicile from circumstances. Such questions are frequently brought for adjudication before the Court of Cassation, in which I practise, and before that Court only, and this distinction is, therefore, not generally known. Domicile in its other and broad sense (*lato sensu*), has reference to the obligations of a party, one of which is the mode in which he shall make his Will; and this domicile is to be determined by circumstances, and cannot be arbitrarily decided upon in the negative by any such particular formal act. Thus, as regards foreigners, the authorization of the Government to establish a domicile is considered indispensable when the foreigner claims right, *i.e.* to enjoy *les droits civils*, but it is not so considered when Frenchmen, or others duly authorized, claim rights against

him. So in matters relating to a foreigner's Will, by which, of course, rights are conferred on other parties, it may be said, accepted by the Testator, the broad, not the strict sense of the term domicile is applied; and, therefore independent of any authority of the Government to the foreigner to establish his domicile, the Court will infer that domicile to have existed or not, according to the circumstances of the case. The French law applies the technical expression 'opening the succession' to all cases in which a person has died testate or intestate. The succession is considered as opened at the very instant of the death of the deceased, independently [319] of any formality, and the succession is called testamentary or legal, according to whether the deceased died testate or intestate. The Tribunals do not fix the opening of the succession at any certain day, but must declare it opened from the day of the death, and all the consequences thereof take effect from that time. The rules in France, which govern the laws of successions, are very complicated; but the question of the domicile does not affect the question of succession, except in one point, namely, the determining the Tribunal having jurisdiction to adjudicate on the question of succession, and that jurisdiction is always determined by the place of the domicile (*lato sensu*) of the deceased. The personal rights and remedies of a Frenchman against other Frenchmen do, according to the laws of France, follow him into a foreign country as dependant on the personal law; but his remedies must, of course, be exercised according to the Tribunals of the country in which he resides. As regards foreigners, however, we do not give them the same rights we claim for Frenchmen; for a foreigner, simply as such, and without having obtained the authorization of the French Government before referred to, has no right of instituting proceedings against another foreigner in this country." On his further examination, being referred to the case of D'Abaunza, decided first in the Tribunal Civil de la Seine, and afterwards affirmed by the Royal Court of Paris, reported by Sirey, vol. ii. p. 372, of 1842, he says: "This case directly confirms the principle I have before expounded, because in this case it was mooted whether a stranger, and particularly a Consul, could claim the rights of a domiciled Frenchman (for instance, that of not being imprisoned for a civil [320] debt), without having obtained the authorization of the Government required by the 13th Article of the Code Napoleon; and the Tribunal decided that, notwithstanding the party's prolonged residence in France, and marriage there, he could not claim such rights; and very justly, because, as I have before deposed, the authorization of the Government is indispensable to a foreigner for his acquiring rights or immunities, that is to say, domicile in its strict sense; but in the same case the Attorney-General explains very clearly that domicile (*lato sensu*) is independent of the authority of the Government, and that it is within the province of the Tribunal to judge of the value of the circumstances in reference to which the foreigner must be considered as having or not having his domicile in France." On being referred to Lynch's case, decided first by the Tribunal of the Seine, and afterwards affirmed by the Court of Appeal of Paris, reported by Sirey, 1851, vol. ii. p. 791, which decided "that the law which regulates the succession of a foreigner deceased in France, as to personalty situate in that country, is the law of the country of the deceased, especially when the deceased had not a legal domicile in France and leaves no heir. Code Civil, 3, Law of the 14th July, 1819. Consequently that the French Tribunals are not competent to take cognizance of a demand for liquidation and distribution of such a succession; and consequently, moreover, an Act emanating from the competent foreign tribunal, and authorizing one of the heirs provisionally to administer the succession of the deceased, must apply to the personal property situate in France, even if that property should not be specially designated in that Act; provided always, of course, [321] that the said Act does not contain anything contrary to the principles of the French law. Thus if that Act attributes to the heir, who has been appointed administrator, the power of disposing of the property of the deceased, the other heirs cannot claim from the French tribunals the authorization to act themselves, and cause the sale of the personal property situate in France to be proceeded with. And, if the foreign Tribunal has required the heir, who has been appointed administrator, to give security for his administration of the property situate in the foreign country, it is proper for the French Tribunals likewise to require from him security as regards the personal property situate in France."



And being interrogated whether it was not expressly decided in that case that, as the deceased, Lynch, had not become a naturalized Frenchman, and had not even obtained from the King the right to establish his domicile in France, he had died an Englishman, that, as his fortune was all personal status, that is to say by the English law, which followed him on to French soil, as the French law follows a Frenchman into a foreign country, and continues to regulate there his capacity and his status, he answered, "It is decided in that case that Lynch, the deceased, was born in Ireland, and not being a naturalized Frenchman, nor having obtained the authorization of the Government to establish his domicile in France, he had died an Englishman; but the point of domicile was not that on which the decision turned, for the question was not what was the deceased's domicile; but what was his national character? And that being ascertained, the personal law, I have before alluded to, was applied to him in reference to such his national character, and to his moveable property [322] as dependent thereon. One of the motives for determining the incompetency of the French tribunals to adjudicate on that case was, that the deceased had left no French heir." So that this witness does not think the case applicable to the one we are now arguing, and his opinion seems well founded from one of the surmises in the case itself, which declares that whereas Lynch never had been a naturalized French subject, and had not even obtained from the King of France the right of establishing his domicile in France, therefore he died an English subject. That case, therefore, though put in evidence as an authority, has no application. Then this witness states his decided opinion on the facts we have pleaded. "An English lady (he says), a single woman, or the widow of a person neither French nor English, could, in my opinion, acquire a domicile (*lato sensu*) by mere residence in France, but she cannot, by virtue of that domicile, claim civil rights, without having obtained the authorization of the Government to establish her domicile in France (13th Art. Code Napoleon). A prolonged residence in this country, with an intention manifested of remaining permanently here, would be sufficient, according to the law of France, to establish a French domicile. No particular period of residence is required for that purpose by the French law. In the case of Connolly referred to, the Plaintiff in the Court below was, I believe, a Frenchman. The principle which ruled the decision was, '*locus regit actum*,' and not the principles of national sovereignty, or the protection due by the law of France to French subjects." And he adds further, "In the directions in the Code Napoleon, as to the execution of Wills, nothing whatever is mentioned as to foreigners domiciled in France, or fixing their residence there, and such circumstances would have no bearing whatever upon any question as to the mode of making a Will valid, according to the forms of the French law"; and again he declares his opinion, that "a foreigner permanently residing in France, having a fixed establishment there, and expressing an intention of permanently residing there, is considered, according to French law, as having his domicile in France. No authorization of the Government is necessary for a foreigner to acquire such a domicile in France. In the absence of any expressed intention by the party of permanent residence, circumstances may afford evidence of that intention in virtue of Article 105 of the Code Napoleon. In fact (he says implicitly), no authorization of Government is necessary towards the acquisition by a foreigner of French domicile conferring the obligations of legal domicile." He remembers the case of Breul, to which he is referred in the Imperial Court of Paris, reported by Sirey, 1854, vol. ii. p. 105. which decided that a fixed residence in France, joined with an intention of remaining there, is sufficient of itself to confer a French domicile on a foreigner. He then goes on to say, "I have referred, as requested, to the Articles 103, 104, and 105 of the Code Civil. The law, as expressed in these articles, applies not to French subjects only who may change their domicile, but to foreigners also, who have fixed their permanent abode or domicile in France, and our Courts would have no difficulty in applying it indifferently to French subjects or foreigners. As regards the making and execution of deeds and other instruments, it is clear; for the rule '*locus regit actum*' is more severely observed in [324] France than in any other country, that in what concerns obligations flowing from the Civil law, permanent residence, with the intention of remaining, will produce the same effect in reference to the status of the party as the authorized domicile." Thus much for this

witness, whose evidence and opinion is of the highest importance, and who distinctly states, that the 13th Article of the Code Napoleon does not apply so as to render necessary the authorization of the Government to the acquisition of a *de facto* domicile, and one *jure gentium*. The next professional witness is Senard, an Advocate of the Cour d'Appel in Paris. He says, "A foreigner domiciled in France, if he make his Will in France, must, in order to its validity, make it conformably to the laws of France, and the forms required thereby in reference to Wills. If, however, he makes his Will in any other country, although domiciled in France, he must make it according to the forms prescribed by the laws of that country, upon the principle, '*locus regit actum*.'" But, upon the question of domicile, and the application of the 13th Article of the Code Napoleon, he is quite decisive. He says: "According to my opinion, a foreigner, who has a fixed establishment in France, permanently resides there, and expresses his intention of continuing to do so, would, incontestably, be considered, according to French law, as domiciled in France. No authorization of Government is necessary for a foreigner to acquire a domicile in France. The authorization of Government is only necessary, in order to add the enjoyment of the civil rights defined by the Code to those which naturally attach to domicile. In default of an express declaration by the foreigner [325] of such intention of permanent residence, the proof of such an intention will be inferred from circumstances; see the 105th Article of the Code." He then refers to Breul's case and says, "That case does decide that a fixed residence by a foreigner in France, joined with an intention of remaining there, is sufficient of itself to confer a French domicile on him, and I know there were several previous decisions to the same effect in other Courts." On being referred to the 103rd, 104th, and 105th Articles of the Code, he says, "These articles are only, as it seems to me, the expression of the reason and general principles of the law of common right, and, therefore, they rule all the questions of domicile, whatever may be the condition of the parties, whether Frenchmen, domiciled foreigners, or mere strangers." And then he goes on to say, "It is not the fact of domicile that creates the necessity for his confirming himself in the execution of instruments to the forms of French law; that necessity is derived from the maxim, '*locus regit actum*,' and is applicable as well to a mere traveller as to a foreigner domiciled here." Upon the 13th Article of the Code, he says, "There has been a considerable controversy among eminent advocates and jurists in France relative to the question, whether a stranger can acquire in France a legal domicile without the authorization of the Government. This difficulty results from the terms of the 13th Article of the Code Napoleon, and is caused, as it appears to me, by confounding the distinction between the enjoyment of civil rights, which can only spring from the authorization of the Government, with the consequences of domicile, properly so called, which naturally result from the fact of a party having taken up his principal [326] abode in France, with the intention of permanently residing there. For a stranger to be a guardian of the children of another, a witness to instruments, a witness in a court of justice, as experienced in any particular art (*expert en justice*) and other purposes, it is not sufficient that he may be domiciled, he must have a domicile authorized by the Government; but in order to the due service upon him of process at his residence, or, in order to the determination on his death of the Tribunal competent to take cognizance of the question of his succession, it is sufficient that he possess such a domicile as is constituted by the fact of his having established his principal residence in France, with the intention of remaining in this country. I desire to add, that this distinction is more especially proper and apparent, when the law of England, as to the form in which a Will should be made, comes to be considered." Then he alludes to the change of opinion of Merlin, who, in the last edition of his *Repertoire de Jurisprudence*, Tome VI. pp. 190-1 (3rd Edit.), had "laid it down very formally, that the authorization of the Government was only necessary to the foreigner, in order to his obtaining civil rights in France, and that he had no need of it to enable him to acquire a legal domicile, constituted by the fact of his having his principal establishment in this country, joined with an intention of permanently remaining" in France. He then goes on to say that "the French law applies the term 'opening the succession' to the cases both of persons dying testate and intestate. In France the domicile only regulates the Tribunal which shall have



cognizance of the question of succession, it does not in any way regulate the law governing the succession." And [327] then after explaining the law of the opening of the succession, according to Article 110 of the Code Napoleon, and, being referred to the case of D'Abaunza, reported by Sirey, 1842, vol. ii. p. 372, he takes much the same view as the preceding witness, though he seems to consider the grounds of the decision obscure; he then considers Lynch's case, reported by Sirey, 1851, vol. ii. p. 791, which was a case in which the French law of community of goods was held to have been assented to by a husband, an alien, living without authorization in France, who had married a French woman, not to have decided anything on the point in question, it not being alleged that he had taken up his principal residence in France, and manifested his intention of permanently remaining there. In regard to the acquisition of domicile with letters of authorization, he says, "It is my opinion, that an English lady, a single woman, or the widow of a person, neither French nor English, could, by mere residence in France, acquire a French domicile of succession, if such residence constituted her principal establishment, and was accompanied with an intention of permanently residing there. It is not possible (he says), to fix the duration of residence necessary to raise the inference of such intention of remaining there. It is one of the circumstances, the examination of which appertains to the judge." This witness confirms in every essential particular the views and opinions of Frignet. The third professional witness examined is Paillet, an Advocate of the Cour Impériale of Paris, and ancient President of the Order of Advocates of that Court. He states that he is fifty-seven years of age, and from his age and position must be of considerable standing; his opinion, therefore, is [328] entitled to great weight. He says regarding domicile, "To constitute the domicile of a foreigner in France, residence there, *de facto*, is necessary, joined with an intention of permanently residing there": that is as we contend, and in strict conformity with the *jus gentium*. Then after deposing to the testamentary law of France, he states his opinion regarding the effect of Article 13, on the law of domicile, both clearly and strongly. He says, "There is no formal provision in the Code as to whether a foreigner, who has taken up his residence in France, with an intention expressed of permanently residing there, is to be considered as domiciled in France, but, according to French jurisprudence, such a person is considered as domiciled in France. It is a question much controverted in our jurisprudence, whether the authorization of the Government is necessary to enable a foreigner to acquire a domicile in France, but I think that, in accordance with numerous and recent decisions of the superior Courts (*arrêts*), a domicile is acquired, in such cases, without any authorization of the Government, though that authorization is indispensable to the foreigner's acquiring certain civil rights, according to Article 13 of the Code Napoleon. In the absence of any expressed intention of permanent residence, circumstances may afford evidence of that intention; and in that case it will belong to the tribunal to judge from the circumstances as to the existence, or not, of such intention." Upon the Articles 103, 104, and 105 of the Code Napoleon, he says, "The law does not expressly state, that the provisions in those articles apply to foreigners domiciled here under the circumstances I have deposed to, but they are held by inference to do so, as well as to French [329] subjects. Such a fixed residence in France, joined with an intention of permanently remaining there, would oblige a foreigner to conform, not only to the laws of police, but likewise to the civil laws generally, and especially to those regulating the form of acts and contracts." In support of the opinion he has already expressed on the 13th Article, he says, "that it is considered that domicile appertains more to the law of nations than the municipal law (*loi civile*), and that, if the contrary of the opinion he has given were held, the foreigner who has left his country, and takes up his abode in another, *animo non revertendi*, would be without any domicile at all"; and he refers to the 3rd Article of the Code, as showing that it is a rule of French law (*le statut personnel*) that the personal rights of a Frenchman follow him into a foreign country, and, reciprocally, that those of a foreigner follow him into France. This witness then refers to, and confirms the view taken by the previous witnesses of, the case of D'Abaunza, and refers to the case of Olivarez, a Danish subject, determined on the 7th of August, 1854, who died, and was domiciled at Bordeaux. That case was decided by the Imperial Court of Bordeaux. The witness

stated, that the report had not yet appeared in the regular reports, but that it appeared from a report "*Le Droit*," 11th of October, 1854, that it was expressly decided, "That the acquisition by a foreigner of a domicile in France, is independent of the authorization which can be granted to foreigners by the Government, to fix their residence in France. Domicile belongs to the law of nations; it is always determined by the place of the principal establishment." Nothing can be clearer, or more conform-[330]-able to the true state of the law than this decision. Being referred to the case of Lynch, he takes the same view of it as the other witnesses, and refers to the cases of Onslow and Lloyd, in both of which cases an Englishman was held domiciled in France without any authorization of the Government. The case of Onslow, which was in the Court of Riom, and reported by Dalloz, 1836, vol. ii. p. 57, decided that a foreigner who was established in France at the time of the promulgation of the law of 30th of April, 1790, and who had had a continuous domicile there for five years, and who had married a Frenchwoman there, was legally naturalized, without being obliged to take the civil oath: which oath was required by law from the foreigner whom it naturalized only for the purpose of admitting him to the advantages arising from the qualities of an active citizen. That the laws subsequent to that of 30th of April, 1790, particularly the Constitution of 1791, which required from foreigners the condition of the oath, were enacted only for the future, and could not deprive the foreigner, who had been naturalized agreeably to the law of 1790, without taking the oath of his quality of a Frenchman. And again, that a foreigner, who, before the Code Civil, had established his residence in France, and had by several acts manifested his intention of permanently remaining there, has irrevocably acquired a legal domicile in France, notwithstanding any subsequent laws requiring other conditions, and this is the case, also, since the promulgation of the Civil Code, even though the foreigner may not have the authorization of the Government. Lloyd's case, which was in the Court of Appeal of Paris, and is reported in Sirey, 1849, vol. ii. p. 420, is as to the [331] community of goods, and decides that a husband, an alien by birth, but long domiciled in France, who marries, without contract, in that country, a Frenchwoman, is considered to have assented to the legal community of goods established by the French law, notwithstanding the fact that his domicile is unaccompanied by an authorization from the Government, necessary to an alien to establish his domicile; such authorization, which is requisite to enable an alien to enjoy all the French civil rights, is not necessary to constitute the community of goods which is governed by the *jus gentium*. Both these cases are of the first importance, as showing the principle on which the French Courts act, with reference to civil as distinguished from personal acts. Then the witness gives his opinion in much the same language as the others upon the case now under discussion. He says, "It is my opinion that an English lady, a single woman, or the widow of a person neither French nor English, could not, by mere residence in France, but she could, by taking up her principal residence in this country, and manifesting an intention of permanently remaining there (the two conditions must go together), establish a domicile in France. The law does not determine the length of residence necessary for that purpose. That is a point to be appreciated by the Judge, among the circumstances of the case leading him to his decision."

Thus much for the witnesses on the law of France, on this point, who have been examined by us, all of whom give their opinions, justified by the authority of decided cases, that a domicile may be acquired in France without the authorization of the Government, provided by Art. 13, of the Code Napoleon. The Will, [332] therefore, should have been executed according to the French and not the English form, for it is an established rule, that the validity or invalidity of a Will relating to personal property, is to be determined by the law of the country where the deceased was domiciled at the time of his decease, *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 373), *Craigie v. Lewin* (3 Curt. 435), *De Bonneval v. De Bonneval* (1 Curt. 856), *Anderson v. Laneville* (9 Moore's P.C. Cases, 325), Story's "Conf. of Laws," sec. 465 (2nd Edit.). It is true that a contrary doctrine was held in *Collier v. Rivas* (2 Curt. 855). In that case the Testator died domiciled in Belgium: he left certain testamentary papers, executed, not according to the forms required of Belgian subjects, but according to the English law: the law of Belgium determining,



under the particular circumstances of the case, the validity of testamentary instruments by the law of the Testator's domicile of origin, the Court of probate pronounced in favour of the papers, on the ground that they were valid instruments by the law of this country, in which the deceased was previously domiciled. That case, we submit, is questionable, and upon investigation cannot be supported; it is against principle and the weight of authority as laid down in *Stanley v. Bernes* [3 Hagg. E.R. 373]. The Court below decided that the deceased was *de facto* domiciled in France by the *jus gentium*: if that were so, the Will, not having been executed in conformity with the law of France, is invalid, yet the Court grants probate of a Will in English form made by a domiciled Frenchwoman! There is no doubt that the Court below rightly determined that the deceased was domiciled in France, but then [333] it had no authority to decree probate of an instrument made in English form. The law of a foreign country upon any subject is a matter of fact to be ascertained by the evidence of witnesses versed in that law. The principles applicable to this subject are laid down in the case of *The Earl Nelson v. Lord Bridport* (8 Beav. 527), *Whicker v. Hume* (13 Beav. 376), and they must regulate an English Tribunal dealing with foreign law. The inference deduced by the learned Judge from the authorities referred to in support of the position that authorization by the French Government, unless the party be naturalized, was necessary to establish such a domicile in France, as to give the power to make a Will, is directly opposed to the case of *Anderson v. Laneville* (9 Moore's P.C. Cases, 325), decided by this Court, and to the doctrine and authorities laid down by writers of authority in France, and the decisions of the French Courts. With regard to any other domicile than a French domicile, there is no sufficient evidence of the marriage to enable the Court to fix the deceased with an Italian domicile. It is indeed against proof, for the deceased herself denies it; and except the assumption of the name of "Allegri" for "Calcraft," and that, too, many years after the alleged connection with Allegri, and his supposed death, there is no pretence for supposing that the lady was ever married at all.

Dr. Jenner, on the same side.—The decision of the case in the Court below is made to depend on the construction of the 13th Article of the Code Napoleon. That Article is declaratory. It [334] says, "the foreigner who shall have been admitted under the authorization of Government to establish his domicile in France, shall enjoy all civil rights so long as he shall continue to reside there." The question then is, is testacy such a civil right as requires the authorization of the Government to make valid its exercise? All the foreign witnesses we have examined say not, and the authorities cited bear them out, *Quartin's* case, which was not before the Court below, but is referred to in *Connolly's* case. It is a decision of the Court of Cassation, reported by Dalloz, 1847, vol. i. p. 273; though relating to a Will in a holograph form unknown to our law, it is strongly in point upon this question. The summary, or marginal note as we should call it, contains the principle of the decision. It decides that the rule, "*locus regit actum*" applies to a holograph Will: consequently, the validity of these Wills is dependent on the law of the country where they are made, and not on the personal statute of the Testatrix, Code Civil, 999. Thus a holograph Will made in France by a foreigner is valid, although the personal law of that foreigner would not authorize that form of Will. Now, it appears from the report of the case, that *Quartin* was an Englishman without having obtained any authorization to entitle him to the rights of a French citizen; but the Will being in a form such as the law of France allowed, and the parties interested under it being foreigners, the Court admitted it, though contrary to the law of England, and decided upon the principle of "*locus regit actum*," that such Will was valid. The witness Blanchet says distinctly, that he has known, from his own experience, many cases in which it has been held that "a fixed residence, [335] joined with an intention of residing, is sufficient to confer a domicile on a foreigner." That was *Connolly* and *Breul's* cases, already referred to. The question regarding the effect of Article 13 of the Code Napoleon, on the domicile, is strictly one of foreign law, and the law applicable to it must be proved as a fact, as was done in *Collier v. Rivaz* (2 Curt. 859), *Dalrymple v. Dalrymple* (2 Hagg. Const. Rep. 58, App. p. 17), *Whicker v. Hume* (13 Beav. 376): this we have done by our witnesses and authorities, the whole weight of whose testimony is against the position contended for, namely, that the authorization of the Government is necessary to create

a legal domicile in France. The domicile *jure gentium* is complete without such authorization, and the consequence of such domicile is, to require that a Will be made according to the law of the domicile, namely, the French law, and, therefore, that this Will, which is in the English form, and executed according to the solemnities required by the English law, cannot be maintained. We are entitled under such circumstances to administration as in case of intestacy. We lay no stress upon the Italian marriage. The Court below treated it as not sufficiently proved. If there is any foundation for it, the domicile would be Italian not French, and then the Will in question would be equally inoperative.

The Queen's Advocate [Sir John Harding].—Any question regarding the Italian marriage may be dismissed at once. The learned Judge of the Court below was clearly of opinion, that there was not only no proof, but that the declaration of the deceased to the Respondent, Freeman, that no such [336] marriage had ever taken place, was in the circumstances in evidence conclusive against it. Now, the case stands thus. The Appellant's argument is, that the Court below having decided that the deceased was *de facto* domiciled in France, was bound by the law of England to decide that the Will was valid or invalid by the law of France, it being an established rule that a Will is valid or invalid according to the law of the country of the domicile. That, however, is an assumption of the very question at issue, for if it be granted that the domicile was *de facto* in France, then it must be proved that the effect of such domicile is to give the party power to make a Will, and that is clearly not the case, unless the domicile is accompanied by authorization. For the purpose of testacy, therefore, the *de facto* domicile is worthless, and is no domicile at all. The Will, therefore, made as it is in the English form, at a time when the Testatrix had unquestionably an English domicile, is, as the Court below has held, entitled to probate. The law regulating Wills, when affected by a foreign domicile, is to be found in Williams "On Executors," vol. i. pp. 269, 275 (1st Edit.), 1 Jarman "On Wills," pp. 5, 6 (1st Edit.), Story, "Conf. of Laws," sec. 468 (2nd Edit.), citing *Desesbats v. Berquiers* (Binney's Rep. 336), Phillimore "On Domicil," p. 18, 4 Burge, "Comm. on Col. and For. Law," p. 316. *Collier v. Rivaz* (2 Curt. 855), *Maltass v. Maltass* (1 Robert. 67), *Croker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 339), *Pottinger v. Wightman* (3 Meriv. 67), *Frere v. Frere* (5 Notes of Cases, 592), *Hoskins v. Matthews* (24 Law Times, 231; S.C. on appeal, 25 Law Journ., ch. 689), are all [337] cases in point. Here there is no evidence of a fixed intention not to return to England. It is not enough that there should be an intention to make the foreign country resided in a future domicile, *Munro v. Munro* (7 Clk. and Fin. 877); there must be an absolute abandonment of the domicile of origin, *De Bonnaval v. De Bonnaval* (1 Curt. 856), *Craigie v. Craigie* (3 Curt. 435); the acquisition of foreign property is not sufficient, *The Attorney-General v. Dunn* (6 Mee. and Wels. 511). There is no authority for holding that the property of a British subject dying intestate in a foreign country, even if domiciled there, is to be distributed according to the law of that foreign country, or that if a British subject be domiciled in a foreign country, he may not make his Will according to the law of the country of his allegiance and not of his domicile. This has been decided upon questions of legacy duty, *In re Ewin* (1 Crompt. and Jerv. 151), *Thompson v. The Advocate-General* (12 Clk. and Fin. 1). The law regarding the revocation of Wills by change of domicile alluded to by Story, "Conflict of Laws," ch. xi. sec. 472 (2nd Edit.), quoting John Voet, Ad. Pand., tom ii. lib. 38, tit. 37, sec. 34, is unknown in this country. The Statute of Wills, 1 Vict., c. 26, makes no provisions for revocation by change of domicile. Such mode of supposed revocation is quite novel. The only revocation provided by that Statute is by the publication of another Will or Codicil, or by destruction of the existing Will, as there indicated. But here there is no foreign domicile either *de facto* or *de jure*, there was no intention manifested *exere patriam*, no proof of *animus non revertendi*. The ques-[338]-tion of the effect of a French domicile is doubtless one of foreign law, and to be proved as a fact. But, I deny the position insisted on, namely, that no authorization was necessary to enable the deceased to make a Will according to the French form, or that the witnesses examined on the other side, or the cases cited by them, have proved such a proposition. The case proved is not the case pleaded. All the witnesses examined admit that the question of testacy, as depending on authorization, is a disputed point.



Domicile, when spoken of in France, means domicile under the Code Napoleon. The opinion given by Frignet, that the Will of a foreigner made in France must be made conformably to the laws of France, is not well founded: and the case of *Browning v. De Veine*, which he cites, is not an authority for such a proposition. It is diametrically opposed to the spirit of the Code Napoleon, and contrary to the privilege expressly given by Article 999 of that Code, which allows a Frenchman, though domiciled in a foreign country, to make his Will conformably to the laws of his own country. There is no distinction between testacy and intestacy. Pothier, *Traité de Com.*, tit. 160, shows, what the law was previous to the Code Napoleon. Then as to the evidence produced by us, we, too, have examined professional witnesses, whose testimony is unimpeached; they are all gentlemen of eminence and standing in their profession. Let us see what they say to the propositions contended for. The first is Marie, an Advocate of the Imperial Court of Paris, late Minister of Justice. He says: "I have attentively and deliberately considered the state of facts contained in the articles of the allegation now read and translated to me by the interpreter. According to my opinion, the party de-[339]-ceased referred to, was not, by reason of the premises just read and translated to me, ever lawfully domiciled in France, so as to have acquired a domicile of succession according to the laws of that country. I say that she had not a legal domicile." He then takes the distinction between the domicile of a person in the ordinary and in the legal sense, the *de facto* domicile and the *de jure* domicile, in the latter of which the Article 10, of the Code, relating to the opening of the succession, applies, and he refers to Articles 102, 103, 104, and 105, in confirmation of his view. He then refers to the 11th and 13th Articles, observing that by the terms of these Articles, taken together, there are two cases, and only two cases, in which a foreigner can enjoy civil rights in France, or, as he expresses it, "Will obtain there a legal domicile:" first, the international reciprocity; second, the expressed authority of the Government; and without these two the foreigner can only have a *de facto* domicile. He states that when these Articles of the Code Napoleon were under consideration, M. Gary, Orator of the Government, said, "A foreigner cannot establish a domicile unless he be admitted thereto by the Government." That at the period of the 18th *prarial*, year 11, the Council of State in a decree (sanctioned the 20th), in interpreting the Article 13, made use of this general formulary: "Is of opinion that in every case where a foreigner wishes to establish himself in France, he is bound to obtain a permission;" and he cites MM. Richelot, Delvincourt, Duranton, and Pardessus, who all, in reference to these Articles, have given it as their opinion, "that a foreigner cannot give to himself a domicile in France." He cites also the opinion of M. Serrigny, a professor of the school of law at [340] Dijon, given in vol. i. p. 260 of his works, that a foreigner cannot, unless authorized to establish his domicile in France, participate in the right of common for his firewood; and he further cites three decrees of the Court of Paris, reported in the *Journal du Palais*, vol. i. 1843, p. 67, and vol. ii. 1844, p. 324, the first of which contains the following *motif*. (ground of decision): "Whereas the Princess Poniatowska is a foreigner, and does not prove that she has a domicile in France, established according to the Article 13 of the Code Napoleon;" the second, the Court says, "Whereas a prolonged residence, and even a marriage contracted in France, are not sufficient to confer the rights arising from the establishment of a domicile which can only be effected on the condition declared by Article 13, that is to say, with an expressed authority (authorization);" and the third, a similar decision of the Court of Douai, where the Court said, "A residence more or less prolonged cannot constitute a legal domicile, since, according to the disposition of the Article 13, a foreigner cannot acquire a domicile in France, unless by, and in virtue of, an ordinance of the King." Upon the authority of these cases, and in accordance with the law, the opinions of writers and the decisions of Courts of Justice, the witness comes to the conclusion that without such authority to establish his domicile, a foreigner cannot acquire civil rights, or a legal domicile which implies the possession of such rights, and he states that in his opinion the deceased had not acquired a domicile of succession according to the laws of France. Being interrogated with regard to Thornton's case, decided by the Court of Cassation, and reported in the *Journal du Palais* (New Edit.), 7th November, 1826, he says,

[341] "It was decided in that case that Thornton, an Englishman, was domiciled in France by authorization of the French Government, and was, therefore, bound to conform to the laws of France, both in the form and matter of his Will;" and he again refers to the terms of the 13th Article of the Code Napoleon, as the foundation of his opinion. Onslow's case he excepts from the operation of the Code Napoleon, the domicile having been acquired before its promulgation. When examined upon Connolly's case, he denied its authority for the position contended for, and observes that it was decided without reference to the Article 13 of the Code Napoleon, and upon its own peculiar circumstances, which were exceptional. Blanchet, an Advocate of the Imperial Court at Paris, is the next witness examined by us: he states his opinion like the other witness, upon the admitted state of facts, that the deceased was never legally domiciled in France. He states the law of France as to domicile previous to the Code Napoleon as derived from the Roman law, which, where any doubt exists, refers the domicile to that of origin, and he cites two instances of such decision. His reasoning and conclusions are in direct conformity with the previous witness. He, too, is referred to Thornton and Onslow's cases, and takes the same view of both. He disputes the soundness of the decision in Breul's case, and says, "I could produce many cases, in some of which I have myself pleaded, in which the French Courts have decided just the contrary to what is suggested to have been the decision in that case." He says with regard to Connolly's case, "From the grounds for their decision expressed by the Court, it is apparent that it was the circumstance of French interests being af-[342]-fected (which interests the Court declares itself obliged to protect), which caused the decision to be as it was, and if the parties interested had all been foreigners, the Court would have decided itself to be incompetent to entertain the question." He is referred to Lloyd's case, and admitting the facts regarding it, and the correctness of the report, he takes exactly the same objection to its authority, and for the same reasons as he urged against Connolly's case. *Coin de Lisle*, another Advocate of the same Court, is of the same opinion regarding the domicile of the deceased: he says, when asked if she had acquired such domicile, emphatically, "No," and adds, "I will divide the ground of my opinion into two parts. The first part is, that a foreigner never can acquire a domicile of succession in France, except in conformity with Article 13 of the Code Napoleon. The second part is, that, laying aside the rule laid down by the said Article 13, the facts alluded to do not sufficiently establish an intention on the part of the deceased not to die an English subject. So that he is clearly against the domicile both on the law and facts of the case. He says, the first part of his proposition will require long developments, and goes very minutely into an examination of the previous and subsequent articles on domicile in the Code Napoleon. He says, previous to the Code there was no general law relating to domicile, hence the word "domicile" was equivocal, and frequently indicated a mere residence; and refers to its use in that sense in the law of 30th of April, and 2nd of May, 1790 (Coll. of Duvergier, vol. i. p. 187), and previous to the Code Napoleon, *ib.* vol. xiv. p. 316, *ib.* vol. xvi. p. 391, *ib.* vol. lxix. p. 415; he cites also the definition given by Nicias Gilliard, in his [343] "*Requisitoire*" of the 5th of March, 1851, which is to be found in Dalloz (Coll. vol. li. Pt. I. p. 39, n. 1. coll. 2. *Aliena*). Having examined the law, as laid down by these authorities, he passes on to the decisions of the Courts, examining those decisions; first, with reference to the freedom from arrest conferred by the Code Napoleon, which is essentially a civil right. Pardessus, "*Treat. on Com. Law*," No. 1524. Troplong, "*Comm. on Personal Arrest*," p. 378, No. 496, citing the case of the Princess Poniatowska, 11 Sirey, Pt. II. p. 455, which decided that a foreigner residing in France and who pays there a personal contribution, is not considered domiciled there, if he has not obtained the previous permission of the Government. Consequently, he is subject to arrest for damages intervening in a commercial matter in favour of a Frenchman against him, Code Napoleon, 13 Law, 10th September, 1807; and he cites a variety of cases to the same effect, from the volumes of Sirey, from all of which he insists that it results that the authorization of Government is necessary to create a domicile in France. For the second part of his proposition he examines the evidence, and concludes that there was no fixed intention on the part of the deceased to establish herself permanently in France. He afterwards, upon interrogations, admits the definition of



"Domicile," by Pothier, as "*le lieu où une personne a établi la siège principal de sa demeure et ses affaires*;" but observes that definition was given before the promulgation of the Code Napoleon, and was applicable to the then existing state of government in France; and he says, "To enable me to answer the question, whether, with regard to the circumstances which constitute domicile, as defined by Pothier, the [344] French Courts would adopt the general principles of the law of nations which are adopted in England, and other countries, I ought to know how far those general principles are adopted in England and those countries, which I do not. I will add further, in considering the general spirit of our French legislation, that this spirit proves that we frequently reject the rules of the law of nations;" and he goes on to say, "I form my opinion that such domicile—that is, domicile as defined generally by writers on international law—is not, by the law of France, a sufficient domicile to render the estate of a deceased foreigner, who had such domicile, subject to the French law of succession, on the ground that the law of succession is purely a municipal law, '*Ler quae pertinet tantum ad jus civile, non ad jus gentium*.'" He is asked as to his acquaintance with Thornton's, Onslow's, Breul's, Connolly's, and Lloyd's cases, of all which he takes the same view, and argues against their application as the former witnesses. Now, *Coin de Lisle* is a most material witness, and his whole examination is most important, as proving the construction put by the French authorities, writers as well as Courts of Justice, on the 13th Article of the Code, and the term "Domicile." Then there is another French witness, Hebert, who is also an Advocate of the Imperial Court of Paris. He is of the same opinion as to the acquisition of a French domicile, *de facto*, by the deceased as the other witnesses, and he examines the circumstances in evidence upon that point with great minuteness; upon the question, whether by the French law the succession is governed by the place of domicile, or whether, where a foreigner, as in this case, has been neither naturalized or authorized to establish a domicile in [345] France, by the law of his own country; he argues, that though the succession to moveables belonging to foreigners has been allowed to be opened even when the foreigner was not domiciled by reason of the *forum*, yet as to the form of acts it is different, the rule in such case being "*locus regit actum*," and he quotes in support of his opinion, *Zoezius ad Pandectas*, tit. "*qui Testamenta facere possunt*," No. 49, and the following portions: Consultations, vol. iii., Consultation 341. Paul Voet, *De Statutis*, sec. 9, cap. ii. iii. and ix. *Vinnius ad Instituta*, B. ii. vol. x. No. 5. Cochin, vol. i. p. 72, *ib.* vol. v. p. 697. Boullenois, "Dissertations," p. 6. Ricard "On Donations," Pt. I. cap. v. vol. i. No. 1286, and following. Merlin, *Répertoire*, Verbo "*Loi*" par. 6, No. 8. Verbo "*Testament*," sec. 2, par. 4, No. 1, Art. 3, Toullier, vol. x. No. 119, *ad notam*. Decree of the Court of Cassation of the 30th of November, 1831 (Sirey, vol. xxxii. Pt. 1. p. 52). Decree of the Court of Rouen, of the 21st July, 1840 (*Mémorial du Répertoire de l'Enregistrement*). Felix's Treatise on International Law, B. ii. tit. i. cap. i. No 73 to 79. He takes the same view, varying only in terms, of the cases already cited and put in evidence and commented on by the other witnesses. A fifth witness, De Vatismesnil, also an Advocate of the Imperial Court of Paris, confirms and supports the view taken by the other witnesses: as, however, he does not adduce any fresh authorities, it is not necessary to do more than refer your Lordships to his deposition both on the articles and to interrogatories. Then what are the propositions we contend for in this case, and which we say are fully established by both the evidence and authorities referred to? First, we [346] say that irrespective of the law of the Code Napoleon, the facts of this case do not found a domicile *de facto*, according to the law of France previously to the Code Napoleon. It required authorization of the Government. *In re Adam* (1 Moore's P.C. Cases, 460). Second, that according to the present law of France, there can be no domicile for purposes of testacy or succession, except under the provisions of the Code Napoleon, *Whicker v. Hume* (13 Beav. 366), namely, first, by *authorization du Roi*, as required by the 13th Article of the Code Napoleon: or secondly, by naturalization. In *Laneuville v. Anderson* (9 Moore's P.C. Cases, 325), the objection to the want of the Testator obtaining the authorization of the Government was not pleaded. It is not, therefore, an authority against us. Third, we say that the law respecting testacy is in the same category with the law respecting succession: that testacy and succession belong to the *Droit Civil* and not the *Droit naturel*, or the *Droit des gens*. Then we say,

that the only decision directly applicable to this case is the decision in Lynch's case (Sirey's Rep. 1851, 2, 791), and that is in favour of the parties seeking probate in this country: and that this position of law insisted upon by the parties claiming probate, is further proved by the fact that the converse is established by the case of *Thornton v. Curling* (Daloz's Rep. 1827, 249), decided by the French Tribunals. All the cases and all the authorities in the text-books show, that where a domicile has not been acquired by authorization, the law of the domicile of origin of the foreigner, notwithstanding an international domicile by residence, determines the form in which a Will is to be made, and how the estate in [347] case of intestacy is to be distributed. *The Attorney-General v. Dunn* (6 Mee. and Wels. 511), *Maltass v. Maltass* (3 Curt. 231, 1 Robert, 67), *Collier v. Rivaz* (2 Curt. 855), *Crocker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 339), the only exceptions being, when an interest in a French subject intervenes, or where the right claimed is an international right. The question is one entirely of French law, and the authorities show that according to the law of France no foreigner can acquire a domicile until he has the authorization of Government, so as to enable him to bequeath his estate by Will. The Duchess of Kingston's case (Coll. Jurr. 323).

Sir Fitz-Roy Kelly, Q.C.—There is no dispute in respect to the facts of the case. The whole question is, what are the legal consequences and effects of those facts? Here is a Will valid according to the English Statute of Wills, 1 Vict., c. 26, impeached on the ground of the acquisition of a foreign domicile, which, it is contended, renders it essential that the Will should have been made conformably to the law of the domicile. It is not distinctly stated when the foreign domicile was acquired, whether at the time of the making of the Will, or at the death of the Testatrix. If the domicile was complete at the time of making the Will, it would be an important element in the case, involving the question, whether a Will made as required by the law of the then domicile can be revoked by the acquisition of a foreign domicile after its execution, or revived by the adoption of the original domicile. It is not, however, necessary to [348] argue these questions. In France, the law of succession decides the domicile, and, to use the language of Dr. Lushington, in *Maltass v. Maltass* (1 Robert, 72), "when we speak of the law of domicile as applied to the law of succession, we mean not the general law, but the law which the country of domicile applies to the particular case under consideration." The question, then, is, what is the law of domicile in France as to this point? There are three kinds of domicile in France. The first and highest is domicile acquired by naturalization, which carries with it all the political as well as civil rights of a French citizen. The second is domicile acquired by residence, and accompanied with authorization which confers no political, but gives all civil rights, and among these testacy and intestacy. The third is domicile acquired according to the *jus gentium* by residence without any *animus revertendi*. Of these different kinds of domicile, the two first alone confer the power of making a Will, or regulate the succession. The exceptions prove the soundness of the rule, for they apply only where French subjects or French interests are concerned. This Court makes the law of France, in a case like this, part of the law of England. *Dalrymple v. Dalrymple* (2 Hagg. Con. Rep. 58), and the principles of that law are well expressed by our witnesses, Blanchet and De Vatesmesnil. The former witness says, "The right of testating is a personal right, which follows the foreigner the same as the Frenchman. Wherever he travels or resides, it appertains to the right of nations, to the international law as much as the civil law. It would not be rational to impose, in an absolute manner, on a traveller, or a mere re-[349]sident, the obligation of making his Will in the form and in the language of a country whose laws and language may be quite unknown to him; or of which the imperfect knowledge which he might have, or conceived himself to have, might lead him into error, give rise to nullities as to form, and lead him to express by his words intentions contrary to those he might really have. The French law could not admit a system which would involve such consequences. The Article 109 of the Code Napoleon enables a Frenchman who is in a foreign country, to make his Will by an act under private signature (*acte sous signature privée*), in conformity with the Articles 970, or by an authentic act with the forms which are in use in the locality where that act is drawn. The law is in unison with reason, and with the civil law, and the law of nations; it takes into account all circumstances, physical, moral, and intellectual, in which a traveller, or a resident in a foreign



country, may be placed. The law gives him the alternative of making his Will, according to the form in use in the country where he may happen to be, if he be conversant with its language and laws, or in the French form if he can, or chooses to adopt it in preference. In fact, in the eyes of the French law, the French form is and must be considered preferable: it is only in a subsidiary way that it points out, and allows the foreign form to be made use of in the making of a Will. With regard to the foreigner neither naturalized nor authorized to establish his domicile in France, whether a traveller, or a mere resident, the decision ought to be the same, for the same reasons, in reversing the positions. There is no doubt, that, if there be an impossibility for the foreigner to make his [350] Will in the forms and language of his own country, of necessity he must adopt the form in use in the country where he is, and such Will will be valid; but, if the difficulty and inconvenience of expressing and writing in a foreign tongue, if the complete ignorance of the laws and customs of that country compel him to have recourse to the forms in use in his own country, where his Will is to receive its execution, how could it be declared in either country that such a Will would not be valid? It would, in effect, be declaring that generally a traveller is to die without a Will, *ab intestato*: consequently the Will in question in this matter is valid, if it be made in conformity with the laws and customs in England." The other witness, De Vatesmesnil, says, "The right of transmitting personalty (personal property), whether by Will or *ab intestato*, is a right derived from the *statut personnel* ('*Mobilia sequuntur personam*.') Our Code adopts this principle in Article 3 of our Code Civile (now called again Code Napoleon), which contains two enactments: the first is, that real property, of which even foreigners are seised, is governed by the law of France; from which it must be inferred that personal property is not so governed; and the second is, that the law relating to the *status*, and the capabilities of persons, governs Frenchmen, even when residing in foreign countries; from whence must be inferred from the principle of reciprocity, that the same principle applies to foreigners residing in France. The authorities on the subject are as follows: MM. Merlin, Toullier, Demolombe (Professor of Law), Duranton (Professor of Law), and Felix, in his Treatise on International Law, No. 61. There is, however, one exception to this principle, which occurs when a foreigner [351] has obtained the authorization of Government to establish his residence in France, conformably with the Article 13 of the same Code, which says, 'The foreigner who shall have been admitted by authorization of the Sovereign to establish his domicile in France, shall there enjoy all the civil rights so long as he shall continue to reside in the country;' and the reason of this exception is, that the foreigner in this case by his own will and the concurrent consent of the Sovereign has subjected himself to the *statut personnel* of a Frenchman, and has consequently renounced the *statut personnel* (the municipal law) of his origin, so long as he is under the application of the Article 13; but in no other situation can a foreigner be withdrawn from his *statut personnel*, relating to succession of his personal property, however long may have been his residence in France. There are many decisions of the Courts of Justice affirming the above principle, and one in particular of the Imperial Court of Paris, of the 13th of March, 1850, in the matter of Lynch, which says as follows: 'Considering that Francis Lynch is born in Ireland, and had there his domicile for a long period,—considering that he was not naturalized a Frenchman, nor even had obtained the authority from the Sovereign to establish his domicile in France, that, therefore, he died a British subject,—considering that his fortune is wholly personal, and, therefore, governed by the *statut personnel*, that is to say, by the law of England, which followed him on to French soil, as the law of France follows the Frenchman on foreign soil, and continues there to govern his rights and his *status*' (Dalloz's Journal of the Court of Cassation, vol. lii. Pt. II. p. 80). It would be useless, in this case of Calcraft, to inquire, [352] whether the decision would be similar, if it involved French interests, either of parties or of government." The testimony of the witness, Coin de Lisle, is to the same effect: he says positively, "I do mean to give it as my opinion of the laws of France, that no foreigner can obtain a lawful domicile in France, so that the succession of his property shall be regulated by the law of that country, unless he shall have received the express authorization of the Government of France. That is my positive opinion. It is my opinion that by the laws of France, a foreigner cannot obtain a domicile of succession in France, by fixing his abode there with the intention of permanently remaining there. I do

not deny that Pothier has defined domicile as '*le lieu où une personne a établi le siège principal de sa demeure et de ses affaires*,' and I should say the same: but Pothier said so before the time of the Code Civil, and with reference to Frenchmen, at the time when the territory of France was under the jurisdiction of different customs; consequently he meant only to say that, if a Frenchman born within the operation of the customs of Paris, had established his permanent abode in Normandy, his succession would be opened in Normandy, where he would have his principal establishment. Pothier never meant to say, that a Frenchman, going to settle in England and having no longer an establishment in France, would have his succession (*verroît sa succession*) liable to be opened in England; on the contrary, he knew that the succession of a Frenchman who had died in London, would be opened in France at the place and subject to the customs of his domicile of origin." All our witnesses are uniform on this point, and they all give authorities in support of their opinion. It is [353] impossible to distinguish the case of *Collier v. Rivez* (2 Curt. 855) from that now before the Court. The law of domicile, as affecting the succession, is fully considered and discussed in the judgment of *Maltass v. Maltass* (1 Robert. 72). Then as to the foreign jurists, besides those already referred to, there are numerous authorities who all concur in the view I am taking of the French law of succession. Nicias Gaillard, *Dalloz, Jurisprudence Générale* 1851, 1st part, p. 38; Pothier, *Œuvres de*, vol. vi. p. 57 (No. 21). Coin de Lisle, "*Commentaire Analytique du Code Civil*," p. 35; Troplong, "*Le Code Civil Expliqué*," vol. xviii. p. 378; Pardessus, "*Cours de Droit Commercial*," p. 773; Duranton, "*Cours de Droit Français*," vol. i. pp. 95, 291; Leget, "*Code des Étrangers*," p. 298; Demolombe, "*Cours de Code Civil*," lib. i. tit. I. c. iii. p. 332 to 335; Demangeat, "*Condition civile des Étrangers en France*," p. 369; Zachariæ, "*Cours de Droit Civil Français*," vol. i. pp. 278, 280; Okey, Dig., p. 107; Merlin, *Rep. de Jur.*, Art. "*Étranger*," sec. x. No case can be cited to show that a Will made in the English form in France has been declared void on that account. All the cases which have been cited from the French authorities go clearly to establish the proposition, that nothing but authorization can enable the law of France to govern the distribution of property belonging to a party domiciled in France, but they do not prove that a person domiciled by the *jus gentium*, or not domiciled with authorization, is not at liberty to make a Will, according to the form of the domicile of origin, and that such Will will not be valid and effective.

[354] The Attorney-General [Sir Richard Bethell], in reply.—The French domicile, *de facto*, is admitted: it is too strong to argue that point: the real and only question is the civil domicile. It lies in the narrowest compass, and is in truth but the distinction between the province of national law and the province of municipal law to determine the domicile. There is no diversity of opinion as to what constitutes a domicile according to the principles of national law. "*Mobilia sequuntur personam*," is the universal maxim; the distribution is by the *forum* of the home: testacy, or intestacy, is according to the law of the domicile. *Stanley v. Bernard* (3 Hagg. Ecc. Rep. 373); *Croker v. Marquis of Hertford* (4 Moore's P.C. Cases, 349); *Price v. Dewhurst* (4 Myl. and Cr. 76); *Hare v. Nosmyth* (2 Add. 25). Courts of justice will receive with distrust any statement that the municipal law of a foreign country is at variance with the universal law of nations on the question of domicile. The municipal law may prescribe specific regulations regarding testamentary power, without interfering with or encroaching on the inherent right of the law of nations to determine the question of domicile. Testacy is the mere creature of municipal law, and may be varied in every country in the world. The municipal law of England regulates and decides on the validity of testaments and the execution of testamentary power. *Tatnall v. Hankey* (2 Moore's P.C. Cases, 342). There is no reason against the law of France doing the same. But it is said that part of such municipal law is, that a stranger, though domiciled *de facto* in France, cannot make a Will disposing of property in England without letters of authorization from the Government. [355] The French Tribunals may be incompetent to deal with such a Will, because they have no jurisdiction over the property, but that does not affect the domicile, which is a question beyond the power, as I apprehend, of the municipal law, or a foreign Court, to deal with, except according to the law of nations. But the *onus* of proving such to be the municipal law of France lies on the other side: it is a fact to be proved in evidence, that this has been attempted to be done by the cases, and deposition of witnesses, who have referred as part of their evidence to writings



of foreign and native jurists on the question. But admitting the application of all these, they go only to show what the municipal law of France is, not that that law on the general question of domicile is in antagonism to the law of nations. The best evidence of the variety of opinion on the subject in France is to be found from the fact that Merlin, one of the most eminent of modern French jurists, has changed his opinion no less than three times upon this very subject. In the edition of 1812 of his works, alluded to by one of our witnesses, he modified his former opinion: while, in that of 1827, he says the French municipal law has not changed the law of domicile: from which the necessary conclusion is, that authorization is not necessary to the testacy of a foreigner domiciled in France, Merlin, *Rep. de Jur.*, Art. "Domicil" (Paris Edits. 1812 and 1827). The cases brought forward by us all tend to this conclusion. In the case of *Collier v. Rivaz* (2 Curt. 855), the conclusion was one of fact, not of law. The learned Judge introduced a distinction between a domicile of residence, and a domicile of succession. There is no soundness in [356] such a distinction, nor is there any authority for it. This case is the necessary result of that decision. In the Baron de Mecklenbourg's case, decided by the Tribunal of the Seine, on the 14th of March, 1856, and reported in the *Gazette des Tribunaux*, of the 16th of the same month, and upon appeal (*Le Droit*, 27th July, 1856), it was held that a "foreigner who has his principal establishment in France, is considered domiciled in France. It is, therefore, in France, that his succession is opened, and the French tribunals are competent to decide upon the difficulties which arise on the subject of the succession. It is not material that the *de cuius* was not authorized to enjoy these French civil rights, the legal enjoyment of these rights being independent of the question of domicile." Connolly and De Olivarez's cases, besides the authorities we have already cited, all go to the same conclusion. There is no necessity for authorization of the Government to enable a foreigner to be testable; the laws of France do not attempt to alter the universal law of nations as to the acquisition of a foreign domicile for such a purpose. The 13th Article of the Code Napoleon was enacted as a matter of favour to encourage foreigners to settle in France, at the time when the *droit d'aubaine* was in full vigour, and was intended to relieve foreigners from the disability which the law in that respect imposed upon them. But that Article, so far as regards testation, has become valueless since the law of the 14th of July, 1819, which abrogated the *droit d'aubaine*. Merlin, *Rep. de Jur.*, Art. "Domicil," s. 13, pp. 355-9, lays it down that a domicile could be acquired before the passing of the Code Napoleon, which has not made any alteration.

[357] Their Lordships' judgment was reserved, and was now pronounced by

The Right Hon. Lord Wensleydale (May 9, 1857).—Their Lordships have attentively considered the long and able arguments, which were addressed to them by the learned Counsel at the bar for several days, and they are now prepared to advise Her Majesty to reverse the sentence of the Judge of the Prerogative Court.

The principles which ought to govern their decision are few and clear.

The *onus* of proving that an instrument is the Will of the alleged Testator lies on the party propounding it. The Respondent has undoubtedly established a *prima facie* case by the evidence he has adduced of the due execution of the Will. The *onus probandi*, then, lies upon the party impeaching the Will, to show that it ought not to be admitted to proof.

The Appellant alleges that the supposed Testatrix was at the time of her death (for that is the material date), domiciled elsewhere than in England. The burden of proof of that fact unquestionably rests upon her. She must establish that the alleged Testatrix had lost her domicile in England: and if it is proved that she abandoned it and gained another elsewhere, and died in that new domicile, the *onus probandi* is then shifted, and it lies upon the party propounding the Will to prove that the law of that domicile was such as to authorize a Will in that form. If he fails in that proof the Will propounded cannot be admitted to probate.

That the law of the Testator's domicile at the time of making the Will, and of the death of the Tes[358]tator, when there is no intermediate change of domicile, must govern the form and solemnities of the instrument, can no longer be questioned. The maxim "*Mobilia sequuntur personam*," has long prevailed, and whatever the origin of that doctrine may be, whether it was derived from a fictitious annexation of moveables to the person, or from an enlarged policy growing out of

their transitory nature, it has (as Mr. Justice Story observes) so general a sanction among all civilized nations that it may now be treated as a part of the *jus gentium*, Story, "Conflict of Laws," sec. 380. It follows from this maxim that the post-mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, if he dies without a Will: and it equally seems to follow that if the law of that country allowed him to make a Will, the Will must be in the form and with the solemnities which that law required: and it was so decided in the case of *Stanley v. Bernard* (3 Hagg. Ecc. Reps., 373), which doctrine, we believe, has been generally approved, Story, "Conflict of Laws," sec. 468.

It is not of importance to discuss in this case, whether a Will, valid at the time of making it by the law of the then domicile of a Testator, would be avoided by his acquiring and having at the time of death another domicile, according to which it would be invalid: because upon the facts in evidence no change of domicile took place between the time of making the Will and the time of death. If the Testatrix was domiciled in France, in 1853, when she died, the evidence shows that such domicile had commenced in 1842. Whatever question might have arisen, if the deceased had died in 1842, [359] her subsequent residence for eleven years gave a character to her prior residence, and proved that the domicile had commenced at that time. Nor is it material, for the same reason, to consider the point urged by the Queen's Advocate, that by the 7 Will. IV. and 1 Vict., c. 26, sec. 20, no Will can be revoked except by another Will or Codicil, or by its destruction, as therein mentioned. Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, "Conflict of Laws," sec. 473), nor any that the Statute, 7 Will. IV. and 1 Vict., c. 26, applies only to Wills of those persons who continue to have an English domicile, and are consequently regulated by the English law.

Two questions, therefore, are to be disposed of in this case:—

First. Has the Appellant proved satisfactorily that the deceased, Madame Calcraft or Allegri, died domiciled in Italy, or in France, where the Appellant alleges that she was actually then domiciled?

Secondly. Has the Respondent established, to the satisfaction of their Lordships, that by the municipal law of the domicile at the time of death, the Will propounded was valid?

We proceed to consider these questions in their order.

As upon the first of them their Lordships concur with the learned Judge of the Prerogative Court in the conclusion at which he has arrived, it is not necessary to enter into much detail of the facts in proof.

The deceased was the daughter of an officer in the East India Company's service, born in the East [360] Indies, in 1795. She had, therefore, an Anglo-Indian domicile of origin. General Calcraft, her father, returned to England with her and her sister and mother, in 1805. The deceased resided with him as part of his family till 1825, and no doubt then her domicile was English. She left her father in 1825 or 1827, and travelled with her governess abroad, and went into Italy. Her father died in 1834, and her sister then joined her, and travelled also in Italy till 1837, when both sisters removed to Paris, lived together till 1840, in furnished lodgings, then in hired apartments in the Boulevard des Capucines, till the death of the sister, in September, 1840. She renewed from time to time, for short terms of years, the lease of those apartments, and died in them, without ever having quitted Paris, in September, 1853.

Whilst she was in Italy, she was said to have been secretly married to an Italian, named Allegri, and she went by the name of Allegri, from 1840 to the time of her death. But there was no proof of the actual marriage. It appears that at one time she confessed to Freeman, the Respondent, that she was not married, and their Lordships agree with Sir John Dodson, that the supposed domicile in Italy, as the country of her husband, is entirely out of the question.

The only matter to be considered is, whether she acquired a domicile in France. There are very strong circumstances in evidence to show that she did. These are, her residence in Paris for fifteen years, without any business or occupation in that place, and without ever quitting it: her taking her apartments on leases, and fur-



nishing them herself: her occasional declarations that she would never return to [361] England, and that she wished to be buried near her sister in the cemetery of Père la Chaise.

It is of no weight, in opposition to these facts, that her fortune was principally in the English funds and other securities here. It is, indeed, true, that her not procuring an authorization from the Government to fix her domicile in France, according to Article 13 of the Code Napoleon, hereafter to be noticed, and perhaps also the fact of making her Will in the English form, are some evidence that she did not mean to abandon her English domicile: but they are of little weight, as it is highly probable that she knew nothing of the provisions of the Code Napoleon, or of the necessity of making the Will in any but the ordinary English form. On the whole, their Lordships entirely concur with the learned Judge in his opinion that the deceased was domiciled, according to the law of nations, at Paris, both at the time of her death and the time of making her Will, if that is at all material: and we think it is not.

This domicile being established in evidence, the burden is thrown on the Respondent to prove that the Will, in the English form, is sanctioned by the municipal law of France. He must show upon the balance of the conflicting evidence in the cause, that the Wills of persons, so domiciled, in that form, are allowed by that law.

This is the important question, and the only one of any difficulty in the case.

Much evidence was produced of the law of France on both sides; the *viva voce* testimony of experts in the science and practice of the law, vouching and referring to the Code Napoleon decrees, and to known treatises. Some of those last have been since brought [362] forward and referred to without objection on either side, and their Lordships have to decide on the whole of this (for the most part) very unsatisfactory, confused, and conflicting evidence, whether they are convinced that this Will, executed in France in the English form, is valid.

On the part of the Respondent, five persons practising in the French Courts, stating themselves to be experienced in the law of France, were examined; on the part of the Appellant, three. It is to be lamented that from the very nature of the case we cannot satisfy ourselves by the personal examinations of those witnesses as to the weight due to each of them, and a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other. We are compelled, therefore, to decide the disputed question with inadequate means of judging of their professional eminence, their skill, and knowledge. It is to be remarked, speaking with all respect to those gentlemen, that the rule of international law which all English lawyers consider as now firmly established, namely, that the form and solemnities of the testament must be governed by the law of the domicile of the deceased, does not appear to be recognized, or at least borne in mind, by any of them. Nay, in *Quartin's case*, both the *Cour Royale* and the *Cour de Cassation*, expressly decided that the Will must be in the form and with the solemnities of the place where it is made, on the principle that "*locus regit actum*;" an error which is ably exposed in the opinion of M. Target in the *Duchess of Kingston's case* (*Coll. Jur.*, p. 323). The three witnesses called for the Appellant, Messrs. Frignet, Senard, and Paillet, all maintain the same doctrine.

[363] If this position were really true, the case of the Appellant would prevail, but the other witnesses do not maintain the same doctrine. Of the five experts examined for the Respondent, three, Messrs. Blanchet, Hebert, De Vatismesnil, all think that the Will, either in the form required by the law of the domicile of origin, or the place where the party dwells, is valid: a position which, by English lawyers, is certainly now considered to be exploded since the case of *Stanley v. Bernes* [3 Hagg. E.R. 373].

The whole of these five experts give their opinion that the deceased never was domiciled *de facto*, according to the law of nations, in France, upon the facts stated in the case. In that respect their Lordships have already intimated that they entertain a contrary opinion, and that circumstance, although it is quite consistent with their being right in their opinion of the law, a little diminishes the reliance to be put upon it.

These five witnesses all say, some less decidedly than others, that to gain a legal domicile in France the authorization of the Emperor was necessary. Some admit

that there are contrary *dicta* and decisions. The other three experts, those examined on behalf of the Appellant, give their opinion that to acquire a legal domicile, such as will cause the succession to open in France, the Imperial authorization is not necessary (Frignet, Senard, and Paillet), but most of these experts also admit that it is a disputed question.

This difference between the learned experts arises upon the construction of the 13th Article of the Code Napoleon, upon which we can form some opinion ourselves. It is to this effect:—"The fo-[364]-reigner who shall have been admitted by authorization of the Emperor to establish his domicile in France, shall enjoy there all civil rights, so long as he shall continue to reside there." It is said that the rights of testacy and succession are civil rights, and that a domiciled foreigner cannot enjoy those rights without this authorization. Pothier, in his treatise "*De la Communauté*," Pt. I. cap. I, art. 1, classes the right of testacy and succession among civil rights, which strangers have thought not to include domicile, and contracts among the "*droits des gens*," which strangers have thought to be included;\* and in his "*Traité des Testaments*," cap. 3, sec. 1, art. 1, p. 309, he says:—"Le testament appartient au droit civil, d'où il suit qu'il n'y a que ceux qui jouissent des droits de citoyens qui puissent tester," and, therefore, "*aubains*" are strangers not naturalized, are regularly incapable of bequeathing the goods they have in France.

The affirmative provision that every foreigner who shall be authorized to fix his domicile in France shall have all the civil rights, though it does not explicitly say so, no doubt means that the foreigner, to enjoy [365] all, must have that authorization; but it does not follow from that provision alone that he cannot enjoy any one or more of those rights without it: he may quite consistently with that Article have the power of testacy and the power of leaving his succession to devolve on his family.

But assuming that the 13th Article prohibits the exercise of any civil right to one who is domiciled, but has not an authorization from the Emperor, and, therefore, denies the right of testacy altogether, what is the consequence? Is it that the foreigner cannot make any Will at all of his personal goods, wherever situated, or only of his personal goods situated in France?

If the former is to be considered as the true construction, then the consequence is that a stranger, if he elects to domicile himself in, and dies in, France without authorization, loses his power of making a Will altogether, and his effects by the law of nations will not pass under his Will, according to the rule already stated. What rights his relatives would have is another question.

If he should be domiciled in a country where, on death, by law all his effects go to the Sovereign by a "*droit d'aubaine*," more extensive than that of old France, which applied only to personal effects within the kingdom, that law must prevail, and his Will would be of no validity, and his relatives, by the law of his domicile of origin, would lose all their rights. In this view of the 13th Article, this Will cannot be admitted to probate.

If the meaning is, as seems probable (see Merlin, Rep. de Jur., Art. "*Etranger*," sec. 11, Ed. 1812), that he shall have no power, unless so authorized, to make [366] a Will of personal effects situate in France, but he may for those elsewhere, still his Will, to have any effect, must be in the form and with the solemnities of his domicile, according to the general rule, otherwise it cannot be admitted to proof, and the property in France would not pass by it. So that upon any construction of this Article,

\* "21. Lorsque des étrangers, quoique non naturalisés mais domiciliés en France, sous une Coutume qui admet la communauté de biens, sans qu'il soit besoin de la stipuler, y contractent mariage, sans passer aucun contrat de mariage, la communauté légale a lieu entre ces personnes. Il est vrai que ces personnes ne sont pas capables du droit civil, qui n'a été établi que pour les citoyens, tel que le droit des testaments, des successions, du retrait lignager; mais elles sont capables de ce qui appartient au droit des gens, telles que toutes les conventions. Or, la communauté légale n'est fondée que sur une convention eue les personnes, qui contractent mariage, sont présumées avoir eue d'établir entre elles une communauté, telle que la loi de leur domicile l'établit, de laquelle convention, de même que de toutes les autres conventions, les étrangers sont capables."



on the assumption that the power of making a Will is one of the civil rights on which it operates, the Will in question is not valid.

There seems strong ground to contend that the restraint upon the power of testacy, and of the right of devolving personal effects upon relatives, is done away with altogether by subsequent legislation. By the law of the 14th of July, 1819, foreigners are entitled to succeed, and to dispose and receive in the same way as French subjects in all the extent of the kingdom. If a stranger can dispose of his personal property in France, or anywhere else by Will, why should he be the less able to do it, because he is domiciled in France?

Be that as it may, if the power of testacy is still restrained by the 13th Article of the Code Napoleon, and if the only effect of that Article is, that a foreigner may be legally domiciled, but yet not enjoy the civil right of making a Will, this Will ought not to be admitted to proof.

But it is then contended on the part of the Respondent, that by the law of France no domicile, for any purpose whatever, can be obtained there except by the previous authorization of the Government. The witnesses differ on this point, and it will be proper to take a short review of the decided cases and the principal text authorities cited at the bar on both sides, and it will be found that they, on the whole, [367] confirm the opinion that a domicile which regulates the succession may be obtained without such authorization.

And first let us examine the decided cases. These decisions are not treated with the same respect, and are not of so much authority in France, as the decisions of English Courts are in England. By one gentleman, Marie, there is said to be an adage that "the decrees are good for those who obtain them," and it is said that considerations of equity prevail too often in the decisions of the French Courts, and that they often vary. But we must consider these decisions, pronounced by sworn Judges, under their judicial responsibility, as of more weight than the opinions of Advocate witnesses, or even than some text writers. Of these decisions, part are inapplicable, as they relate, not to testacy or succession, but to civil rights, clearly such, which strangers, and even domiciled strangers, are not entitled to, unless they have the required authorization (such as the right to be free from personal arrest), D'Abaunza's case, the case of the Princess Poniatowska, and in Sirey, 1811, fol. 455, Dreunler's; some relate to rights of action in French Courts, as the case of Rowland and sons, (Sirey, 1844, p. 756, *ib.* 1848, p. 417), and Kirby and others' case (Sirey, 1853, p. 714), to which the mere domicile can give no right unless the authorization of Government be added; others, part of the cases cited, relate to contracts which belong to the *droit des gens*, which are impliedly governed by the law of the place of residence, independently of domicile, such as Lloyd's case, Breul's case, where domiciled foreigners were held bound by an implied contract to have a *communaute des biens*, upon the principle that the contracts of residents are impliedly made according to the usage of the place where they reside. The [368] case of D'Herwas is upon a question of contract. None of these cases have any bearing on the present. Those which have, are cases where the succession is held to be regulated by the domicile of the deceased, though such domicile was unauthorized by the Government.

The first is De Olivarez, in which it was expressly decided in 1854, by the Civil tribunal of Bordeaux, that a foreigner may acquire a domicile, without the authorization of the Government, so as to regulate the succession; that the question of domicile belongs to the law of nations, and the succession is regulated by it; and that the 13th Article of the Code Napoleon did not apply to such a case. There was an appeal to the Cour Imperiale, who expressly decided the same way, and that the 13th Article, requiring the Emperor's authorization, applied only to the acquisition of civil rights, and did not prevent the acquisition of a domicile by a foreigner, so as to regulate his succession.

The only observation to be made against the authority of this case is, that the parties consented to the Court winding up the account, and that the personality should be governed by the law of domicile, which the Court observed is the consequence of a principle generally inculcated by almost every author and admitted in law. We do not think that this consent weakens the authority of that decree. In this decision the previous authority of a decision at Riom, in 1835, is cited. It

was Onslow's case (Dalloz, 1836, 2, 57). Onslow, the deceased, had established himself in France, before the 7th of April, 1790, and before the promulgation of the Code Napoleon, and was entitled to the exercise of civil rights by virtue of that law, and, therefore, the 13th Article [369] did not deprive him of them; but the Court expressly decided that he might be domiciled notwithstanding the 13th Article, and that the authorization of Government was not necessary to a domicile which regulated the law of succession.

The next case cited was that of the Baron de Mecklenbourg, decided first by the Tribunal of the Seine, and afterwards by the Imperial Court of Paris (Le Droit, 27th July, 1856). The Court of First Instance at Paris determined that, though he had never had the authorization of the Government to enjoy civil rights, yet the legal enjoyment of those rights was independent of domicile, and the deceased being domiciled at Paris, his succession opened there. The Imperial Court reversed this judgment, on the ground that the deceased had never abandoned his domicile of origin, and that all his heirs were foreigners; and the Court appears to have mentioned the want of an application for an authorization to establish his domicile in France, as evidence that he never meant to acquire one there; no more. It does not say that the want of authorization at once put an end to the right of domicile.

In Lynch's case (Sirey, 1851, 2, 791), the fact of Lynch not being domiciled in France at the time of his death, but in Ireland, is the ground of the decision. Whether the fact of his not having ever obtained authority to establish his domicile, is used as evidence of having no intention to acquire one, or that he had no domicile for the want of it, is difficult to decide. The case cannot, at all events, be considered as contrary to that of De Olivarez.

The case of Connolly was also cited; it occurred in 1853. It is reported by the name of *De Veine v. Routledge*, in Sirey's Reports, 1852, and has been [370] referred to on both sides at the bar. It involves other points besides that of the validity of the Will. Madame de Veine, a natural daughter of the Testator, cited the legatees before the Civil Tribunal of Fontainebleau, to set aside the Will, as being void according to the law of France, and to have her share of the succession. That tribunal decided that Madame de Veine had not established her case as a legitimate daughter, and that the Testator having an English domicile, the Will was valid. On appeal the Superior Court reversed this decision. It seems that the Court held that the Testator was domiciled in France (though it is never stated that he obtained the authorization of the Emperor); that his succession opened there; that his natural daughter was legally recognized by him, and, being a Frenchwoman by marriage, had a right to claim a part of the succession; and the Will being invalid by the French law, not being in the proper form, Madame de Veine was entitled to recover in her suit. The Court add (incorrectly, as has been said before), that the form of the Will must be regulated by the law of the place where it is made.

Upon a review of these decisions upon the material question in this case, the effect of a domicile by the law of nations upon the law of succession, it is clear that the great weight of authority is in favour of the position, that the authorization of the Emperor is not necessary in order to establish a domicile for the purpose. There is no one decision that it is necessary, for it is by no means clear that Lynch's case so decides, and the case of Olivarez and the principles laid down in the other clearly support the opposite doctrine.

It remains for their Lordships to observe on the [371] text-writers referred to on both sides. The authority of Merlin has been cited on the interpretation of Article 13 of the Code Napoleon. It was referred to in the case of the Princess Poniatowska, as laying down the proposition that no domicile could be acquired without the authorization of Government. Sirey, 1811, p. 553; Merlin, *Répertoire*, "Domicile," Ed. 1824, s. 13, pp. 16, 17; *Répertoire*, Ed. 1812; "Etranger," s. 11, Ed. 1824; Art. "Etranger," s. 1, No. 6, p. 531; where he lays down that proposition, against the proposition of M. Proudhon. In the edition of 1830, this article has been rewritten, and a perfectly different view of the law taken. The question Merlin considers is, whether authorization is necessary to gain a domicile. He says it was universally allowed to be unnecessary before the Code Civil. He discusses the question for what purposes it was rendered necessary by the Code.



Certainly, he says, to enjoy the civil rights reserved to Frenchmen. He could not sue other strangers, not domiciled, upon contracts made with them in France or abroad, for he could not claim any privilege of exemption from the rule "*actio sequitur forum rei*." It is not required to render him liable to be sued in his domicile in France. It is not required in the computation of ten years, rendered necessary to obtain naturalization. He concludes that the Code has not changed the nature of the domicile at all. He refers to the *avis* of the *Conseil d'Etat* of the 18th *Prairial*, *An. xi.*, which was, that in every case where a stranger wishes to establish himself in France, he is in all cases bound to obtain the permission of the Government, and that these permissions being, according to circumstances, subject to modifications, and even revocations, cannot be determined by general rules.

[372] Merlin says, that this opinion was given in answer to a question to the *Conseil d'Etat*, whether the authorization by the 13th Article, giving the foreigner the power to acquire all civil rights, also gives the power of obtaining by Article 3 of the *Acte Constitutionnel*, *Primaire*, *An. vii.*, the rights of a French citizen; and he says, the answer is to be understood according to the subject-matter, namely, the question put to them, and that the expression "*en tous cas*" refers to the cases the subject of the inquiry. And besides, he says that this opinion was never inserted in the Bulletin of Laws, and did not bind the Courts of Justice, and was merely meant to govern the conduct of the Minister of the Interior with respect to foreigners who, having lived ten years in France, wished to be recognized as citizens; and he concludes by stating it as his opinion, that a foreigner who establishes his domicile in France without the permission of the Government, submits himself by that act alone to the jurisdiction of the French tribunals, acquiring by that act alone the power to marry in the place which he chooses for his habitual residence, and determines by that act alone the competence of the Judge who, after his death, takes cognizance of his succession that he leaves in France. This latest opinion of Merlin seems to be fully warranted by the reasons he gives, and to be perfectly satisfactory.

The statement of Legat, "*Code des Etrangers*," pp. 287, 288, founded on the construction of the same *arret* of the *Conseil d'Etat*, that a stranger, unless authorized, cannot have a domicile, appears not to be maintainable; nor the same statement by Demangeat, "*Histoire de la Condition Civile des Etrangers en France*," p. 369.

A passage was referred to in Zachariae, "*Cours de [373] Droit Civil*," Pt. I. ch. vi. p. 280, "That the establishment by a stranger of his domicile in France, with the authorization of the Government, has the effect of submitting his *succession mobilière* to the application of the French law." Of that there is no doubt, but it does not follow that it is not true, if he is domiciled without it. In the same treatise (p. 278), referring to a prior note (262), it is said that a stranger requires the same authorization to establish his domicile in France as to enjoy civil rights. He states that this opinion is corroborated by the *avis* of the *Conseil d'Etat*, 18-20, *Prairial*, *An. xi.*, importing that in every case where a stranger wishes to establish himself in France, he is bound to obtain the authorization of Government.

The satisfactory explanation given by Merlin, above referred to, does away with the authority of that opinion of the Council of State, and shows that no reliance can be placed on this opinion of Zachariae.

Troplong, in his "*Commentary*" (*Sur la Contrainte par Corps*, sect. 596), inquires who is a stranger domiciled in France, and says, that the 13th Article of the Code gives the answer:—"He who has received the authorization of the King to fix his domicile there, and by that right enjoys civil rights." He is speaking of the liability to arrest, *contrainte par corps*, and of that there is no question; it has no bearing on this case.

On the whole, then, on a review of all this evidence of the law of France, their Lordships are clearly of opinion, that it is not established, that for the purpose of having a domicile which would regulate the succession, any authorization of the Emperor was necessary; that a legal domicile for this purpose was clearly [374] proved, and that consequently, if the Testatrix had a power to make a Will at all, the Will in this form was invalid.

There are still two English cases to be noticed. The Respondent relies on

*Collier v. Rivaz* (2 Curteis, 855), in which Sir Herbert Jenner Fust decided that on the evidence before him, an Englishman domiciled in Belgium, by the law of nations, but not authorized by the Government, according to the 13th Article of the Civil Code of France, in force there, might make a Will in the English form. The case was not regularly contested, which makes it of less authority. It was a mere question on the parole evidence of the Belgian law, which was very short and unsatisfactory. Their Lordships have referred to the depositions, and doubt whether the learned Judge was warranted by the evidence contained in them in coming to the conclusion which he did. In this case the evidence on both sides is very full, and leads to a different conclusion. On the other hand, there may be cited for the Appellant the case of *Anderson v. Lancelotti* (9 Moore's P.C. Cases, 225), where the Judicial Committee decided that a domicile was acquired in France, though the deceased had not complied with the 13th Article of the Code Napoleon, and that objection was distinctly taken ([9 Moo. P.C.] p. 336). That point, however, does not appear to have been much considered.

Their Lordships are of opinion, that the judgment of the learned Judge of the Prerogative Court was unsupported by the evidence, and will advise Her Majesty to reverse it, and recall the probate. Under all the circumstances of this case their Lordships will direct the whole costs of these proceedings to be paid out of the estate.

[Mews' Dig. tit. WILL; II. TESTAMENTARY INSTRUMENTS, ETC.; b. *Foreign and Colonial*. S.C. below, 1 Drane 192. On point (i.) as to domicil, discussed in *Pepin v. Bruyère*, 1900, 69 L.J. Ch. 730; and see *Bloxam v. Favre*, 1883, 8 P.D. 103; (ii.) as to foreign law, followed in *Concha v. Murrieta*, 1889, 40 Ch. D. 550.]

#### [375] ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

ARDASEER CURSETJEE.—Appellant; PEROZEBOYE.—Respondent \* [April 12 and 13, 1856].

The Bombay Charter of Justice (December, 1823) gives the Supreme Court "full power and authority to administer and execute, within and throughout the Town and Island of Bombay, and the limits thereof, and the factories subordinate thereto, etc., upon all persons so described and distinguished by the appellation of British subjects, as aforesaid, there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London, in Great Britain, so far as the circumstances and occasion of the said Town, Island, territories, and people shall admit and require."

Suit on the Ecclesiastical side of the Supreme Court at Bombay by wife against husband for restitution of conjugal rights and for maintenance. Protest by the husband, that the parties were Parsees professing the religion of that sect, and that the Court had no jurisdiction to administer towards them the Ecclesiastical law as at the date of the Charter was used and exercised in the Diocese of London. Upon appeal, Held: (reversing the judgment of the Court below, and maintaining the protest) that the Supreme Court of Bombay, on its Ecclesiastical side, had no jurisdiction to entertain such a suit, as there existed such a difference between the duties and obligations of a matrimonial union among Parsees from that of Christians, that the Court, if it made a decree, had no means of enforcing it, except according to the principles governing the matrimonial law in Doctors' Commons, which were in such a case incompatible with the laws and customs of Parsees [10 Moo. P.C. 418].

*Quære*: Whether, in such circumstances, the Supreme Court can, on its civil side, give relief to the wife? [10 Moo. P.C. 419].

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Lawrence Peel.



In this case the appeal was brought from a judgment of the Supreme Court at Bombay, which over-[376]-ruled a protest entered by the Appellant against the competency of that Court to entertain a suit instituted against him by the Respondent, his wife, for restitution of conjugal rights. The Appellant and Respondent were Parsees, and natives of the Island of Bombay.

On the 7th of November, 1853, the Respondent filed a libel against the Appellant on the Ecclesiastical Side of the Supreme Court of Bombay, pleading, first, that in the month of May, 1830, a marriage according to the laws and uses among Parsees, and agreeably to the rites and ceremonies of the Parsees' religion, was duly had and solemnized between the Respondent and the Appellant, the Respondent being a daughter of Framjee Cowasjee Banajee of Bombay, Parsee merchant and inhabitant, deceased, and the Appellant the son of Cursetjee Ardaseer, late of Bombay, a Parsee merchant and inhabitant, also deceased. Secondly, that after the celebration of the marriage, the Respondent, by reason of her tender years, continued to live and reside with and under the protection of her father, and separate and apart from her husband, until the month of February, 1833, when the Respondent, having attained the age of puberty, quitted her father's roof, and she and her [377] husband then came together, and the marriage was then consummated between them. Thirdly, that some time in the course of the year 1835, the Respondent paid a visit to her father, with the consent and approbation of her husband, and while on such visit was taken seriously ill, when she was visited by her husband, and was treated by him with conjugal kindness, and that, on her recovery from her illness, she returned to the house of her husband, and was received and treated by him then as his lawful wife; but that after a short residence and cohabitation with him, the Respondent, with the consent of her husband, paid another visit to her father, with the intention of returning to her husband when requested by him so to do, and that the Appellant, while his wife was on such last-mentioned visit to her father, having neglected to invite her back to his house for a considerable period of time, and the Respondent being desirous of returning to her husband, her father requested him to send for his wife, which he refused or neglected to do; that subsequently, the Respondent, through her relations and friends, applied to her husband to the like effect, and that especially her father, on the 3rd of July, 1843, wrote to the Appellant's father a letter, in which he desired and requested him to endeavour to induce the Appellant to receive back his wife, but that he refused to comply with his request; that the Respondent, on the 3rd of July, 1843, proceeded to the house of her husband, but after a short stay there was obliged to quit it from his violent conduct and demeanour towards her, he refusing to permit her to remain in his house and forcibly expelling her from the same. Fourthly, that the Respondent, during the lifetime and [378] up to the time of the death of her father, continued to live in his house in consequence of the continued refusal of her husband to take her back and maintain her, and was maintained and supported by and at the expense of her father. Fifthly, that since the death of her father, which took place on the 12th of February, 1851, the Appellant had refused to receive the Respondent, or to allow her any maintenance, and that she had been obliged to support and supply herself with the necessaries of life, by the sale from time to time of her jewels and furniture, and by the occasional assistance of her friends, and had frequently been in great distress for want of money to pay her monthly bills for rent and the other necessaries of life, and had been obliged to contract debts on such account to a large amount, and was, and had been for some time past, in very needy and destitute circumstances, and without the means of providing herself with the necessaries of life. Sixthly, that since the death of her father, the Appellant, though he had never been divorced from the Respondent, went through the form and ceremony of a second marriage with one Bhicooyjee, a daughter of one Dorabjee Dadabhoj, of Bombay, Parsee inhabitant, and had for some years past been and was then living with her as man and wife, and had had several children by her, and had repudiated the Respondent, his lawful wife, without any just cause; and the libel prayed that the Respondent's husband might be ordered to take back his wife, and treat her with conjugal kindness, or, if the Appellant should not consent, to pay her Rs. 1000 per month for the period of her natural life, or a

suitable maintenance for her, together with the arrears of such maintenance [379] from the 3rd of July, 1843; and that an account might be taken, under the directions of the Court, of the Appellant's property, moveable and immoveable, as well as that embarked in his trade or business, together with the profits thereof, and that such suitable maintenance might be made to the Respondent thereout, as the Court should, under all the circumstances of the case, declare the Respondent as the lawful wife of the Appellant, entitled to.

The Appellant filed a protest against the competency of the Court to entertain the suit, alleging that the Respondent and the Appellant were respectively born in the Island of Bombay, and were Parsees, professing the religion of Zoroaster, commonly called the Parsee religion, and were respectively descended from the race of Parsees inhabiting Goozerat in India, and were not respectively descended from Parsees born or residing within any of Her Majesty's dominions other than the territories under the government of the East India Company in India, and were not respectively persons who, prior to the date of the Letters Patent establishing the Court, had been described or distinguished in the Royal Charters of Justice for Bombay by the appellation of "British subjects," and that the Court was incompetent to take cognizance of or proceed in the suit, or to administer towards and upon the Promovent or Impugnant the Ecclesiastical Law, as the same, at the date of the Letters Patent establishing the Court, was used and exercised in the Diocese of London in Great Britain.

The protest was argued on the 9th of January, 1854, and on the 5th of July following, the Chief Justice, Sir William Yardley, and Sir Charles Jackson, [380] the Puisne Judge, disagreeing in opinion, delivered their judgments, *seriatim*.

The judgment of Sir William Yardley, the Chief Justice, certified and returned by him to the Privy Council, as containing the reasons for his judgment, after setting forth the pleadings, proceeded thus: "The question which is raised by this protest is, whether the Court has Ecclesiastical jurisdiction in matters relating to the marriage state over persons of the Parsee religion, who are natives and inhabitants of the Town and Island of Bombay. If the Court has such jurisdiction, this protest must be overruled; if not, it must be allowed. At the time this case came on for argument, I entertained, and I confess I still entertain, great doubt whether the Impugnant ought to be allowed again to raise this question by protest, inasmuch as in the year 1843, when a suit precisely similar to the present was instituted against him by the same Promovent, he then put in the same protest, which, after solemn argument, was overruled in an elaborate and careful judgment by Sir Erskine Perry, then Puisne Judge of the Court: the Chief Justice, who had been prevented by illness from hearing the argument, fully concurring in the conclusion that the Ecclesiastical jurisdiction did extend to Parsees, as appears by a full report recently published by Sir Erskine Perry in his collection of *Oriental Cases*, and that decision has been followed in at least one other case, which is also reported in the same volume. *Bucharoge v. Merwanjer Nasserwanjer*. (Perry's *Oriental Cases*, 73.) However, as this is an important question of jurisdiction, and the former decision does not seem to have been acted on by the Promovent in this case, [381] and as my learned brother dissents from that judgment, I have thought it better not to content myself by merely referring to the former judgment, but to examine afresh the arguments which have been adduced on both sides of the question; but in so doing it is not my intention to travel over the same ground traversed by Sir Erskine Perry in his judgment, but to consider a few points in the argument which have been adverted to either not at all, or not so fully as their bearing on the question seems to demand. The Act, 4 Geo. IV., c. 71, under the immediate authority of which the Charter establishing this Court was granted, after reciting that it might be expedient for the better administration of justice in Bombay, that a Supreme Court of Judicature should be established at Bombay, in the same form and with the same powers and authorities as that now subsisting, by virtue of the several Acts before mentioned, at Fort William in Bengal, enacts by section 7, 'That it shall and may be lawful for His Majesty, his heirs and successors, by Charter or Letters Patent under the Great Seal of Great Britain, to erect and establish a Supreme Court of Judicature at Bombay aforesaid, to consist of such and the like number of persons to be named from time to time by His Majesty,



his heirs and successors, with full power to exercise such Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction, both as to Natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control within the said Town and Island of Bombay, and the limits thereof, and the territories subordinate thereto, and within the territories which [382] now are or hereafter may be subject to or dependent upon the said Government of Bombay, as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereof;’ and by section 17 of the same Act, it is declared and enacted (amongst other things), ‘that it shall be lawful for the said Supreme Court of Judicature at Bombay to be created by virtue of this Act, within the said Town and Island of Bombay and the limits thereof, and the factories subordinate thereto, and within the territories which now are or hereafter may be subject to or dependent upon the said Government of Bombay; and the said Supreme Courts respectively are thereby required, within the same respectively, to do, execute, perform, and fulfil all such acts, authorities, duties, matters and things whatsoever as the said Supreme Court of Fort William is or may be lawfully authorized, empowered, or directed to do, execute, perform, and fulfil within Fort William in Bengal aforesaid, or the places subject to or dependent upon the Government thereof.’

“I have been the more particular in setting out these two sections, because upon the language of the 7th section, as distinguished from that of the 13th Geo. III., c. 63, s. 13, under which the Supreme Court at Calcutta was erected, is founded an argument, that if the Court at Calcutta has Ecclesiastical jurisdiction over the natives of India residing within its jurisdiction, it does not thence follow that this Court has such jurisdiction, because the 7th section of the 4th Geo. IV., c. 71, only empowers the Crown [383] to erect a Court, with the powers and authorities therein described, and that, therefore, we must look to the Charter itself to ascertain the extent of the jurisdiction conferred; whereas by the 13th Geo. III., c. 63, sec. 13, it is declared that the Court to be erected ‘shall have, and the said Court is thereby declared to have, full power and authority to exercise and perform all Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction,’ etc. Now, I feel compelled altogether to dissent from this argument, for I think it impossible that the Legislature could more clearly have expressed its intention that the Court to be erected at Bombay should be a Court with jurisdiction co-extensive with that of the Supreme Court of Calcutta than it has done in the 17th section of the Act, which I have cited, and which seems to me to give, by relation, to the Court here, any authority and power which the Court at Calcutta may have derived from the language of the 13th Geo. III., c. 63, sec. 13; and if that be so, the argument which goes to show that the decision of the Supreme Court at Calcutta in the Beebe Muttra’s case (Clarke’s ‘Rules,’ p. 119) is no authority in this case, entirely falls to the ground, and we must take it, that if by virtue of the language of the Act, 13 Geo. III., c. 63, the Supreme Court at Calcutta has the jurisdiction, this Court also, by virtue of the language of the 4th Geo. IV., c. 71, equally possesses it. But without for the present either adopting or rejecting the view of Chief Justice Russell, as to the force and power of the words cited, let us proceed to examine those clauses of our own Charter in which the jurisdiction of the Court is defined.

“The language of the clause of the Charter [384] granting Ecclesiastical jurisdiction is as follows:—‘And it is our further will and pleasure, and we do hereby, for us, our heirs and successors, grant, establish, and appoint that the Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical jurisdiction, and shall have full power and authority to administer and execute within and throughout the Town and Island of Bombay, and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said Town, Island, territories and people shall admit or require, and to that purpose, we give and

grant to the said Supreme Court at Bombay full power and authority to take cognizance of and proceed in all causes, suits, and business belonging and appertaining to the Ecclesiastical Court before the said Supreme Court of Judicature at Bombay, in whatsoever manner to be moved, as well at the instance or promotion of parties as of office, mere or mixed, against any of the said subjects residing in the said Town, Island, territories, or districts, and which by the law and custom of the said Diocese of London are of Ecclesiastical cognizance, and the said causes, suits and business, with their incidents, emergents and dependents, and whatsoever is thereto annexed and therewith connected, to hear, despatch, discuss, determine, and also to grant probates under the seal, etc., of the last Wills and testaments of all or any of the said subjects of us, [385] our heirs and successors, dying and leaving personal effects within the said Town, Island, territories, or districts, respectively, and of all persons who shall die or have effects within the places aforesaid,' etc., etc.

"The difficulty in the construction of this clause arises mainly upon the words 'and towards and upon all persons so described by the appellation of British subjects;' and it is contended for the Impugnant, that these words do not include any of the Asiatic inhabitants of the Island of Bombay, even though they and their forefathers may have been subjects of the Crown of England for many generations: and this term 'British subjects,' has undoubtedly given rise to much discussion: and an opinion of Sir Charles Grey has been cited from the Fifth Appendix to the Third Report of the Select Committee of the House of Commons on the Affairs of the East India Company, 17th February to 6th October, 1831, in which, after admitting the great obscurity which the meaning of the term, as used in various Acts of Parliament and Charters, is involved, he says, 'Perhaps if I were asked what I myself should say approached to a criterion of any question whether a person is within the meaning of this expression as it is used in the Statutes and the later Charters, it would be, whether he is a subject by any other title than that of birth within British India, and that if he is a subject in any other way he is a British subject according to the meaning of the Madras and Bombay Charters; but that if he has no other claim than that of birth in British India, he is not.' Sir Charles Grey then expresses himself, as it seems to me, very doubtingly upon the sufficiency of this definition, or [386] description: and certainly one does not see very clearly why the term 'British subjects' should be held to include any native, whatever his colour or race, of Jamaica, or any other dependency of Great Britain not included in the British Isles, and yet be held not to include persons born in an Island which has been a dependency of the Crown since 1661, and the natives of which have, since that time, owed no allegiance to any other power; and I cannot help thinking that all Sir Charles Grey meant to say was, that such a construction might avoid many and perhaps most of the difficulties which have arisen from the use of the term.

"It is further contended in argument, that the difference of the language of the clause of the Charter now under consideration, as to the granting of probates indicates an intention that the power to grant probates should have a more extensive application than the general Ecclesiastical jurisdiction granted by the first part of the clause, and that such intention is manifested by the words 'and of all persons who shall die or have effects within the places aforesaid,' which words are not in the Calcutta Charter, and, therefore, it is argued those words were clearly introduced for the purpose of including the native subjects of the Crown in this Island, which clearly shows that it was not intended that the former part of the clause should apply to them. But are the words proper for this purpose? What are 'the places aforesaid?' We must refer back to the former part of the clause, and we find that the places aforesaid are the 'Town and Island of Bombay and the limits thereof, and the factories subordinate thereto, and all the territories which now are or hereafter may [387] be subject to or dependent upon the said Government,' which would now include the whole of the Bombay Presidency, and perhaps the newly-acquired Province of Scinde. How, then, can it be for a moment contended that these words were introduced merely for the purpose of giving jurisdiction to grant probates of the Wills of the native inhabitants of the Island of Bombay? Probably the intention with which these words were introduced may have been to enable the Court to grant probate of the Wills of foreigners dying and leaving *bona notabilia* in the jurisdiction, 'or' meaning 'and.' But it is not necessary at pre-



sent to determine the meaning of those words. It is sufficient to show that of themselves they afford no argument that Natives are not included in the jurisdiction granted by the former part of the clause. Now, if that be so, we have no more jurisdiction to grant probate of the Wills of the Asiatic native inhabitants of this Island than we have to exercise a general Ecclesiastical jurisdiction over them; that is to say, none at all, unless they are included in the words 'persons distinguished by the appellation of British subjects,' or unless we can put some reasonable construction upon the Charter which would include them as well as British subjects of British descent. That is difficult, I admit, but not insuperable, if we read the Charter in conjunction with the Act of Parliament under the authority of which it was granted, and which authorized the erection of a Court 'with full power to exercise such Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction, both as to Natives and British subjects, etc., within the said Town,' etc. Now, if we take the clause conferring the Ecclesiastical jurisdiction, and [388] apply the words 'and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid' to the words immediately preceding, viz. 'and all the territories which now are, or hereafter may be, subject to or dependent upon the said Government,' and to those words only, we might then hold that we had an Ecclesiastical jurisdiction within and throughout the Town and Island of Bombay, and also over British subjects, in the narrower sense of the term, in the other territories subject to the Government of Bombay; and this construction would be in strict conformity with the practice of the Court ever since it was established, and is moreover favoured by the language used, the words 'and towards,' etc., seeming to couple the words following with the sentence immediately preceding, and being unnecessary and ungrammatical if the operation of the former words was to be confined to 'persons described and distinguished by the appellation of British subjects;' and further, the words 'there residing' may, with equal grammatical correctness, be applied to 'the territories which now are or hereafter may be subject to or dependent upon the Government of Bombay,' as to the whole of the local definition of the jurisdiction. This construction would give us a jurisdiction, local and universal, in the Town and Island of Bombay, and personal over British subjects in the territories dependent upon the Government of Bombay; and this construction alone (if the Natives of Bombay may not be described as British subjects) would be in conformity with the jurisdiction heretofore exercised by the Court, and seems to satisfy and reconcile the language of the Statutes and the Charters. I have shown that the [389] Statute gives the Court a general Ecclesiastical jurisdiction; and it is laid down by Chief Justice Russell, in *Beebe Muttra's case*, on the authority of Lord Kenyon, in *The King v. Miller* (6 Term Rep. 268), that the King's Charter could not essentially narrow the powers granted by Act of Parliament; nor do I think there was any intention to do so, the Charter being intended rather to particularize and specify the powers of the Court than to limit and control them.

"But another argument has been used against the exercise of an Ecclesiastical jurisdiction over any other inhabitants than those of British parentage or descent, on the ground that the Ecclesiastical Courts are essentially Courts Christian, and that their jurisdiction cannot be applicable to persons of any other religion, because formerly the sentences of those Courts were enforced by the greater or lesser excommunication, a process which, in the case of a Hindoo, or Fire worshipper, would be simply absurd. To this it may be answered, that excommunication was abolished by the 53rd Geo. III., c. 127, and consequently was not, at the date of our Charter, the practice of the Diocese of London; and if the argument is good for anything, it tends to show that the Supreme Courts in India cannot reasonably exercise any Ecclesiastical jurisdiction over natives who are not Christians, either for granting probates, or letters of administration, or otherwise. But the Charter seems to have been framed with a view to meet objections of this nature, for it expressly provides (sec. 29) that 'in all suits so to be determined by the laws and usages of the said Natives, the said Courts shall make such rules and orders for the conduct of the same, and frame such process for [390] the execution of their judgments, sentences, or decrees, as shall be most consonant to the religion and manners of the said natives, and to the said laws and usages respectively, and the easy attainment of the ends

of justice;' and the whole Charter is conceived in the same enlarged and liberal spirit, looking rather to the substantial ends of justice than to an exact conformity to the proceedings of English Courts of law.

"It has been pointed out, too, that Sir Erskine Perry's judgment proceeds on the assumption, that unless the Court exercise an Ecclesiastical jurisdiction, natives of Bombay would have no means of enforcing the rights and obligations springing from the married state, and would be altogether without remedy; and in reply to this argument, it is suggested that the wife, in a case like the present, might sue her husband, either on the equity or plea side of the Court, and that at all events persons supplying her with necessaries might sue him. That is quite true, and it might constitute some argument against the existence of an Ecclesiastical jurisdiction in such cases, if the only 'conjugal rights' acquired by marriage by a Parsee female were a right to be maintained at the expense of her husband; but though it is true that marriage is a contract, it is something more than a contract. It is the most important of all social institutions, and under it a female acquires a *status*, rights, and privileges which would be very inadequately vindicated by an action for necessaries; and I am not aware of any authority for the position that she could enforce those rights and privileges by a suit against her husband on the equity side of the Court. I think it is much more natural to suppose that the Legislature, when it was about to erect Courts of plenary [391] authority and jurisdiction in the presidency towns of British India on the model of the Courts of various jurisdictions in England, and expressly conferred upon the Indian Courts those different species of jurisdiction, intended that the procedure should be, so far as was consistent with the circumstances of the country and its inhabitants, conformable to that of the Courts in England respectively exercising the corresponding jurisdictions. And, finally, this jurisdiction has been so long exercised in the Supreme Court and the Recorder's Court, that it has, to use the language of Lord Mansfield, become 'a rooted and established practice,' not to be disturbed except upon sure and sufficient grounds. A suit of this kind was entertained by Sir James Macintosh when Recorder; and we have seen that two suits of a similar kind were entertained by Sir Erskine Perry, to whose judgment in the case between these very parties I beg leave more particularly to refer,—a judgment founded upon much research and inquiry, and an extensive knowledge of the subject. Under these circumstances, even if I saw more reason than I do to doubt the soundness of the views of my predecessors, I should pause before I took upon myself to reverse a current of decisions which has flowed all in one direction for half a century, or thereabouts, and I believe still longer. I think it would be incumbent on me, even if I entertained much more serious doubts than I feel on this occasion, to act upon those uniform decisions until they shall have been reversed by a superior tribunal."

The judgment of Sir Charles Jackson, the Puisne Judge, was as follows:—"Two questions appear to be raised by this protest: first, whether this Court has [392] any and what Ecclesiastical jurisdiction over Parsees, and if it has, secondly, to what extent such jurisdiction can be properly exercised between Parsees.

"The first question, whether this Court has any and what Ecclesiastical jurisdiction over Parsees, must be decided upon the construction of the Act of Parliament authorizing the establishment of this Court, and the Charter of the King passed in pursuance of that Act. The 4th Geo. IV., c. 71, sec. 7, authorized His Majesty, by Charter, to erect and establish a Supreme Court at Bombay, 'with full powers to exercise such Civil, Criminal, Admiralty, and Ecclesiastical jurisdiction, both as to Natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions and control within the said Town and Island of Bombay and the limits thereof, and the territories subordinate thereto, and within the territories which now or hereafter may be subject to or dependent upon the Government of Bombay, as the said Supreme Court of Judicature at Fort William in Bengal by virtue of any law now in force and unrepealed doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereof.' It is clear from this section, that the Legislature contemplated the issuing of a Charter giving this Court an Ecclesiastical jurisdiction over Natives as well as British subjects, and the same power to ad-



minister the same as the Supreme Court at Calcutta was invested with ; and it appears from the 17th section that this Court, when created, is required 'to do, execute, perform, and fulfil all such acts, authorities, duties, matters, [393] and things whatsoever as the Supreme Court at Calcutta is or may be lawfully authorized, empowered, or directed to do, execute, perform, and fulfil,' etc. Considering the terms of this enactment, and the positive language of section 13 of the 13th Geo. III., c. 63, conferring a general Ecclesiastical jurisdiction on the Supreme Court at Calcutta, and the decision of that Court in Beebe Muttra's case, I think it is clear that this Act confers upon this Court an Ecclesiastical jurisdiction over the Natives of Bombay.

"The Charter establishing this Court, dated the 8th of December, 1823, must next be considered. The 47th section of that Charter regulates our Ecclesiastical jurisdiction, and appears to be divisible into two parts. The first part of the section gives an Ecclesiastical jurisdiction in all causes and suits which are of Ecclesiastical cognizance ; and the second gives power to grant Probates and Letters of administration ; and the terms employed throughout the section, describing the classes of persons subject to these different jurisdictions, are very remarkable. The first part of the section grants the Court Ecclesiastical jurisdiction 'towards and upon all persons so described and distinguished by the appellation of British subjects,'—'as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said Town, etc., shall admit or require,' and for that purpose authority is given to this Court to hear and determine all causes of Ecclesiastical cognizance brought 'against any of the said subjects.' The second part empowers the Court to grant Probates of the Wills 'of all or any of the said subjects,' 'dying and leaving personal effects within the said Town, etc., and all persons who shall [394] die or have effects within the places aforesaid.' These last words, 'and of all persons,' etc., could not have been inadvertently inserted in this section, for they are not to be found in the Calcutta Charter (of which the Ecclesiastical section in this and the Madras Charter is in other respects a copy), and their insertion here raises the construction, that it was intended to let in a larger class of persons to the benefit of the jurisdiction regarding Probates than was provided for in the previous part of the section regarding Ecclesiastical suits. It is material, therefore, to ascertain what persons are meant by the description of 'persons so described and distinguished by the appellation of British subjects,' whether this description means, as is contended, on the one hand, that anomalous class of persons so well described by Sir Charles Grey in his Minute in the Report on the affairs of the East India Company,—a class difficult to define, but well understood in the common parlance of the Supreme Courts ; or whether it means all inhabitants of this Island, excepting aliens. We find the same expression used in the 28th section of the Charter, in which the jurisdiction in Civil suits and actions is confined to such 'persons as have been heretofore described and distinguished in our Charters of Justice for Bombay by the appellation of British subjects ;' and this section is followed by the 29th, which gives the Supreme Court jurisdiction in all suits and actions against the inhabitants of Bombay. This last clause applies to the inhabitants generally, and does not appear to be introduced merely for the purpose of giving jurisdiction over aliens, inasmuch as it provides, in the cases of Mahomedans and Gentoos, that their peculiar laws should be preserved to them ; [395] and I, therefore, think that these two sections, taken together, show that the 28th section applied to a particular class of British subjects, and not to all the inhabitants of Bombay. We find the same expression in the 43rd section of the Charter, which empowers the Sheriff to summon in Criminal cases juries 'being persons so heretofore described and distinguished as British subjects ;' and it is clear that under that clause of the Charter, previous to the year 1826, all the inhabitants of Bombay could not serve on juries, for in that case the Statute, 7th Geo. IV., c. 37, which was passed to render all inhabitants (not being aliens) capable of serving on juries, was wholly unnecessary. On the whole, therefore, I think that from the reference to former Charters in section 28, and from the position in which the expression is found in that section, and from the terms of the 43rd section, and Statute, 7th Geo. IV., c. 37, that the expression 'prescribed and distinguished as British subjects' cannot mean all the inhabitants of Bombay, and that it must be

understood as meaning British subjects in a restricted sense, and excluding all those 'subjects' who have no other claim than that of birth in British India. Such was the opinion of Sir Charles Grey on the meaning of that term, as expressed in the report to which I have referred: and such was the opinion of Sir Edward Ryan, arrived at in Beebee Muttra's case (Clarke's 'Rules,' p. 142); and though the other Judges dissented from him in that decision, it would appear from the report that Chief Justice Sir William Russell did not dissent from this construction of the term 'British subjects.' (Clarke's 'Rules,' p. 127.) Then again, I think that the different language used in the latter part of section 47 of the Charter, in [396] which the jurisdiction is given to grant Probates of the Wills 'of the said subjects,' 'and of all persons who shall die or have effects within the places aforesaid,' was probably introduced for the purpose of avoiding the question which arose in Beebee Muttra's case; and it certainly is improbable that they should have been so introduced for the purpose of meeting the case of aliens and sojourners only, a suggestion which seems to me answered by a comparison of sections 28 and 29 of the Charter, in which the term 'British subjects' is evidently used in contradistinction to the other native inhabitants of Bombay.

"Having thus ascertained the strict meaning of the term 'described and distinguished as British subjects,' in the first part of this section, I will proceed to examine some of the grounds on which it has been attempted to give those words a more extensive construction. First, it is said that this construction will exclude from the Ecclesiastical jurisdiction of this Court, except with respect to Probate and Administration, not only Parsees, Hindoos, Mahomedans, and Jews, but also the Portuguese and native Christian inhabitants of this Island. This is not so, for under the general Ecclesiastical jurisdiction vested in us by the 4th Geo. IV., c. 71, we might still entertain all suits of an Ecclesiastical nature 'which the circumstances and occasion' of such parties might require; but whether we ought to exercise with respect to all these parties such general Ecclesiastical jurisdiction is a question of grave doubts, for such a jurisdiction seems wholly inapplicable to Asiatics, whose creed admits of polygamy and great facilities of divorce.

"Then again it is argued, that the 28th section of the Charter gives this Court jurisdiction to determine [397] all suits and actions whatsoever, and is supposed to give us an Ecclesiastical jurisdiction over natives, if section 47 does not. The words in the 28th section are certainly large and general, and would, I think, justify us in entertaining an action by Perozeboye against her husband for his breach of contract in not maintaining her; but it is manifest, looking at the whole Charter, and particularly at sections 10, 41, 42, 43, 44, and 47, that section 28 was only intended to define the jurisdiction of this Court in plea side cases, and so it has always been understood. If section 28 had the extensive meaning now sought to be put upon it, many of the clauses in the Charter to which I have referred were wholly unnecessary.

"Assuming, then, that the Charter does not contemplate the exercise of any Ecclesiastical jurisdiction over natives, except with respect to Probates and Letters of administration, and assuming that the Act, 4th Geo. IV., c. 71, does confer a general Ecclesiastical jurisdiction over natives, and that, in accordance with Beebee Muttra's case, nothing in our Charter can limit or restrict the general jurisdiction so given, I still doubt whether we ought to entertain a suit for restitution of conjugal rights between Parsees. We find that we have a vague general Ecclesiastical jurisdiction over natives under the Act; and that the Charter, in which we should expect to find that jurisdiction more clearly defined, does not contemplate the exercise of any such jurisdiction, except with respect to Probates and Letters of Administration. Surely if the Charter itself is so cautious in developing the general jurisdiction given over Natives by the Act, it behoves us to evince as much caution in exercising [398] that jurisdiction. I can conceive some subjects of Ecclesiastical cognizance,—alimony for instance,—which, upon admitted marriage, it might be proper to enforce under the general Ecclesiastical jurisdiction as between parties other than Christians; but I should not be disposed to enforce as between persons of this class, personal duties which may not flow from the contract of marriage as understood by them, or laid down in their creed, and which certainly have not been made of positive obligation by any law or Statute. It is the policy and intention of this Charter to adapt our Ecclesiastical jurisdiction to British subjects 'so far as the



circumstances and occasion of the said Town, Island, territories and people shall admit or require; and acting in that spirit, I think we should hesitate before we introduced among Asiatics so peculiar a form of proceeding as this. The jurisdiction to compel cohabitation seems to flow peculiarly from the Canonist's notions of indissolubility of a Christian marriage, and the obligation, under dread of spiritual censure, to perform all conjugal duties, and is, therefore, I think, inapplicable to natives, who are not bound by any law that I know of, to live with their wives, and are allowed great facilities of divorce. If a suit of this nature can be entertained, we may be called on hereafter to compel a native woman to return to her husband's roof, under which he has other wives, who monopolise his attentions, or we may compel a Mussulmanee to return to her husband's house, to be divorced the minute afterwards, by an imprecation. And, indeed, it appears from the case of *Buchaboye v. Merwanjee Nusserwanjee* (Perry's 'Oriental cases,' p. 73), that the Parsees also claim [399] great facilities of divorce. These may be extreme cases, but I think they show the inapplicability of this form of suit to Asiatics. It is true that in an old case, *Andreas v. Andreas*, the Consistory Court in England held, that they had jurisdiction in a cause for restitution of conjugal rights, brought by a Jewess against her husband, a Jew. Sir William Wynne, in *Lindo v. Belisario*, explains this case, and does so on the ground that the marriage was admitted, and that the Ecclesiastical Court was the only one they could apply to for the purpose. (1 Hagg. Cons. Rep., Appx. p. 9.) The observations of Sir William Wynne on *Andreas v. Andreas* were quite extrajudicial; and it would seem from his observation (*ib.*, p. 11), and those of Sir William Scott (1 Hagg. Cons. Rep., p. 216) in *Lindo v. Belisario*, that they entertained great doubt, if not on the jurisdiction, at least upon the propriety of exercising it, in a question of marriage by Jewish law, and, but for the request of the Lord Chancellor, and with the view of assisting him, would have declined to exercise it; and if they doubted their jurisdiction to determine the validity of such a marriage, they surely must have doubted it with respect to enforcing the personal duties flowing from such a marriage. The doubts of these learned Judges respecting their jurisdiction in matters relating to the validity of Jewish marriages leads me to decline jurisdiction in a much stronger case, in which I am called on to enforce personal duties arising out of a marriage between Parsees; personal duties which are unknown and undefined by any law that I am aware of. No written authority has been cited showing that a Parsee husband must live with his wife, although they dis-[400]-agree; and I cannot see any natural law imposing such a duty, under such circumstances; for the natural law, as between Natives, would rather appear to be that they should live separate when they cannot dwell together in peace.

" But it does not follow, because we decline to exercise a general Ecclesiastical jurisdiction over Parsee, Mahomedan, and Hindoo inhabitants of Bombay, and refuse to entertain suits by them for restitution of conjugal rights, that, therefore, they are without all remedy in such cases as these. By an adaptation of the law of alimony to a state of circumstances like these, we might still give the wife a remedy against her husband in the Ecclesiastical Court. Having this general Ecclesiastical jurisdiction over natives, we might perhaps exercise it so far as to make a native husband do justice, and maintain his wife; but it is quite a different thing to say that a native husband shall cohabit with his wife, whether he likes it or not; for that appears to me to be an adjudication applicable to Christians only, and somewhat anomalous when applied to Asiatics; and if any objection (which does not occur to me) should exist to that course, I cannot see why she should not have a right of action against her husband for damages, or a suit in equity for a maintenance. Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. In Christian countries a breach of this contract cannot be enforced by the wife in a Civil Court directly against the husband, because the law considers a man and his wife as one person, and will not permit an action by the [401] wife against her husband; but no such principle is known to the Mahomedan, Hindoo, or Parsee law; and the Supreme Courts at Calcutta and here have always treated native married women as *femes sole*, and indeed it is quite impossible, upon any *a priori* or natural reasoning, to treat them as anything else. There being, then, as alleged in this case, a breach of contract, the husband having refused to receive his wife, having forcibly expelled her

from his house, and having failed to maintain her, what is there to prevent this Parsee *feme sole* from bringing an action against her husband for damages, or a suit in equity for a maintenance past and future, to be secured from his estate? A great wrong has been done her, and there must be some remedy. The mere fact that such an action is novel, and unknown to the English law, would be no answer to her claim, for the reasons already stated; and she seems to have just the same right to sue in respect of this breach, as any other person has to sue for any other breach of contract; and there is certainly nothing impolitic or *contra bonos mores*, in her recovering damages for the wrong done her, or obtaining that maintenance, past and future, to which she is justly entitled; and I must say, I think that this lady would have a remedy directly against her husband. But even if this were not so, under the circumstances he alleged it is clear that the parties who supply her with necessities will be entitled to recover against her husband, and this Court has already so decided.

"The only question which remains is no doubt entitled to much consideration. It is forcibly urged, that the question has already been decided by a judgment of Sir Erskine Perry between these parties, and that his judgment has since been followed in another case, and that it would be wrong now to re-open the question. This objection would have had more weight if the parties had ever acted on the previous decision in this case; but it appears that after Sir Erskine Perry's judgment, no further steps were taken, and the cause dropped, and that now an entirely new suit has been commenced, to which the present protest has been put in. I am anxious, of course, to pay every respect to the opinions of this Court, but I should not have thought that the cases referred to established such a course of decision as precluded us from inquiring further into a question of jurisdiction, more especially when we find that no such suit has ever been recognized at Calcutta, or I believe at Madras, and there is no report of any enforcement of cohabitation here. For, notwithstanding the strong opinion of the Chief Justice, I still think there is some doubt how far the language of the Charter, directing us, in 1823, to proceed in Ecclesiastical matters according to the practice of the Diocese of London, has the effect of introducing into this country the Statute, 53rd Geo. III., c. 127, by which the process of excommunication in such cases was abolished, and other process substituted. However, if I am wrong in entertaining this question, and not feeling bound by authority, I am happy to think that the expression of my opinion must, from the constitution of this Court, be peculiarly harmless."

In pursuance of the practice of the Supreme Court, an Order was made in accordance with the judgment of the Chief Justice, discharging the protest with costs.

[403] The Appellant appealed from this Order to Her Majesty in Council (a). The appeal was argued by

(a) Previous to the hearing of the appeal, a search was made at the instance of the Respondent, among the records of the Supreme Court at Bombay and the late Recorder's Court, for any records of Ecclesiastical suits between natives of India or other Asiatics for any causes matrimonial, when the following authorities were reported by the acting Registrar and certified to the Judicial Committee to be the only cases on record, from the earliest date at which these records commenced, to the present time:—

1. *Anna Petrusse v. Jacob Petrusse*, of Bombay, Armenian. The libel was filed on the 7th day of January, 1802, for alimony. On the 3rd day of May, 1802, sentence of the Court was signed in this cause, and on the 23rd of March, 1805, the Court ordered an attachment to issue against the goods and chattels of the Impugnant, for monthly alimony due to Promovent.

2. *Dustagool Johannes v. Gregory Johannes*, of Bombay, Armenian. The libel was filed on the 10th of September, 1811, for divorce and separation from the bed and board and mutual cohabitation. On the 28th of July, 1812, the Court, by consent, dismissed the libel; and on the 20th of October, 1812, it was ordered that the original account in Armenian should be delivered to the Impugnant.

3. *Sahibnaboye v. Shaikjee Zarah*, of Bombay, Mahomedan. Libel filed on the 16th of June, 1815, for decree to pronounce that the marriage which took place between the parties was void and of no effect. On the 8th of July, 1815, Court granted to



The Queen's Advocate (Sir John Harding), and Mr. Ayrton, for the Appellant; and Dr. Addams, and Mr. Le Messurier, for the Respondent.

[404] The Queen's Advocate [Sir John Harding].—There are two important questions for decision in this case: first, what jurisdiction the Supreme Court [405] at Bombay possesses in circumstances such as are here presented; and secondly, whether the jurisdiction, if it exists, has been properly evoked. The case comes on upon the Appellant's protest to the jurisdiction of the Court. The parties are Parsees, and the real question is, whether the Ecclesiastical jurisdiction, "as exercised in the Diocese of London," can be applied to Parsee inhabitants of Bombay, who are governed by their own peculiar laws, and as between whom, coming under the general designation of "Gentoo," all matters of contract and dealing are to be determined by their own laws and usages. The first mention of Ecclesiastical jurisdiction conferred on the Supreme Court at Bombay, is in the Statute, 37th Geo. III., c. 142, sec. 9, which enabled His Majesty to erect Courts of Judicature in Madras and Bombay respectively, with "full power and authority to exercise and perform all Civil, Criminal, and Ecclesiastical and Admiralty jurisdiction." The 10th section then defines the extent of the general jurisdiction of the Court, while section 12, which is extremely germane to the present question, "in order," as it is there expressed, "that due regard may be had to the civil and religious usages of the Natives," enacts "That the rights and authorities of Fathers and Masters of families, according as the same may be exercised by the Gentoo or Mahomedan law, shall be preserved to them within their families respectively, nor shall the same be violated or interrupted by any of the proceedings of the said Courts." What could be a

Impugnant leave to defend this suit *in forma pauperis*, and no further proceedings took place.

4. *Perozeboye v. Ardaseer Cursetjee*, of Bombay, Parsee. Libel filed on the 8th of July, 1843, for decree that the said Ardaseer Cursetjee do take back the said Perozeboye his lawful wife, and treat her with conjugal kindness. On the 21st of September, 1842 [1843], Court overruled the protest with costs; and on the 19th of October, 1843, leave to appeal was granted, and no further proceedings.

5. *Buchooboye v. Merwanjee Nasserwanjee*, of Bombay, Parsee. Libel filed on the 2nd of February, 1844, for decree that the said Merwanjee Nasserwanjee do take home and receive the said Buchooboye his wife, and treat her with marital affection and to render her conjugal rights. On the 20th of April, 1846, sentence of Court signed, and filed the same on the 7th of May, 1846.

6. *Perozeboye v. Nanabhoy Framjee*, of Bombay, Parsee. Libel filed on the 17th of February, 1844, for decree that the said Nanabhoy Framjee do take home and receive the said Perozeboye his wife, and to treat her with marital affection and to render her conjugal rights. On the 1st of January, 1846, sentence was signed in this cause, and filed the same on the 2nd of January, 1846.

7. *Buchooboye v. Merwanjee Nasserwanjee*, of Bombay, Parsee inhabitants. Filed on the 8th of June, 1849, for divorce and separation. On the 22nd of September, 1851, cause called on for hearing, and was struck out, the Impugnant being dead.

8. *Perozeboye v. Ardaseer Cursetjee*, of Bombay, Parsees. Libel filed on the 7th of November, 1853, for decree that the said Ardaseer Cursetjee do take back his lawful wife the said Perozeboye, and treat her with conjugal kindness, and to provide for her alimony in the event of the said Ardaseer Cursetjee refusing to receive her back. On the 10th of August, 1854, Court granted leave to appeal, and on the 13th of November, 1854, the petition to Queen in Council was filed.

9. *Awaboye v. Nasserwanjee Merwanjee*, of Bombay, Parsees. Libel filed on the 23rd of November, 1853, for decree that the said Nasserwanjee Merwanjee do take back his wife the said Awaboye, and render her conjugal rights, and alimony, *pendente lite*. On the 22nd of September, 1854, answer of the Impugnant filed, and no further proceedings.

10. *Khursedball v. Bazenjee Dossaboy Baxterna*, of Bombay, Parsee. Libel filed on the 18th of October, 1854, for alimony. On the 25th of June, 1855, sentence was pronounced and signed in this cause, and the same was filed on the 25th of August, 1855.

greater violation or interruption of a Parsee family than to introduce and enforce among them the Ecclesiastical law as exercised in the Diocese of London! They are not British subjects in the sense intended by [406] the Charter. The first Charter of Justice granted to Bombay was under this Act. Being under the authority of an Act of Parliament, it cannot exceed the exact terms of the Act, *The King v. Miller* (6 Term. Rep. 268; and see *The Queen v. Eduljee Byramjee*, 5 Moore's P.C. Cases, 276; *The Queen v. Alloo Paroo*, *ib.* 296). There is no sufficient proof of the exercise of Ecclesiastical jurisdiction by the Mayor's Court which preceded the Supreme Court, though, in a note by Sir Erskine Perry (Perry's "Oriental Cases," p. 65), it is stated that an Admiralty jurisdiction was conferred in 1683. It is true that that learned Judge held, in a case similar to this, that the Ecclesiastical laws did apply to Parsees, and in a suit for the restitution of conjugal rights awarded alimony, *pendente lite* (*ibid.* p. 73). There was, however, no precedent for such a decision, except a case between the same parties as in this suit (*ibid.* p. 57), decided a few years previously by the same learned Judge, which was never appealed to England. The precedents produced from the Register of the Court are neither strong in themselves, nor do they prove more than the assumption of the jurisdiction by the Supreme Court, and submission to it by the natives of India, who were wholly ignorant of the matter. The present Charter of Justice is in substitution of that under the Statute, 37 Geo. III., c. 142, but contains the same provisions regarding the jurisdiction and Ecclesiastical law.

It is scarcely necessary to argue the second question. The suit is wholly informal: it purports to be for a restitution of conjugal rights, but prays not that alimony, *pendente lite*, should be decreed, but that [407] the husband shall pay his wife a stipulated sum for separate maintenance. If the Supreme Court had all the Ecclesiastical jurisdiction possessed by the Consistory and Arches Courts in England, this Court upon appeal could not make such a decree, or anything like it, upon these pleadings. The Judges in the Court below, though they differ in opinion, are equally in error on the grounds of their decision: the Chief Justice considered himself ruled by the cases decided by his predecessor, and the analogy of the Bombay Charter to that of Fort William. No case was, however, cited before him as having been determined in that Court, and your Lordships have been informed by the learned late Chief Justice, Sir Lawrence Peel, that in a case before him, when presiding at Calcutta, between natives, it was unanimously agreed by the Judges in Court that by the true constitution of the Charter it could never be intended that the Ecclesiastical law was introduced, or could be enforced against natives professing a wholly different creed from Europeans. The other learned Judge, Sir Charles Jackson, seems to found his opinion against the jurisdiction, on the supposition that marriage is a civil contract, which, *per se*, entitles the wife to an action for maintenance. We know of no such law in our Courts here, nor do I apprehend, except under the Poor Law Acts, that any such right exists. The wife's title to a settlement in equity is the only thing the least resembling such a right, but that is under a totally different state of circumstances, and has nothing to do with Ecclesiastical law.

Mr. Ayrton.—Though precedents have been produced from the [408] files of the Court below, this case is, in fact, one of first impression. The decisions of Sir Erskine Perry were not upon the same state of facts as arise here, nor do the pleadings appear to have been in the same form; and an argument was there raised also before that learned Judge against the exercise of Ecclesiastical jurisdiction where the parties were Parsees, which he overruled. The assumption of such jurisdiction by the Supreme Court in such cases is of no higher value than the judgment we now appeal against. The whole question turns upon the true construction of the Bombay Charter of 1823, the words of which must govern the case, *Morgan v. Leech* (3 Moore's P.C. Cases, 368). The authority to apply English law in suits in equity, or common law, is general as regards English residents in the Town and Island of Bombay (Charter, *cls.* 6, 10, 28, 29), but is not extended to natives: they are expressly exempted; their suits are to be determined by their own laws and usages. How, then, can the Court administer the Ecclesiastical law of England in the case of natives, who are exempt from the Common law and principles of equity prevailing here?

Dr. Addams.—This application of the Ecclesiastical law to Parsees is not for the P.C. III.



first time introduced. The precedents show that suits for restitution of conjugal rights have been frequently brought, and uniformly entertained by the Supreme Court at Bombay, and that long before the decision of the two cases cited from Sir Erskine Perry's "Oriental Cases." From the precedents existing in the Registry of the Court, that [409] learned Judge could have come to no other decision. In the case between these parties, the learned Chief Justice has gone most fully into the origin and history of this jurisdiction, which it is plain has been exercised from the first introduction of English law into India. The protest is against the parties being subject to British laws at all; they say they are not British subjects, and, therefore, that the Ecclesiastical law cannot be applied to them. But they are living under the protection of the British rule, and within the territories belonging to Great Britain, and if, therefore, they are not expressly exempted by the Charter, they must be subject to the law there provided for all residents within the limits of Bombay. Are they, then, either Mahomedans or Gentoos? for they are the only classes exempt. Parsees are not named or alluded to, either in the Charter or Act of Parliament.

With regard to the pleadings, they are sufficient for the object of the suit, which is one for restitution of conjugal rights; the prayer for maintenance is a prayer for alimony, for that is the only maintenance the Ecclesiastical law can give, and must be, in the first instance, *pendente lite*. If the pleadings in substance are sufficient, this Court will not refuse to administer justice on account of an irregularity in form.

Mr. Le Messurier.—There is no question that the Supreme Court at Bombay possesses Ecclesiastical jurisdiction. That is given by the 47th section of the Charter. By the 37th section, that Court is empowered to frame rules [410] and process in all suits to be brought in that Court; and rules of practice and procedure have been accordingly framed, and exist. The sole question then is, whether these parties, being Parsees, are amenable to the jurisdiction established. The Supreme Court has jurisdiction over all British subjects residing within the factory, or subject to, or dependent on, the Government of Bombay; that is expressly provided by section 28. The Government permits these parties to be residents in Bombay, they are, therefore, *prima facie* liable to the jurisdiction of the Supreme Court. But it is alleged that they are Parsees, professing the religion of Zoroaster, and, as such, exempt from the Ecclesiastical jurisdiction of the Court. Now, Parsees are nowhere designated or exempted in the Charter. Mahomedans and Gentoos are the only natives designated, and they are exempted only as to "their inheritance and succession to lands, rents, goods, and all matters of contract and dealing between party and party, which shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos." Supposing, however, Parsees to be exempt from the jurisdiction, what law is to be applied to them? they are neither Mahomedans nor Gentoos. It is clear, therefore, if any law is applicable to them, it must be the English law; that which they are entitled to claim as British subjects. It is argued, on the other side, that Parsees come under the general designation of "Gentoos," which is a mere *nomen collectivum*. But, if so, the Gentoo Code would have to be applied to Parsees. Why, then, this objection to the introduction [411] of Ecclesiastical law? The laws of marriage are governed in this country by Ecclesiastical law; if then a question relating to the validity of a marriage come before the Supreme Court, that Court must look to the law by which the marriage is to be regulated, and if there is no special law provided for and applicable to the parties, the law of England must be the rule for the Court's decision. That would be a case of the application, *pro tanto*, of the Ecclesiastical law, though not on the Ecclesiastical side of the Court. Matrimonial suits between Parsees have been entertained by the Mofussil Courts, *Miharwanjee Nuoshirwanjee v. Awan Bae* (2 Borr. Bom. Sud. Dew. Repts. 209); to these are added several cases in regard to marriage contracts, dower, etc.: they are all collected in Morley's Dig. tit. "Husband and wife," 4, p. 299. What is to prevent the Supreme Court exercising a similar jurisdiction when the case is properly before them when administering that law, the administration of which is expressly given to them by the terms of the Charter?

Mr. Ayrton, in reply.—Parsees are within the definition of "Gentoos," which is a generic term, being corrupted from the Portuguese word, "*Gentis*," meaning a gentile, or heathen, as distinguished from Mahomedans or Hindoos, the native

inhabitants of India. The Ecclesiastical jurisdiction conferred by the Charter is intended for, and limited to, British subjects. Its sentence can only be enforced by Ecclesiastical pro-[412]cess, that is, by excommunication. How can such a process be applied to Parsees?

Judgment was reserved, and now delivered by

The Right Hon. Dr. Lushington (17th July, 1856).—The present question arises upon an appeal from the Ecclesiastical side of the Supreme Court of Bombay, which Court had overruled a protest against its jurisdiction; and their Lordships will have to determine whether, under all the circumstances, the judgment ought to be maintained, or the appeal allowed.

The suit in the Court below was a suit for restitution of conjugal rights; such is clearly its character, though some of the averments in the libel, and a part of the prayer made, are different from what would be made or admitted in the Ecclesiastical Courts in this country.

The parties are Parsees, natives of the Island of Bombay, and there resident. Their religion is that of Zoroaster. The wife brought the suit. The husband, in a protest after the libel was given in, denied the jurisdiction of the Court, and contended that it was incompetent to take cognizance of such a suit. The Chief Justice was of opinion that the protest ought to be overruled, thereby, in effect, deciding that the Court might proceed to administer justice in such a suit between the parties. The Puisne Judge dissented. According to the Charter of the Supreme Court, judgment was given in accordance with the opinion of the Chief Justice.

The language of the clause of the Charter granting [413] Ecclesiastical jurisdiction is as follows:—"And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, grant, establish, and appoint that the Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical jurisdiction, and shall have full power and authority to administer and execute within and throughout the Town and Island of Bombay, and the factories subordinate thereto, and all the territories which now are or hereafter may be subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said Town, Island, territories, and people shall admit or require; and to that purpose We give and grant to the said Supreme Court at Bombay full power and authority to take cognizance of and proceed in all causes, suits, and business belonging and appertaining to the Ecclesiastical Court before the said Supreme Court of Judicature at Bombay, in whatsoever manner to be moved, as well as at the instance or promotion of parties as of office, mere or mixed, against any of the said-subjects residing in the said Town, Island, territories, or districts, and which by the law and custom of the said Diocese of London are of Ecclesiastical cognizance, and the said causes, suits, and business, with their incidents, emergents, and dependents, and whatsoever is thereto annexed and therewith connected, to hear, despatch, discuss, determine, and also to grant probates under the seal, etc., of the last Wills and Testaments of all or any of the said subjects [414] of Us, Our heirs, and successors, dying and leaving personal effects within the said Town, Island, territories or districts respectively, and of all persons who shall die or have effects within the places aforesaid."

Such being the jurisdiction conferred by the above clause upon the Supreme Court, we must next consider the objection which has been raised to the exercise of that jurisdiction in this case. The especial reason assigned against the Court taking cognizance of this case, as set forth in the protest, is, that the parties are Parsees, professing the religion of Zoroaster, born in the Island of Bombay, natives of India, and are not persons who, prior to the date of the Letters Patent establishing the Supreme Court, have been described in the Royal Charter of Justice, by the appellation of "British subjects,"—that the Court is incompetent to take cognizance, or to proceed in this suit, or administer to the parties the Ecclesiastical law as used and exercised in the Diocese of London.

It is quite true, as was argued at the Bar, that the reason assigned for the in-



competency of the Court to exercise jurisdiction is, that the parties to the suit are not British subjects within the meaning of the Charter, and that the general averment of incompetency had reference to that reason; but we think that in a case of this description, where the question substantially is, whether the Court has jurisdiction to entertain the suit, or, to state the case more accurately, whether from the peculiar nature of the subject-matter this case is not excepted from the general Ecclesiastical jurisdiction conferred by the Charter, it is our duty to look at the whole record, and give judgment accordingly. If it be ap-[415]-parent on the face of the record that the suit is not maintainable, we think that there is enough in the protest to require us to express our opinion, though that protest may not have been intended to direct our attention to more than one particular objection.

Proceeding upon this principle, we will assume for the moment, that the parties to this suit are properly described and distinguished by the appellation of "British subjects," and address ourselves to the question what, with reference to the facts of the case, is the proper meaning of the words, the "Ecclesiastical law, as the same is now used and exercised in the Diocese of London, so far as the circumstances and occasion of the said Town, Island, territories and people shall admit or require." The inquiry, then, is, whether the circumstances and occasion will admit or require the application of the English Ecclesiastical law in this instance?

We must remember that the English Ecclesiastical law is founded exclusively on the assumption that all the parties litigant are Christians; indeed originally, more strictly speaking, Christians professing the doctrine of the Church, and that till of late days, the only mode of enforcing the decrees of Courts Christian was by process of excommunication, the imprisonment which followed taking place under the authority of the Civil Courts. Excommunication in ordinary cases is now superseded; instead of that proceeding, the Ecclesiastical Courts pronounce the parties to be in contempt, and signify the same to the Court of Chancery, which issues the authority to imprison.

It is true, however, that a considerable part of the jurisdiction of the Ecclesiastical Court is in its nature, [416] though not in its origin, purely civil, and has no proper connection whatever with any religious matters. We advert to the grant of probate and administration.

Our proper inquiry is, whether, with reference to the limitation in the Charter, "as far as the circumstances and occasion of the said people shall admit or require," it is consistent with that limitation for the Ecclesiastical side of the Supreme Court to entertain a suit for the restitution of conjugal rights at the instance of a Parsee wife against her husband.

We must consider the nature of such a suit, the steps which must or may be taken in it, and the consequences which may arise from any decree which may be pronounced in it. In such a suit, the first step may be to try the validity of a Parsee marriage, and though this might be a task of no small difficulty, yet, perhaps, it might be practicable to determine such a question by Parsee law, if it be competent to a Court Christian to take cognizance of the Parsee law for such purposes. We are aware that, under particular circumstances, the Ecclesiastical Courts in England have exercised jurisdiction with respect to Jewish marriages, ascertaining their validity by Jewish laws; but the very great difficulties attending such investigation, and the almost absurd consequences to which they lead, would not induce us to follow those precedents further than strict necessity requires.

Assuming, however, the validity of the marriage to have been tried and established, the next step in a suit for the restitution of conjugal rights in the Ecclesiastical Court, if there be no defence, is to order the husband (assuming him to be the party [417] proceeded against) to take his wife home and treat her with conjugal affection; and if he refuse, to pronounce him in contempt, the consequence of which is imprisonment. The husband may defend himself by alleging and proving his wife's infidelity or cruelty.

The Ecclesiastical Court has no power to decree alimony, except *pendente lite*, or after a decree for separation by reason of cruelty or adultery. It is wholly contrary to the first principles on which the Ecclesiastical Courts proceed, to allow alimony under any other circumstances, for the Ecclesiastical Court cannot contemplate any separation of husband and wife, except where cohabitation is pre-

vented by adultery, or rendered impracticable by cruelty. Under all other circumstances, a separation is, by Ecclesiastical law, unlawful. It follows, therefore, if the wife succeed in a suit for the restitution of conjugal rights, the sole remedy is to compel the husband to take her home.

It appears in this case that the husband has gone through the form of marriage with another woman, with whom he is cohabiting. He, therefore, either has another wife, lawful by Parsee law, or he is living in adultery.

Is it possible that in either of these two cases the husband can, by the Ecclesiastical law as it prevails in the Diocese of London, be directed to take his wife home? In England, the wife, on account of such an intercourse, would be entitled to a separation from bed and board, and alimony; but a prayer for restitution is, under such circumstances, wholly unheard of. A Court Christian cannot enforce a renewal of cohabitation with an adulterer or adulteress: such a [418] proceeding would be utterly repugnant to its character, its practice, and its principles. Such a decree would not be the administration of Ecclesiastical law, but the violation of it. What might be the remedy by Parsee law we think it wholly unnecessary to inquire, because, from the religion the Parsees profess, it cannot be the remedy the Court Christian would afford, nor would such relief be administered by Ecclesiastical law.

There are, however, other difficulties. The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility. Change it in its essential character, and it ceases to be Ecclesiastical law altogether.

For the reasons we have stated, we think that a suit for the restitution of conjugal rights, strictly an Ecclesiastical proceeding, could not, consistently with the principles and rules of Ecclesiastical law, be applied to parties who profess the Parsee religion; but we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them. We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them, but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it must be [419] recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as, for time out of mind, were incident to their own caste; nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages. Such remedies we conceive that the Supreme Court on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow. In suits commenced on the civil side, the peculiar difficulties which belong to the exercise of Ecclesiastical jurisdiction in some matrimonial cases would not arise. Proceedings might be conducted on the civil side with such adaptation to the circumstances of the case as justice might require, though on the Ecclesiastical side such modification would be wholly irreconcilable with Ecclesiastical law.

We have been led to make these observations, not merely by general considerations, but more particularly by the case of *Mihirwanjee Nuoshirwanjee v. Awan Bacc* (2 Borr. Bom. Sud. Dew. Repts. 209). That case shows that the Sudder Adawlut at Bombay will take cognizance of matrimonial suits between Parsees, and will afford them such relief as a due regard to their own laws and customs will allow; it also proves, as indeed must be expected, that those laws and customs are wholly at variance with the principles which govern the matrimonial law of the Diocese of London, and incompatible with the Ecclesiastical law, as in such cases is administered. One instance will suffice. It appears that, under many circumstances, the husband is permitted to take a second wife, the first being alive.

We have not neglected to observe that in two or [420] three cases, the Ecclesiastical side of the Supreme Court has not refused to entertain suits of this description, but we have no reason to think that the difficulties which occur to us were brought prominently before that Court, or that, after duly considering them, the Judges came



to the conclusion that they were unimportant. There is no such course of decision as should make us hesitate in giving effect to our own opinion.

We think that the protest should be sustained, and the judgment reversed on the grounds we have stated, and we do not deem it necessary to enter upon a discussion which chiefly occupied the time of the Court below, whether the parties to this suit were or were not persons who, prior to the date of the Letters Patent establishing the Court, were described and distinguished in the Royal Charters of Justice by the appellation of "British subjects." Whatever may, in such respect, be their description, our opinion is that this suit cannot be entertained.

The Lords of the Committee will, therefore, humbly report to Her Majesty as their opinion, that the Order of the Supreme Court of Judicature at Bombay, of 5th July, 1854, whereby the protest of the Appellant was overruled, ought to be reversed, each party paying his and her own costs of this appeal.

[Mews' Dig. tit. HUSBAND AND WIFE; I. MARRIAGE; 1. *Validity*; b. *Solemnisation*; v. *In what places, and before whom*. S.C. 6 Moo. Ind. App. 348. See *Hyde v. Hyde*, 1866, 1 P. and D. 137. As to matrimonial jurisdiction of High Court of Bombay, see art. 35 of Letters Patent of 28th Dec., 1865 (Stat. R. and O. Rev. IV. 117).]

#### [421] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

The Reverend ROBERT WEST,—*Appellant*; EDWARD WILLIAM JOHNSON,—*Respondent* \* [June 20, 1856].

Appeal from the Arches Court of Canterbury dismissed, and the sentence appealed from confirmed with costs, and the cause remitted to the Court below. The Appellant having by special proxy declared that he would proceed no further in the appeal.

In this case an appeal had been interposed from a sentence of the Arches Court suspending the Appellant for two years *ab officio et beneficio*. An inhibition was extracted and served, and a libel given in and admitted, and issue joined upon it. The Appellant's proctor afterwards exhibited a special proxy under the Appellant's hand and seal, and by virtue thereof declared that the Appellant proceeded no further in the appeal.

Dr. Phillimore for the Respondent, now moved to dismiss the appeal and to confirm the sentence appealed from, and to remit the cause to the Arches Court of Canterbury, and to condemn the Appellant in the costs of appeal.

Their Lordships ordered accordingly.

#### [422] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

WILLIAM DIMES,—*Appellant*; HENRY DIMES and ELIZABETH DIMES,—*Respondents* † [June 19, 20, 21, 1856].

The difference, in a question of fluctuating capacity and partial recovery, between unsoundness of mind partaking of the nature of mental derangement, manifesting itself in insane delusions; from unsoundness of mind caused by fever, which produces delirium, observed upon [10 Moo. P.C. 428].

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

† Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

In a case where from bodily indisposition the Testator's mind fluctuated, and at times produced an excitement which while it lasted amounted to unsoundness of mind, a Will and Codicil made in accordance with the intentions of the deceased expressed in a former testamentary instrument and of his declarations and the state of his affection; pronounced for, the fact of a lucid interval at the time of execution being established [10 Moo. P.C. 439].

Where the circumstances of the case are so doubtful as to require that a Will should be established by legal proof, the party objecting to the legality ought not to be subjected to costs for instituting such an inquiry; but after a full inquiry and the Will established in the Court below, the Judicial Committee held that there was no sufficient ground to justify the appeal, and decreed costs against the Appellant [10 Moo. P.C. 440].

This case related to the validity of the Will and Codicil of Thomas Dimes. The deceased had been insane and kept under the control of a keeper. The sole question raised in the Court below and upon appeal was, whether these instruments were executed by the deceased during a lucid interval, when he was of competent and sound mind. There was no dispute that these instruments were made in accordance with the expressed intentions of the deceased. The facts of the case fully appear in the judgment.

[423] The Appeal was argued by The Queen's Advocate (Sir John Harding), and Dr. Phillimore, for the Appellant; and Dr. Bayford, and Mr. Hawkins, for the Respondents. Their Lordships' judgment was delivered by

The Right Hon. Dr. Lushington (17th July, 1856).—Thomas Dimes died on the 5th of August, 1850, unmarried. He left two brothers and two sisters. He executed a Will on the 5th of February, 1849, and a Codicil to that Will on the 9th of April, in the same year. These instruments were propounded by Henry Dimes, one of his brothers, and Elizabeth Dimes, one of his sisters, the persons appointed executor and executrix. William Dimes, the elder brother, opposed the grant of probate. On the 2nd of May, 1855, the Judge of the Prerogative Court decreed probate of the two instruments, making no order as to costs. William Dimes has appealed from that decree to this Court.

The question agitated in the Court below was the sanity of the deceased at the times when these instruments were respectively executed.

It is necessary to give a brief history of the deceased before we approach the consideration of his state of mind in February and April, 1849. He died at the age of fifty-eight or thereabouts; by profession he was a solicitor, and his place of business was in Bread Street, Cheapside; his death took place at the house of his brother Henry, at Clapham. The per-[424]sonal estate is estimated at about £3000, and there is some freehold and copyhold property.

By the Will propounded, his brother Henry and sister Elizabeth are the persons chiefly benefited. The Will is attested by George Edward Hart and James Foord: the former being a tradesman at Littlehampton; the latter, a person engaged to attend the deceased, in what capacity, whether as his keeper or attendant, has been the subject of dispute. The Codicil was prepared and attested by Steinberg, a solicitor. James Foord was the other attesting witness.

These instruments were propounded in what is technically called a common *condit*, on which the attesting witnesses were examined.

William Dimes gave in an allegation, in which he pleaded that the deceased was attacked by severe illness in November, 1817, followed by delirium tremens. That he became insane and was treated as such by his medical attendants; that he was placed under restraint, and in the care of two keepers, who attended him till the beginning of 1848. That in the beginning of 1848, the deceased partially recovered his reason, but his health was much shattered; that he travelled the remainder of the year unattended by keepers, and finally settled at Littlehampton. That his conduct after he partially recovered his reason was very strange and eccentric. That on the 8th of January, 1849, he inflicted a severe wound on his arm, with the intention of destroying himself. That by medical advice he was placed under the care of Foord, who was accustomed to attend lunatics, and who continued to attend him to his



death; that he had a propensity to do himself bodily injury, and [425] was of unsound mind till his death. That he laboured under insane delusions in several particulars; declaring himself in a state of poverty; that he should be sent to his parish; and that he should be devoured alive by rats.

The case set up by William Dimes is insanity in 1847, partial recovery in 1848, constant insanity from the 3rd of January, 1849, covering of course the periods when the Will and Codicil were executed.

In answer to this plea, a very long allegation was given in on the part of the executor and executrix. That allegation pleaded, that by the Will of his father the deceased succeeded to his father's business as solicitor; the father died in 1823. That William Dimes, also a solicitor, endeavoured to abstract from the deceased some of his father's business; that, therefore, a quarrel arose, and there was no communication between them till 1839, when there was a partial reconciliation; that deceased declared that he should not leave his brother William any part of his property. That the deceased made a Will in 1846, whereby he gave his brother William ten guineas only.

With respect to the insanity alleged, the fifth article of this allegation admitted temporary mental derangement early in the month of December, 1847, but averred a perfect recovery at the end of that month. The sixth article pleads the execution of a Will on the 29th of November, 1847, and alleges it to have been executed when the deceased was very ill, and confined to his bed, but before he became mentally deranged. The seventh article pleads a recognition of this Will on the 30th of November, and declarations that his brother William should not take more of his property. The eighth article pleads declarations [426]-tions in December, 1847, by the deceased against his brother William, and placing the Will of November in the custody of Mr. Soward. The recovery of the deceased in 1848, and acts of business, are then set forth. The twelfth article pleads an agreement for a partnership with Steinberg in January, 1849, which deed of agreement was executed on the 9th of April in that year. The thirteenth, fourteenth, and fifteenth articles relate to the making of the Will propounded, and the eighteenth to the Codicil. The eighteenth article denies that the deceased, on the 5th of January, when he cut his arm, intended to destroy himself, and alleges that he did so to relieve himself from weight and oppression in the head; that he was placed under the care of Foord, but not subjected to personal restraint.

The case, therefore, on behalf of the Respondents is, admitted mental derangement in December 1847, recovery in 1848, and in substance, though not in words, a denial of any relapse afterwards.

In the investigation of this case it appears to us that the best course is to begin by examining the evidence to show the insanity at the end of 1847. Leeson is the first witness. He is a surgeon, and had occasionally attended the deceased, for many years prior to 1847. He was called in on the 22nd of November, and attended the deceased till the 18th of December, when, he says, he ceased to attend him, in consequence of the deceased entertaining unfounded prejudice against him; he says, "he was as mad as he could be." Leeson describes the disease under which the deceased was labouring to have been a severe inflammatory attack of rheumatism, and general fever over the whole system. He says that [427] the illness never assumed the character of delirium tremens, but from the 27th of November the deceased was suffering under delirium, which increased latterly so as to occasion a total loss of his mental powers. He was so violent as to have a keeper.

It is not unimportant to observe that this witness deposes to having seen the deceased three times each day of the 27th, 28th, and 29th of November. In answer to the sixth interrogatory, he states that the deceased was not mentally incapable till the 27th of November, after which he was mentally incapable of attending to any important matter of business. "It is out of the question that a man with a pulse at 130 can settle calmly any matter of business."

Gosset, another surgeon, saw the deceased three times on the 3rd, 4th, and 5th of December; this witness considered the illness to be delirium tremens; he was on the three days quite in a violent state of delirium. In answer to the second interrogatory, he says, delirium tremens would necessarily produce mental derangement, though distinct from what is ordinarily called insanity. "I considered it to be but

temporary, and perfectly curable." He saw him again in April, 1848, for a very short time, and considered he was recovered.

Dr. Connolly was called in on the 5th of December, and paid him several visits, ending on Monday, December the 27th. He says, when he first saw the deceased, he was in a state of high delirious excitement, and spoke of himself as being ruined, and was labouring under delusions, as I understood, on that head. On the 7th, 8th, and 10th of December he was still in a maniacal state of excitement, though for a few minutes he would talk reasonably. His illness had [428] more the character of delirium than mania, but not delirium tremens. When he saw him some months afterwards, he was feeble in body, and somewhat feeble in mind. In answer to the second interrogatory, he says his illness was not such as would necessarily produce permanent mental derangement. "So that I anticipated his recovery, mental and bodily."

That the deceased was of unsound mind during some part of this illness there cannot be a doubt. It was even anticipated that it might be necessary to send him to a lunatic asylum. But it is not unimportant, with a view to forming a just opinion of his mental state hereafter, to consider what, according to the testimony of these medical gentlemen, was the cause of his unsoundness of mind, and the nature of his disease.

Unsoundness of mind may be produced by various causes. A man may be of unsound mind when he labours under delusions, or from excess of fever which produces delirium, or when in a comatose state. Where an individual entertains delusions, he is more properly said to be insane than when he is temporarily affected by delirium or excess of fever; but unsoundness of mind arising from insane delusion is very different from that occasioned by fever or excess. Delusions are of a more permanent character; and when once proved to have been entertained, stronger and more conclusive evidence is required to show that the mind has been relieved from them. Not so when the moving cause is delirium or excess of fever. Such causes are in their nature of a more temporary character, more likely to yield to medical treatment, and there is more probability of cure.

With the exception of one circumstance presently [429] to be noticed, the disease under which the deceased laboured was clearly unsoundness of mind produced by delirium; and two out of three of his medical attendants foresaw and expected his recovery. The circumstance to which we refer was the declaration of the deceased that he was a ruined man; but to such declaration we cannot attach any great weight, because it is proved that whilst the deceased was of sound mind before this attack, he was in the habit of expressing himself in similarly exaggerated terms as to the state of his own pecuniary affairs.

It is impossible, we think, to read and consider the evidence which has been given in this case to the deceased's entire recovery from all mental disease, without coming to the conclusion that he did so recover. We will refer briefly to some of the evidence, which satisfies our minds in coming to this conclusion. There are letters in the handwriting of the deceased of various dates—July, August, and September, 1848. These letters are all on matters of business, and do not betray any symptom whatever of any mental derangement. Added to this are the remarks made by the deceased on the articles of partnership. We have, besides, the evidence of persons who transacted business with him. Hampton, who is a surgeon, transacted business with him in May, 1848, dined and spent three or four hours with him. His account of the deceased is, that he was weak, looked pallid and emaciated, and had every appearance of having had severe illness. "He told me all about his illness: how bad he had been, and who attended him. He told me that he had been for a time quite out of his mind. He made no concealment of that, but talked freely about it: he told me all particulars." This [430] gentleman had been acquainted with him for several years; and he deposes that he was of perfect sound mind, and he entrusted to him the management of some of his own affairs. Wanlop, the publisher of a newspaper, states that the deceased acted professionally for him, in one little affair, as late as the year 1848. He did not see any cause to doubt his being of perfect sound mind. Lane, a very old friend, saw him in January, 1848, when the deceased had a male attendant: he then conversed as rationally and sensibly as he had ever done, but he was irritable.



The history of the deceased after this illness of 1847 is given by Steinberg. In the early part of the year 1848 he visited different places in the country, returning to his residence in Bread Street. In June, 1848, he purchased a house at Littlehampton, and went to live there. Steinberg was in constant correspondence with the deceased during this year, managing the business for him, but the deceased was consulted on matters of business, and gave his directions; and this statement of Steinberg's is corroborated by the letters already adverted to.

Upon a consideration of the whole of the evidence, we are of opinion, that the deceased became of sound mind in the year 1848; that he was then capable of transacting business, and had an adequate testamentary capacity, though his constitution was shaken, and the vigour of his understanding had diminished.

On the 8th of January, 1849, the deceased being at Littlehampton, inflicted a wound on his arm, which nearly occasioned his death. He was upon that occasion attended by Candy, a medical gentleman resident at Littlehampton; by his recommendation, Foord, a regular keeper, previously employed in a lunatic asy-[431]-lum, was hired to attend the deceased. Candy continued to visit him for six weeks, and he gives the following account:—"The deceased was nearly dead from loss of blood: that he sent Foord, who was a regular keeper, to attend him; and that he was of unsound mind."

On the other hand, it is alleged that the deceased was not of unsound mind on this 8th day of January; but that, contrary to his custom, he had been drinking in the morning, and complained of great weight and oppression in his head; that he made the wound in his arm to relieve his head, and not with the intention of destroying himself; that this man Foord was engaged from that time to attend on the deceased, and continued so to do till his death; yet that the deceased was not put under personal restraint, and that he made no attempt afterwards to destroy or injure himself.

No witness examined on behalf of the executor and executrix can give any evidence as to the first part of this allegation, namely, as to the occurrence of the 8th of January. Mrs. Amess, who gives evidence on behalf of William Dimes, deposes that it was the intention of the deceased to destroy himself. She says that he always expressed a fear that he should do himself a mischief, and used to pray against it. We think that the result of this evidence is, that the deceased did attempt to destroy himself, and that he was of unsound mind at the time. The question, therefore, for consideration, is, whether he recovered and became of sound mind on the 5th of February, 1849, when he executed the Will propounded.

Candy is of opinion that the deceased did not recover during the six weeks he attended him from [432] the 8th of January. He says the deceased was generally sullen; "I consider that he was throughout that time in an unsound state of mind; I should call him insane." Candy, when further examined as to the state of mind of the deceased on the 5th day of February, deposes that he was decidedly of unsound mind; the deceased said but very little to him, and appeared to regard him with suspicion; he cannot speak positively to any delusion, though he thinks it probable that delusion might exist.

It is necessary to consider whether this act of violence committed by the deceased upon himself arose from any temporary cause which might quickly disappear, or was the result of a continuous mental derangement which might show itself at any time in a similar form. We have very little evidence to enable us to form a satisfactory opinion upon this point; but remembering the indisposition of 1847, and how soon the deceased recovered from that attack, looking, so far as we are able, at the nature of his indisposition, and remembering also that there is no evidence of delusion, we think it not improbable that the deceased might soon have recovered and become of sound mind; the fact, however, of an attempt at self-destruction, and the continued attendance of the keeper, are circumstances to excite our utmost vigilance, and to induce us to trace accurately the history of the testamentary acts of the deceased, as well as the evidence applicable to the Will propounded.

In the month of October, 1846, when the deceased was unquestionably of sound mind, he executed a Will; by that Will he bequeathed to his brother William ten guineas only, and to his wife the same.

Steinberg, who had been clerk to the deceased from [433] 1831, and in 1849 became his partner, deposes on the sixth Article, that, on the 29th of November, 1847, the deceased sent for him. And we may here remark, that, though Steinberg has some interest under the Will propounded, and also an interest in sustaining the soundness of mind of the deceased, by reason of the subsequent articles of partnership, yet we see no reason to distrust either the accuracy of his memory or his veracity. On that day, the 29th of November, according to his evidence, the illness of the deceased had not any effect upon his mind: he was unable to articulate distinctly, but he motioned the witness to give him a travelling writing-desk, which he unlocked, and gave to the witness the Will of October, 1846. The deceased gave him to understand that he wished to make a fresh Will: the deceased altered in pencil the Will of October, 1846, and stated his reasons for the alterations to be made in his Will: one of which was the recent death of his mother. The deceased had also taken offence against his sister, Susan Dimes, and insisted upon certain observations against her being inserted in the Will. This Will was executed in the presence of Hawtrey and of Younghusband on that same day, the 29th of November.

It is true that Leeson, who attended the deceased at that time, deposes that on the 27th of November the deceased became of unsound mind, and that he saw him three times on the 28th, 29th, and 30th days of November, and that he was suffering under delirium, which he considers to have commenced on the 27th, and to have rendered him incapable of any testamentary act.

Considering the evidence given by the two attesting witnesses, as well as by Steinberg, we think it much [434] more consistent with probability that Leeson should be mistaken as to the day when the delirium commenced, than that these three witnesses should have given evidence entirely contrary to the truth. Indeed, the fact that Dr. Connolly did not attend till the 5th of December, shows that it was not probable that the deceased was in so desperate a state at the end of November: the keeper was not called in till December. We are satisfied, therefore, that the deceased did, having testamentary capacity, duly execute the Will—a Will, in all its contents, very similar to the Will now propounded.

It further appears that the deceased was apprehensive that his Will might be disputed on the ground of his state of mind, soon after its execution, of which, as appears by other evidence, he was fully cognizant; therefore, in August, 1848, he re-executed this Will in the presence of two other witnesses. This execution shows an adherence to the testamentary intentions contained in that paper.

We must now advert to the evidence of Henry Dimes, the brother, executor, and one of the residuary legatees in the Will propounded, and who, though now a competent witness, is greatly interested to support this Will. His credit has, in the course of the argument, been severely attacked; and for that reason and also on account of his interest, it is necessary to examine his evidence with care. It appears that he wrote, on the 10th of January, 1849, from Littlehampton, to his brother William, in which he says that his brother is very unwell and anxious to see him, but he makes no mention of what had occurred on the 8th. On the 12th, he writes another letter, in which he says, "I wish not to alarm you, but, to tell [435] you the truth, Tommy, on Monday afternoon, lost two quarts of blood by his own hand; and the medical man says that now he has commenced, there never will be any reliance upon him." He then presses his brother to come down. In his answer to the third interrogatory, Henry Dimes denies that the deceased intended to destroy himself, or that he was of unsound mind.

We do not perceive any such contradiction between this letter and the statement of Henry Dimes, or in his conduct, as to induce us to say his evidence should be discredited.

The first we learn of the making of the Will of the 5th of February, is from Henry Dimes on the thirteenth Article. He deposes that, on the 9th of January, the very day after the deceased had inflicted the wound upon himself, "in the evening the deceased gave me his Will of November, 1847, and wished me to make minutes on it as to alterations, but I could not write fast enough. I wrote a little on the fly-sheet, but I could not write so fast as he talked, and he got out of patience with me, being very quick himself. He desired me to send it to Steinberg, with directions to make a fair copy of it, agreeable to the deceased's own alterations."



The Will was in a cancelled state, with some pencil alterations on it. The witness wrote about three pencil lines only on the fly-sheet, but does not recollect what: the Will was forwarded to Steinberg about the 12th of January. Steinberg went down to Littlehampton about the 3rd or 4th of February, and gave the deceased some lined paper, and said it was the paper he had written for; the deceased said he should not make his Will just at that time, he should do it by-and-bye. Steinberg left on the 4th of [436] February; on the 5th of February the deceased drew up his Will, on sundry little pieces of paper; he made a fair copy of it on the brief paper he had sent for. After dinner the deceased went out and had it executed. Henry Dimes was present.

Steinberg's account of the transaction is, that in the month of January he received the Will of November, 1847, from Henry Dimes; that, on the 23rd of January, the deceased wrote a letter requesting him to send him some blue-lined brief paper, which he either sent or took accordingly; Steinberg went down on the 3rd of February, when a conversation ensued with the deceased as to his Will. Steinberg told him that as he had cancelled his former Will, his sisters would be unprovided for, and his brother would take the greater part of his property. He said he felt too weak to do it just then. Steinberg then offered to do it for him; but he said he would do it himself when he got stronger: he said he did not intend his brother William to get any of his property; he would take care of that time enough.

The evidence given by these two witnesses is corroborated by the writing of the deceased on the Will, and by the letter produced in this cause. In the margin of the Will, is to be found a memorandum written by the deceased of a provision to be made for his natural daughter. There is also in evidence a letter, dated Littlehampton, the 23rd of January, 1849, and addressed by the deceased to Steinberg: it corroborates, as we have said, the evidence given by him and Henry Dimes, for the postscript is in these words: "When you send again or anybody comes, let them bring a stick or two of some red wax and some lined brief paper." This letter is of still greater import-[437]-ance, as proving that the deceased was not at that time subject to mental derangement, for it discusses, apparently with sound sense and discretion, various matters of business.

The Will thus written by the deceased, and in his own handwriting, and prepared under the circumstances stated, was executed in the presence of Henry Dimes, in the house of Hart, a shopkeeper at Littlehampton, and was attested by Hart, and Foord, the keeper. Both the attesting witnesses, prior to their being examined in this cause, had made affidavits in the Court of Chancery, and, consequently, when they came to be examined ran the risk of being exposed to any contradiction between their evidence and those affidavits. Such a state of things is not very favourable to the production of trustworthy evidence, nor is the evidence produced of a character upon which much reliance may be placed with regard to the soundness of mind of the deceased at the time of the execution. Hart had some slight acquaintance with the deceased, who entered his shop, produced the Will, and asked him to witness his signature, and accordingly the execution took place in the presence of Hart and Foord, who attested the Will. The evidence of Hart as to the competency of the deceased to make his Will is not decided. He says, "Whether Mr. Dimes was or was not competent to make his Will at that period, I really do not think I am competent to judge"; but this witness did not observe that the deceased, either in his conversation or conduct, did anything to excite suspicion. He says, "He certainly seemed from some cause or other to be more than usually nervous and excited in his manner; he acted as if he were in a hurry as it were, but there [438] was nothing whatever in his conduct on the occasion, nothing he did or said but what was rational and natural on such an occasion." The witness adds, that his brother being there, and by his presence sanctioning what was done, it would not enter his mind but that it was right. Foord, after the Will was signed, remarked to Hart, "That is all of no use." Probably that observation arose in the mind of Foord, not from the conduct of the deceased, but from the impression that the deceased being under the care of him, Foord, as a keeper, was, therefore, incompetent to do any legal act. He declines deposing whether the deceased was of sound mind, sufficient, in law, to allow of his making a Will or not. Henry Dimes,

who was present, as might have been expected, speaks positively to the deceased being of sound mind.

It has been contended that certain letters written by the deceased in this same month of February, after the execution of the Will, show that the deceased was not of sound mind. Now, we think that it is not to be wondered at that the deceased having had a keeper placed about him, would be very much excited by that circumstance, and might entertain a notion as to his poverty not quite consistent with a calm and rational consideration of his own state: he was most anxious to leave Littlehampton; he was most desirous to get rid of his keeper; he might possibly have entertained a notion that he should be passed to his parish—this might be either an exaggerated mode of expressing himself, and not unlikely, when we recollect that it is admitted that when of sound mind he used to express his fears of poverty in terms which might be deemed extravagant. But granting that these letters are not altogether reconcilable with a [439] calm and composed state of mind, we do not, however, therefore, come to the conclusion that they prove mental derangement on the 5th of February, a fortnight before the earliest of them was written.

Looking at the contents of this Will, seeing how conformable it is to the intentions of the deceased as expressed in former testamentary instruments, and how consonant it is with all the evidence as to his declarations and the state of his affections, remembering how deliberately it was prepared in every part by the act of the deceased himself, we have come to the conclusion that the deceased was of sound mind when he executed the same, and that the decree of the Court below is well founded. We think that though the deceased was at times of unsound mind, that unsoundness was of a peculiar character, not partaking of the nature of mental derangement manifesting itself in delusions, nor likely to be attended with the same degree of permanency. This was a case where bodily indisposition, fluctuating from time to time, and at periods becoming more severe, did at such times produce an excitement which, whilst it lasted, amounted to unsoundness of mind.

It is not necessary to expend much time upon a consideration of the Codicil; the contents of that instrument are to take away the provision made for the child, and to confirm the Will. It is dated the 9th of April, in the same year, and was attested by Steinberg and Foord. There is nothing irrational in the act which the deceased did, and it is not the province of a Court of Justice to inquire whether the provocation was adequate or not.

We are of opinion that the decree of the Court below is correct in every respect, and ought to be [440] affirmed. The circumstances of the case justified William Dimes in requiring that this Will and Codicil should be established by legal proof, and we agree with the learned Judge of the Prerogative Court that he ought not to have been subjected to costs for instituting such an inquiry; but after a full investigation into all the facts of this case had taken place, and the judgment pronounced, we are of opinion that there was no sufficient ground to justify the appeal, and we shall, therefore, humbly advise Her Majesty to affirm the decree of the Court below with costs.

[See note to *Waring v. Waring*, 1848, 6 Moo. P.C. 341.]

#### ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

GEORGE SCOUTER,—*Appellant*; EDWARD WILLIAM PLOWRIGHT, and MORTON ANDREW EDWARDS (intervening).—*Respondents* \* [June 25 and 26, 1856].

In ordinary cases, where there is execution and capacity, the validity of a

\* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.



Will is established [10 Moo. P.C. 444]. Where, however, the Will is prepared by a party principally benefited, and the circumstances are suspicious, an exception to this rule prevails, and it is necessary to prove to the satisfaction of the Court that the Testator had full knowledge of the instrument and its contents, and executed the same freely, without any undue control [10 Moo. P.C. 444].

- A Will, prepared by the party principally benefited, to the exclusion of the Testator's family, which was concealed during the lifetime of the Testator, declared invalid, and probate refused, the evidence showing no previous declaration of the Testator of an intention to make such a Will, and no subsequent recognition by him of its contents; but, on the contrary, the evidence establishing, from the whole conduct of the Testator, that he executed the Will in ignorance of its contents, while acting under the control of the party principally benefited [10 Moo. P.C. 457, 458].

William Scouler, the validity of whose Will was the question in this appeal, died on the 23rd of July, 1854, about sixty years of age, leaving the Appellant, his only brother and next of kin. The Will [441] was propounded by the Respondent, Plowright, one of the executors named therein. It was impeached by the Appellant on the ground that the Testator had been induced to execute it in ignorance of its contents, under compulsion and duress exercised by the other Respondent, Edwards. The Will had been prepared by the Respondent, Edwards, a partner of the deceased and one of the residuary legatees named in the Will, a few days before the death of the Testator, and by which instrument he was largely benefited, to the entire exclusion of the Appellant. The fact of the execution of the Will was concealed by Edwards from the Appellant, until after the Testator's death. The leading facts and the evidence are fully set forth in their Lordships' judgment. The Judge of the Prerogative Court (The Right Hon. Sir John Dodson) by his decree pronounced in favour of the Will, upon the ground that the capacity of the Testator and the execution of the Will was proved; and he was further of opinion, that the charge of fraud and duress had not been established, although he admitted the case was open to considerable suspicion, and condemned the Appellant in costs from the time of giving in his allegation.

The appeal was from this decree, and was argued by Mr. Bagshawe, Q.C., and Dr. Phillimore, for the Appellant; and Dr. Jenner, and Dr. Spinks, for the Respondent, Edwards.

[442] The arguments are sufficiently noticed in the judgment.

The consideration of the judgment was reserved, and afterwards delivered by

The Right Hon. Dr. Lushington (Nov. 29, 1856).—The Will in this case was propounded by the Respondent, Plowright, one of the executors named therein, and was opposed by the Appellant, the only brother and next of kin of the deceased.

The proceedings in the case were as follows:—An allegation, or rather a common conditit, was given in on behalf of the executor, and thereon were examined the Respondent, Edwards, who drew the Will, and the four subscribing witnesses. An allegation was also given in on behalf of the Appellant. Six witnesses were examined thereon.

The deceased died on the 23rd of July, 1854: his age cannot be distinctly made out from the evidence; it was probably about sixty years. For many years he carried on the business of a sculptor, in Dean Street, Soho. His personal property amounted to about £4000. The Will is dated the 12th of July, 1854. The deceased resided alone on the premises where his business was carried on, a woman coming occasionally to do the household work. His habits were very penurious. His brother, the Appellant, resided at Edinburgh. With Mr. Papworth and Mr. Campbell, who were also sculptors, the deceased was on terms of intimacy. There were also two solicitors well acquainted with him; Plowright, who was the party in the Court below, and Mr. Van Sandau. Dr. D'Allex was his usual medical attendant; Mr. Simpson was with him shortly before his death. Marchetti [443] and Maspoli were for many years employed by the deceased in his business.

By the Will, the share of the deceased in the stock-in-trade is given to his partner, the Respondent, Edwards, and the residue to him and a Mr. Hay. The

executors are Papworth and Plowright. The evidence furnishes us with very little information as to the deceased or his family; we cannot trace that any communication had recently taken place between the deceased and the Appellant, who, as before observed, resided at Edinburgh, though the deceased knew his address.

As Edwards is appointed residuary legatee with Hay, it will be desirable to trace, as far as we have the means, the connection between the deceased and these two gentlemen, observing, however, that there is no evidence of any previous Will having been executed by the Testator.

We have from Edwards an account of his acquaintance and connection with the deceased. Edwards, at the time of his examination, was twenty years of age. He states that he knew the deceased about five years before his death; he went to see the deceased, for his then master, Mr. Physick, to buy a bust; that he was constantly in the habit of seeing him afterwards from time to time, always upon business, to buy or to borrow objects of sculpture from him; he became more intimate with him latterly. Several times previous to the 30th of May, 1854, he went to him respecting the purchase of a figure.

The circumstances which led to the formation of a partnership with the deceased are thus set forth by Edwards in his evidence. "It occurred to me (he says), that his business might be managed more ad-[444]-vantageously, if looked after by some one more active than himself; I considered that it would be advantageous both to the deceased and to myself, if I proposed to enter into partnership. After talking over it several times, and writing a letter stating the terms, I entered into partnership, on the 30th of May, 1854." The entire capital of the firm was found by the deceased alone.

Now, the question of the validity of the partnership is not the subject of the present inquiry, and we notice it only, as it may have any possible bearing upon the Will. It is, indeed, somewhat surprising to see a tradesman of the age of the deceased enter into partnership with a young man under age. When considering the conduct of deceased in the making of the Will, and contents of the Will, it is possible that this transaction may operate, in some slight degree at least, either in favour of the Will, or against it, as the Court may view it in conjunction with all other circumstances.

Considering the evidence which has been produced in support of this Will, we think that there is sufficient proof that the Testator executed this Will according to the exigencies of the Statute, and whatever might be his state of body, his testamentary capacity is not impeached. In all ordinary cases, where there is execution and capacity, the validity of the Will would be established, but where the Will is prepared by the party principally benefited, as in this case, it is well known that an exception to this rule may prevail. In such a case it may be necessary to prove to the satisfaction of the Court that the Testator had full knowledge of the instrument he executed, and for the obvious reason, that the party [445] instrumental in the preparation of the Will, and procuring its execution, is interested. The rule, under similar circumstances, is laid down by Baron Parke, in the case of *Barry v. Butlin* (2 Moore's P.C. Cases, 480). In substance, it is this; that where a Will has been prepared for the Testator by the party principally benefited by it, and executed under his supervision, proof, if the circumstances are suspicious, must be given that the Testator was cognizant of the contents of such Will, and executed it freely without undue control. In a subsequent case, *Darling v. Loveland* (2 Curt. 227), Sir Herbert Jenner Fust stated that the doctrine, as laid down by Baron Parke, had always been the rule prevailing in the Prerogative Court; and according to the best of my knowledge that statement was perfectly correct, though this same question was mooted before the Delegates in the well-known case of *Henshaw v. Atkinson* (not reported; heard on the 1st Commission of Delegates, 9th of June, 1814; on the 1st Commission of Adjuncts, 18th of February, 1815; and on 2nd Commission of Adjuncts, 11th of May, 1815). In that case, the first Commission of Delegates were equally divided in opinion. A Commission of Adjuncts issued, and they were again equally divided, then came a second Commission of Adjuncts, which decided by a majority in favour of the Codicil in dispute; during the pendency of the case before the Delegates, reference having been so often made to the doctrines of the Prerogative Court upon this subject, and every case which appeared



to have the remotest bearing having been searched up, and still a difference of opinion existing, Sir John Nicholl availed himself of the case of *Paske v. Ollatt* (2 [446] Phill. 323), which was an undefended case, to state what he conceived to be the law of the Court upon the question.

There is another matter which cannot be laid out of consideration on the present occasion, and that is, whether the deceased was a free agent, or whether he was not subject to control. Now it is upon a consideration of all these matters combined, that the Court must endeavour to arrive at the true conclusion, and declare whether it is satisfied by the evidence in this cause, that the deceased was, at the time of the execution of the Will, not only of sound mind, but also free from all undue control, and perfectly cognizant of the contents of the instrument to which he set his hand.

With reference to these considerations, and the peculiar circumstances of this case, we must inquire how far the evidence in support of the Will is confirmed by other facts proved in the cause; and also, whether the Court has been put in possession of all the information which a case of this description requires. Edwards makes the following statement: "The first time that I had any conversation with the deceased as to his testamentary intentions was on the 6th of July, 1854, or thereabouts. The doctor had told him, he said, that he was much worse with his drowsy; he (the deceased) said that he ought to make his Will; I cannot recollect the exact conversation nor how it arose. I sent for Mr. Plowright according to the deceased's desire, I wrote for him." Then an interview takes place between Plowright and the deceased. On the 8th of July, the deceased said, "I should like to see Plowright again, or words to that effect," and Plowright had another interview with [447] him. None of these facts have been pleaded, and Plowright has not been examined. It would have tended greatly to the elucidation of this case, if the Court had been informed of what occurred at these two interviews; we might then have known what were the testamentary intentions of the deceased at that period, how far they corresponded with his subsequent acts, and have had some satisfactory explanation why Plowright, having been sent for with respect to deceased's Will, was not employed in the making thereof. The witness goes on to say, that on the 9th or 10th of July, he asked Papworth "if deceased had made a Will;" why this question was asked, or what answer was received, is left in the dark. The witness then proceeds to give an account of the manner in which he received, on the 12th of July, instructions from the deceased. He says the deceased sent for him, and said, "I will now make my Will," and then gave him instructions, of which he made certain memoranda. The witness deposes, that he asked deceased if he should send for Plowright to draw up the Will; when the deceased said, "No, he will charge so much;" the witness then left the deceased, went to Hay, who was his co-residuary legatee, who dictated the Will, which was written by Edwards.

Now Hay has not been examined as a witness in this case, but he might have been, and certainly a plea might have been so framed as to admit of the reception of his evidence, and it might not have been unimportant, as confirmatory of the statement of Edwards, or the contrary.

A very important fact is then deposited to by Edwards. He swears that he took the Will to the deceased, and read it over to him from the beginning [448] to the end; and if this fact were proved to the satisfaction of the Court, and the Testator was a free agent, no doubt the Will would be entitled to probate; but it is left upon the evidence of Edwards alone; there is no satisfactory corroboration of the statement at the subsequent execution. It is said, indeed, that the deceased put on his spectacles and looked at the Will, but not a word escaped him as to his knowledge of the contents of the instrument; one of the witnesses, Salkeld, deposes, that he is quite sure the deceased did not read it through: indeed, if the deceased had had the Will read to him just before, it is not very probable that in his state of bodily health and weakness of sight, he should have read it over at that period. The execution of the Will then follows.

The next step will be to examine, as far as we have the means, what occurred with respect to the deceased's testamentary intentions prior to the 12th of July. We must derive this information from the evidence of Papworth and Van Sandau. Papworth was a sculptor, as the deceased himself was, and had known him for the

last twenty years of his life : he was intimate with him, and in the Will propounded was named one of his executors. On the fifth Article he gives the following account. He says, that on the 10th of July he called upon the deceased : that Edwards spoke of the deceased making a Will, and said it was quite right he should do so, and asked Papworth if he would be one of the executors. According to Edwards' account, the deceased had not at that time stated to him any testamentary intentions ; Edwards then observed, that he thought it would be proper for his own attorney to be one of the executors. Both Papworth and the attorney are executors [449] in the Will, and Edwards was suggesting such arrangement without previous concert with the deceased, and such arrangement is carried out.

On the 11th of July, Papworth again visited the deceased, who told him that Edwards had been speaking to him on the subject of his Will, and had been urging him to make his Will. Of any such proceedings we have no evidence from Edwards himself ; there is not a word from him as to his having spoken to the deceased about making his Will, or urging him to do so.

The next information given by Papworth deserves consideration. He says the deceased asked him to see his solicitor, Van Sandau (not Plowright), and to tell him that he (the deceased) should be glad to see him, and to ask him whether he thought it needful that he (the deceased) should make his Will. On the following day, July the 12th, the witness again saw the deceased in the afternoon, and the deceased again expressed himself as being anxious to see Van Sandau on the subject of his Will. " I told him Van Sandau would be with him in the course of the next day. When I left the deceased, Edwards informed me that I could not be allowed to see the deceased any more without the sanction of the doctor." The witness called again about half-past nine in the evening, and saw both Edwards and Dr. D'Allex. He asked Dr. D'Allex when it was likely that the deceased would be well enough to be seen ; informing him that the deceased expected to see his solicitor on the subject of his Will, and that his solicitor was going to call on that subject in the course of the following day. Dr. D'Allex said the deceased could not be seen. Witness asked Dr. D'Allex whether the appointment must be put off, [450] and he replied " Yes ; " Edwards was present during the whole of that time, and concurred with Dr. D'Allex.

This evidence is of very great importance, and gives rise to many observations. In the first place, it must be taken to be true, for there is no cause to doubt Papworth's veracity ; and, moreover, if it were not consistent with the truth, it was competent to Edwards to have contradicted this statement, both by his own testimony, and also that of Dr. D'Allex.

From this evidence we perceive that Edwards had been urging the deceased to make his Will ; that the deceased contemplated seeing Van Sandau (not Plowright nor Edwards) as to the making of it ; that on this very 12th day of July, after the Will propounded in this cause was executed, Edwards concealing that fact from every one, as he himself admits, and being fully aware that the deceased wished to see Van Sandau about his Will, for the first time prohibits Papworth or any one else from seeing the deceased ; and, moreover, this most important fact appears, that after the execution of the Will the deceased himself, without making any mention of such Will, again desires Papworth to send Van Sandau to him about his Will.

Papworth, so far as the circumstances allow, is confirmed as to this statement by the evidence of Van Sandau, and the letters produced. During the interval between the 12th and the 19th of July, Papworth called once or twice at the deceased's house, but did not see him.

The transactions of the 19th of July are important. There are three witnesses who deposed to them, Campbell, Papworth, and Maspoli ; they mutually confirm each other, so as to leave us in no doubt as [451] to the general truth of their statement. On the 19th of July, Campbell saw the deceased. On that occasion, the deceased was anxious that Edwards and the nurse should not know where his papers were, and he requested Campbell to send Van Sandau to him about his Will. The deceased wanted to see him immediately. Campbell not remembering who Van Sandau was, the deceased wrote down his name on a small piece of paper, which is produced. On the 19th of July, a message came to Papworth from the deceased, desiring to see him immediately. The message was delivered to Papworth by his son ; and Maspoli deposes to the deceased having said, " Go fetch Papworth, and tell



him to bring a policeman with him." That he had told the deceased that he would not do so, because Edwards had blamed him for letting Campbell in on that day. Papworth's son having called, he informed him of the wish of the deceased to see his father. We think it is impossible to deny that the conduct of the deceased on the 19th of July is not easily to be reconciled with the fact of his having on the 12th of that month made his Will, and so largely in favour of Edwards. The desire to conceal his papers from Edwards, his anxiety to see Van Sandau about his Will, nay, the very fact of his sending for Campbell, who was an old friend, and that without Edwards' knowledge and concurrence, all these circumstances militate against the probability of his having finally settled his affairs, and made Edwards a residuary legatee. Neither is it wholly unimportant that the deceased does not send for Hay, who is represented to have lodged in the house, and transacted much of business in writing and accounts for him, and who is in the Will propounded a residuary [452] legatee. Why, if the deceased had duly executed the Will of the 12th of July, should he take the pains, in his debilitated state, to send Maspoli for Campbell, and to send Maspoli secretly from those about him, addressing Maspoli in Italian, that the same might not be known? Why should he send to procure Van Sandau's attendance in this circuitous mode through Campbell, and not through Edwards? If he had really intended the bequests contained in the Will of the 19th of July, and wished to adhere to them, and confirm his intention by a more formal instrument, Edwards was the very person he would have selected to send for Van Sandau. The transactions of this day, July the 19th, do not end here, for it is, as we have stated, on that day, after the interview of the deceased with Campbell, that he, the deceased, said to Maspoli, "Go and fetch Papworth, I want to see him—go fetch him, and tell him to bring a policeman with him." Looking at the previous circumstances, with the postponement of Van Sandau's visit, with the exclusion of the friends of the deceased, whether by the order of Edwards or Dr. D'Allex, these directions of the deceased savour very strongly of his being at that time subject to control, and no longer a free agent.

And this view of the case is further confirmed by the evidence of Maspoli and his conduct. When desired by the deceased to fetch Papworth, he says, "I told Scouler that I should not go, because Edwards had desired me not to let any one see him, and had blamed me for letting in Campbell."

This is very strong evidence of control exercised by Edwards over the deceased at that time: even Maspoli, an old workman of the deceased, dares not [453] disobey Edwards, whose orders were to exclude from the deceased his friends, most manifestly against his wish.

How far this control can have a retrospective effect upon the making the Will is matter for subsequent consideration.

On the 20th of July, Papworth, Campbell, and Van Sandau, go to the house of the deceased. Van Sandau stated to Edwards, that his object in coming was to receive the deceased's instructions as to his Will, and that he had come by his desire to take such instructions. Edwards refused to allow Van Sandau to see the deceased, on the ground that Dr. D'Allex had stated the deceased was not in a fit state to see anybody. Application was then made to a magistrate to procure admission to the deceased, and he directed that a police officer should go to the premises, accompanied by Papworth and a medical man; the attendance of Mr. Simpson was procured, and he, Papworth, and the policeman, went to the deceased's house, when Edwards refused to allow Simpson to see the deceased except in the presence of Dr. D'Allex. In the evening of this 20th of July, Plowright, as solicitor for Edwards, writes a letter, which is delivered to Papworth. The letter states that Scouler is not to be seen by any friends for the present, and that if Papworth should repeat his visits he has left instructions to call in a police constable.

This letter deserves consideration. It is all but impossible that it should have emanated from the deceased, if any credit be due to Campbell or to Maspoli, for the contents of this letter are at utter variance with the conduct of the deceased, as deposed to by them; and if we come to the conclusion that [454] this letter does not contain the intentions of the deceased, it is very strong evidence that Edwards was exercising control over the deceased himself. On the same day, about five in the afternoon, Papworth meets Plowright, and complains of the letter adverted to, and

that Scouler's friends should be debarred from seeing him. Plowright said it was all a mistake, that Scouler's friends might see him, that any one might see him, and that I might see him whenever I pleased. He said, "Fix any time you like, and you shall see him." I said, "Very well, then, seven o'clock this evening."

On this occasion Plowright expressed himself as very much annoyed at the application made to the magistrate. There can, we think, be little doubt but that the application to the magistrate was the true cause of the change in Plowright's conduct, and that such change, without further explanation, is strong evidence that undue control had been practised, and that being convinced that such proceedings could not be justified, deemed it expedient to adopt a different course, manifestly showing his conviction of the impropriety of what had been done.

At seven o'clock that evening, Papworth, in company with Simpson, sees the deceased, who was much pleased to see him. The deceased again expressed his wish to see Van Sandau about his Will, again said things were not going on well. "If they won't let you in, get a policeman, and break open the doors," he said; "I put my trust in you." The deceased called him back and said, "I recalled you, that no mistake may occur; I wish to see Van Sandau; I will now make my Will."

Papworth is confirmed in this statement by the [455] evidence of Simpson: there is no attempt at contradiction, though D'Allex was there upon that occasion, and Edwards also.

We think that this evidence very clearly portrays the state of mind of the deceased, and the condition in which he was placed; moreover on that evening another attempt was made to delay any further interview with the deceased, and a letter with the Testator's signature was sent to Papworth, requesting that the interview with him might be postponed for a few days, until he was able to bear the excitement.

On the morning of the 21st of July, Simpson and Van Sandau call upon the deceased. Van Sandau does not see the deceased. Upon that occasion Van Sandau said to Edwards, "I attend here at the request of Mr. Scouler and for the purpose of making his Will." Edward said he could not allow him to see him, that he had his own interest at stake, that he had invested his capital in the concern, and that he should not permit Scouler to have any private interviews with any one. He threatened to withdraw the doctor and nurse, and stop supplies, and leave Scouler to his fate.

Simpson has an interview with the deceased, and the facts deposed to in his evidence clearly prove that the deceased was not a free agent. The deceased put off seeing Van Sandau. Being asked if he had made his Will, he said, "No, that is why I wish to see my solicitor, I wish to see him for that purpose." Simpson advised him to see his solicitor at once; but he did not agree to do so, saying, he should give offence if he did. It is upon this occasion that the deceased said, that he had been obliged to sign the note. If these declarations of the deceased are to be trusted, [456] here again is evidence of the control to which he was subjected, of his desire to make a Will, and a denial of any existing Will; the expression perhaps is too doubtful to infer from it that he intended to deny his having executed a Will at all. Van Sandau, upon hearing from Simpson what had occurred upstairs, pressed to be admitted to the deceased, but was refused by Edwards.

Things remained in this state till the morning of Saturday, the 22nd of July, when the Appellant, the brother of the deceased, arrived from Edinburgh; he called upon Van Sandau and took him to the deceased's house. Van Sandau then had an interview with the deceased. The deceased said, "There is to be a Will," and desired that his brother should be out of the room; he stated that he had no confidence in Edwards, and asked Van Sandau if he was quite safe, as there were listeners. The doors of the adjoining room having been fastened, Van Sandau asked the deceased what were his testamentary intentions: the deceased replied, "I have not yet quite made up my mind." Van Sandau then told the deceased it was proper he should make up his mind, and asked him, "what relations he had;" the deceased answered, "There is only that youth." Van Sandau then asked, "Am I to understand that you wish to give everything to your brother?" And he answered, "Yes." Van Sandau repeated this question, stating what the Will would be, and the deceased approved thereof. Whilst Van Sandau was writing, the



deceased said, there were two cousins to whom he was desirous of giving legacies, but could not make up his mind, and then declared that he did not intend to give legacies to any other persons. Van Sandau then said he would pre-[457]-pare the Will, leaving the legacies to the Thompsons in blank, and bring it to him. Here ended that interview, and on the morning of the 23rd of July he died.

The Court does not deem it necessary to enter more minutely into the examination of this evidence; it will be sufficient to state the result. We think that under the circumstances of this case, in accordance with the principles laid down in *Barry v. Butlin* (2 Moore's P.C. Cases, 480), so much suspicion rests upon the whole transaction that it is imperatively necessary for the Court to be satisfied that the deceased was a perfectly free agent and had a knowledge of the contents of the instrument he executed. The case stands thus. The Will is preceded by no declaration of any intention to execute an instrument of that tenor, nor after its execution is there the least recognition of its contents; on the contrary, the whole conduct of the deceased, as described by the evidence, furnishes strong proof that he was either ignorant of the contents of this Will when he signed it, or that he was acting under control and duress. The Will is prepared by the person principally benefited, and he, by his own admission, conceals the fact of the execution from every one during the lifetime of the deceased, and destroys the instructions. The four attesting witnesses do not give satisfactory evidence of any knowledge by the deceased of the contents of the Will. The fact depends solely upon the testimony of Edwards, who indeed till lately could not have been received as a witness at all. We are of opinion that in this state of facts, remembering also that such evidence as might in some degree have corroborated Edwards, has been withheld, the Court cannot legally [458] or satisfactorily come to the conclusion that the deceased knew the contents of the Will at the time he executed it. We must further add, that the proof of control immediately subsequent to the execution and which continued to the utmost period that was practicable, raises a strong suspicion that the acts done by the deceased on the 12th of July, were not the spontaneous acts of a free Testator. For these reasons we cannot assent to the decision of the Court below, and must humbly advise Her Majesty that the decree pronouncing for probate of this Will be reversed. We further think that gross fraud has been committed in this case, and duress inflicted on the deceased; we must, therefore, further advise Her Majesty, that the Respondents should be condemned in all the costs of this litigation.

[See note to *Barry v. Butlin*, 1838, 2 Moo. P.C. 480.]

#### ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

FRANCIS HART DYKE,—*Appellant*; ANNA BARTON,—*Respondent* \* [June 27, 28, 1856].

The nominee of the Crown contesting the validity of a Will of a bastard, a widower, and without issue, on the ground of testamentary incapacity at the time of execution, condemned in costs by the appellate Court, under Statute, 18th and 19th Vict., c. 90, sec. 2, upon an unsuccessful appeal from a sentence of the Prerogative Court, establishing the Will.

This was an appeal from a decree of the Prerogative Court of Canterbury, pronouncing for the va-[459]-lidity of the Will of John Robert Maling, of Southampton Street, in the parish of St. Pancras, in the county of Middlesex, the deceased in the cause. The deceased died on the 11th of April, 1854, a widower, without issue, and a bastard, leaving behind him a Will, bearing date the 27th of March, 1854, in which Weekes, the deceased's medical attendant, was named sole executor, and the

\* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir. William H. Maule.

Respondent, the mother of the deceased's late wife, and Holdell, the sister of the deceased's late wife, were named residuary legatees. The deceased died possessed of personal estate only. A caveat was entered by the Appellant. Her Majesty's Procurator-General, as nominee of the Crown, who alleged, that the deceased had died a widower without issue, a bastard, and intestate. On the part of the Respondent, administration with the Will annexed was prayed for.

The sole question raised by the suit in the Prerogative Court was one of fact, whether the deceased was of competent disposing mind when he made and executed the Will? The case of the Appellant was, that from intemperate habits, the deceased was subject to frequent attacks of *delirium tremens*, which weakened his mind, and that the Will was executed while the deceased was not of sound disposing mind. It was not alleged that any fraud was practised upon the deceased in reference to the Will. Witnesses were examined as to the testamentary capacity of the deceased, but as both the Prerogative Court and the appellate Court were clear upon that point, it is unnecessary to refer to their evidence. The Judge of the Prerogative Court (the Right Hon. Sir John Dodson), by his interlocutory decree, held, that the deceased was of perfect capacity at the time of making [460] the Will, and that the bequests were, in the circumstances, a natural disposition of his property; pronouncing for the force and validity of the Will, and decreed letters of administration with the Will annexed of the deceased's effects, to be granted to the Respondent. Against this decree the present appeal was prosecuted, and was argued by

The Queen's Advocate (Sir John Harding), and Dr. Jenner, for the Appellant; and by Mr. Rolt, Q.C., Dr. Bayford, and Mr. R. Pritchard, for the Respondent.

At the conclusion of the arguments, their Lordships' judgment was delivered by

The Right Hon. Dr. Lushington, who expressed their Lordships' opinion that, although there might have been a case of fluctuating capacity, yet that there was no doubt that the deceased executed the Will at a time when he was perfectly competent to do such an act, and, therefore, affirmed the judgment of the Court below.

Mr. Rolt applied for costs, under Statute, 18th and 19th Vict., c. 90, s. 2, against the Appellant, as the nominee of the Crown, contending that the costs would come out of the Consolidated Fund; as in the case where the Crown is successful and is decreed costs, it is provided by Statute, 1st and 2nd Vict., c. 2, sec. 12 (*a*), that they are to be carried to and made part of the consolidated Fund.

[461] Dr. Lushington.—It would be a great calamity, if appeals such as these could be prosecuted by the nominee of the Crown without payment of costs of an unsuccessful appeal. The decree of the Court below must be affirmed with costs.

## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

RICHARD THOMPSON and another,—*Appellants*: JOSHUA FROM,—*Respondent* \* [June 30, July 1, 1856].

### THE "DUMFRIES."

A schooner with the wind free, sailing from south-west, and steering north, meeting with a barque on the starboard tack, close-hauled, is bound by the rule of the sea to give way, and go astern.

Held, in such circumstances (reversing the decree of the Admiralty Court).

(*a*) See, upon the question of the Crown being entitled to costs before the Statute, 18th and 19th Vict., c. 90, sec. 2, *Kane v. Maule*, 2 Smale and Giff. 331. S.C., on appeal, 4 De Gex, Mac. and Gor. 565.

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.



that the barque was right in keeping her course, as it was to be presumed that the schooner would give way to her, and that the schooner, not having seen the barque till too late, and then ported her helm, which led to the collision, was alone to blame.

This was a case of collision between a Foreign and a British vessel. The cause was promoted in the Admiralty Court by the Respondent, the owner of the late schooner, *The Christina and Maria*, a Foreign vessel, against the barque *Dumfries*, and the Appellants, her owners.

[462] The facts of the case as they appeared from the pleadings were these:

The *Christina and Maria*, of the burthen of 127 tons, was bound from Hamburgh to Newcastle-on-Tyne; The *Dumfries*, of the burthen of 318 tons, was bound from the river Tyne to New York. The *Christina and Maria*, about 11 p.m. on the 5th of November, 1855, was fifteen miles to the eastward of Whitby, and, as alleged by the Respondents, steering north, making seven knots an hour, with a stiff breeze from the south-west, and carrying a light which burnt brightly at the end of her bowsprit, visible three quarters of a mile off, although the atmosphere was so dark and thick that a vessel without a light could not be seen at a greater distance than two cables' length. The barque was suddenly descried at about two cables' distance a little on the schooner's port bow. The *Christina and Maria* immediately put her helm hard aport, and fell off until her sails shook. The *Dumfries*, without making the slightest alteration in her course, ran into *The Christina and Maria*, and struck her a violent blow a little abaft the mainmast on the port side, cutting her down to within a plank of the water's edge; in consequence she immediately sank. And the act on petition alleged and imputed the collision to the negligence and want of skill, or of a proper look-out, on the part of *The Dumfries*. The answer of *The Dumfries* alleged, that, at the time in question, she was steering S.S.E., close-hauled, on the starboard tack, with a bright light in a patent globe lantern on the fore-castle, ready to be exhibited when required. That she discovered the schooner's light two or three points on her weather bow, and a man immediately [463] held up the globe lantern on the top of his head. That *The Dumfries* lay as clear as she could to the wind, clean full. That when *The Christina and Maria* herself was seen, she was running right before the wind, attempting to cross the hawse of the barque, whereupon the pilot caused the barque's helm to be hove hard a-port, but, before she could come up into the wind, *The Christina and Maria* continuing her course, caught her and broke her jibboom, and did her other damage, and the answer attributed the collision to the want of caution and good seamanship on the part of those in charge of *The Christina and Maria*, in not keeping to windward of *The Dumfries*, and in porting her helm and so crossing *The Dumfries*' hawse, without considering whether she was on the port or starboard tack, and which could have been ascertained in ample time to have avoided the collision. The evidence of the witnesses as to the distance at which the vessels were first seen, and their positions, was conflicting and contradictory. The effect of their testimony is mentioned in the judgment. The Judge of the Admiralty Court (The Right Hon. Dr. Lushington), assisted by the Elder Brethren of the Trinity House, was of opinion, that *The Dumfries* was solely and entirely to blame for not having ported her helm at an earlier period (See case reported, *nom. The Dumfries*, 1 Swabey, 63). The present appeal was preferred by *The Dumfries* from this sentence.

The appeal was argued by Dr. Bayford, and Mr. Forsyth, for the Appellants; and Mr. Temple, Q.C., and Dr. Addams, for the Respondent.

[464] The argument principally turned upon a comparison of the evidence, as to the time when *The Dumfries* showed her light and the exact positions of the vessels.

Upon the question of law, which imposed upon a vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel that is close-hauled, *The Woodrop-Sims* (2 Dod. 86), *The Rose* (2 W. Rob. 5), *The London Packet* (2 W. Rob. 213), *The Speed* (2 W. Rob. 225), *The James Watt* (2 W. Rob. 274), *The Ann and Jane* (2 W. Rob. 109), *The Traveller* (2 W. Rob. 197), *The Gazelle* (2 W. Rob. 517), *The Sea Park* (1 Spink's Ecc. and Adm. Rep. 186), *The Clarence* (1 Spink's Ecc. and

Adm. Rep. 206), and Statute, 17th and 18th Vict., c. 104, sec. 296 (*a*), as to the rule respecting ships meeting each other, were cited.

Judgment was reserved, and now delivered by

The Right Hon. Sir John Patteson (5th July, 1856).—This case presents, as many cases of collision do, very considerable difficulties, arising principally from conflicting evidence as to the distance at, and the po[465]sition in which, the respective ships were first seen by each other: points upon which witnesses are often found to be inaccurate without incurring any just imputation of wilful misrepresentation.

The evidence, however, distinctly shows, that *The Christina and Maria* was sailing with a fair wind from south-west and steering north, that *The Dumfries* was sailing on the starboard tack close-hauled.

The general rule of navigation is undoubted, that under such circumstances, *The Christina and Maria*, having the wind free, was bound to give way to *The Dumfries*, that is, to go astern of her, as we interpret the expression "to get out of her way," which in this case she might easily have done, either by a little starboarding her helm, or even by keeping her course north, if she had seen *The Dumfries* a little sooner than she is said to have done. *The Dumfries*, on the other hand, was entitled to keep on her course, presuming that *The Christina and Maria* would, according to the general rule, give way to her. We refer in this case to the general rule, for, assuming the Statute, 17th and 18th Vict., c. 104, sec. 296, to apply, on which we do not think it necessary to give any opinion, we think that under the circumstances the general rule cannot be disregarded, having regard to the terms of the proviso in this Statute.

Unfortunately, *The Christina and Maria* did not see *The Dumfries* until the vessels were so near that there was danger of collision, and then, instead of giving way to *The Dumfries* by starboarding her [466] helm, she ported her helm, and attempted to pass the hawse of *The Dumfries*. Seeing this, *The Dumfries* also ported her helm, but it was then too late to avoid the collision.

The Trinity Masters were of opinion that *The Dumfries* was solely and entirely to blame, for not having ported her helm at an earlier period, and the very learned Judge of the Court of Admiralty adopted that opinion. The Sailing Masters, whose assistance we have, are of a different opinion, and consider *The Christina and Maria* entirely to blame; they think that she might and ought to have cleared *The Dumfries*: that less than half the time that it took *The Christina and Maria* to veer from north to east (which they are of opinion she did), would have cleared her, had she hauled her wind, or passed to windward by starboarding her helm, which she had the power of doing.

Their Lordships, feeling the greatest respect for those who decided this case in the Court below, have nevertheless to determine which of these conflicting opinions is right, and it is not without much hesitation that they have come to the conclusion that *The Christina and Maria* was to blame in this case, and not *The Dumfries*.

The general rule, as has been already observed, is clear, and, notwithstanding that the evidence is conflicting as to the time at which *The Dumfries* showed her light, and as to the exact position of the vessels, their Lordships cannot discover that *The Dumfries* had any reasonable ground whatever for supposing that *The Christina and Maria* would not give way to and go astern of her, until just before the collision: they consider, therefore, that she was [467] fully justified in keeping her course, and was in no way bound to port her helm earlier than she did.

(*a*) This section enacts that "Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or a sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships should be put to port, so as to pass on the port side of each other: and this rule shall be obeyed by all steam ships, and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard should be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to keeping such ships under command."



Under these circumstances, their Lordships must advise Her Majesty, that the judgment of the Court below ought to be reversed; but as one vessel was wholly lost, and the other sustained much injury, and the case is attended with many difficulties, they are of opinion that no costs ought to be allowed to either party, either in this Court or the Court below.

[Mews' Dig. tit. SHIPPING, XX. COLLISION, 9. *Foreign Ships—Foreign Law*; 11. *The Regulations*, a. *Generally*: b. *Cases on the Regulations*, S.C. 1 Swab. 63, 125. See Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), ss. 418-424; and International Regulations for Prevention of Collisions, 1897, Arts. 17 *et seq.*]

## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

EDWARD BATES and Others,—*Appellants*: DON PABLO SORA.—*Respondent* \*  
[July 1, 2, 1856].

### THE "MOBILE."

The Statutes, 6th Geo. IV., c. 125, sec. 55, and 17th and 18th Vict., c. 104, sec. 388, only exempt the owner of a vessel, having a licensed pilot on board, from liability for damage, when the damage is caused exclusively by the negligence or unskilfulness of the pilot.

Where, therefore, a collision was caused by the joint negligence of the pilot and the crew,—Held, that the Statutes did not exempt the owners from damages for a collision caused by their vessel.

This suit was brought by the Respondent, the owner of the Spanish brig *Fenix*, a brig of 290 tons burthen, against *The Mobile*, a British vessel of the burthen of 1040 tons, for loss and damage sustained by him in consequence of a collision which occurred between *The Fenix* and *The Mobile* [468] in the Gull Stream, on the 19th of August, 1855. *The Fenix* was proceeding in ballast from London to Cardiff; *The Mobile* with troops on board was bound from the East Indies to London. Each vessel had a licensed Trinity-House pilot on board. The case of *The Fenix* was, that when about midway between the Middle Breake and South Breake buoys, beating through the Gull Stream on the starboard tack, with a strong wind from the south-west, she descried *The Mobile* distant about a mile. That there was a small schooner likewise beating through the Gull Stream a short distance to the windward, and also on the starboard tack. That *The Fenix* held on her reach round the buoy, expecting that *The Mobile* would go under her stern. That the schooner to windward tacked in order to round the bouy, but *The Fenix* not having reached over sufficiently, kept her reach on the starboard tack; that *The Mobile* was hailed to go astern, but instead of so doing she attempted to go ahead, and in consequence thereof ran with great violence into the starboard side of *The Fenix*, in the wake of her fore-chains. *The Mobile*, in her defence, alleged that a brig was in company with her close on her starboard side. That the pilot on board *The Mobile*, shortly prior to the collision, was taken unwell and compelled to leave the deck for a few minutes, but on so doing had given charge thereof to the second-mate to steer her north-east by north, by which she would have passed clear of the schooner, had the two vessels continued their then respective courses; but the schooner instead of doing so, when she had approached to within four or five times the length of *The Mobile* suddenly hove in stays to go about on [469] the port tack. That the pilot having returned on deck, seeing the relative position of the respective vessels, hailed the brig on her starboard side of *The Mobile* to port her helm, and at the same time ordered the helm of *The Mobile* to be ported. That both vessels paid off rapidly, but that *The Fenix*, continuing to keep her reach, was hailed to put her helm down and go about; *The Mobile*, from her position, being unable to pass under the stern of *The Fenix*. But *The Fenix* kept on her course and ran into *The Mobile*.

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.

The Judge of the Admiralty Court (The Right Hon. Dr. Lushington), assisted by the Trinity Masters, was of opinion (case reported, *nom. The Mobile*, 1 Swabey's Adm. Rep. 69), first, that the second-mate was to blame for not having in time adopted measures to avoid all risk of collision with either the schooner or *The Fenix*; secondly, that when the pilot came on deck, it was too late to take any safe measures; and thirdly, that no blame attached to *The Fenix* in any respect whatever; that it was not safe for her to have altered her course at any period of this transaction, and the decree condemned the Appellants, the owners of *The Mobile*, for such loss and damage. From this sentence the present appeal was brought.

Mr. Serjeant Shee, and Dr. Addams, for the Appellants, argued, that the evidence established the fact that the collision was inevitable on the part of *The Mobile*, but that it might have been easily avoided by *The Fenix*. They further contended, that *The Mobile* being in charge of a licensed pilot at the time of the collision, and whose negligence caused the [470] accident, the Appellants, the owners, were not liable. Statutes, 6th Geo. IV., c. 125, sec. 55, and 17th and 18th Vict., c. 104, sec. 388.

Sir Frederic Thesiger, Q.C., and Dr. Twiss, for the Respondents,—Insisted, that if the pilot was to blame, the negligence was also proved to be shared by the second-mate; and that being so, the non-liability for damages under the Statute, 6th Geo. IV., c. 15, sec. 25, by reason of having a licensed pilot on board, is confined exclusively to a case of negligence or unskilfulness by the pilot alone. *The Diana* (4 Moore's P.C. Cases, 11; S.C. 1 W. Rob. 131), *The Christiana* (7 Moore's P.C. Cases, 160), *The Protector* (1 W. Rob. 45), *The Vernon* (1 W. Rob. 317). Also, that *The Mobile* was alone to blame, as she could have gone astern of *The Fenix*.

Judgment was pronounced by

The Right Hon. Sir John Patteson (July 5, 1856).—*The Mobile* was going free with a fair wind; *The Fenix* was on the starboard tack close-hauled. *The Mobile*, therefore, ought to have given way and gone astern of *The Fenix*. It was argued that she could not do so, because a schooner, which was also on the starboard tack, had suddenly heaved to and come round, and that *The Fenix*, although then only at about the middle of the Gull Stream, ought to have done the same.

The Trinity Masters and the learned Judge of the Court of Admiralty held that, notwithstanding those circumstances, *The Mobile* might and ought to have gone astern of *The Fenix*, and was wholly to [471] blame. The Sailing Masters, whose assistance we have, are of the same opinion, and their Lordships entirely concur in that view.

But there was a pilot on board *The Mobile*, and it is contended that he was acting in charge of her, and that the damage was occasioned by his negligence, so that the owners of *The Mobile* are discharged from liability under the 55th section of the 6th Geo. IV., c. 125, and the 17th and 18th Vict., c. 104, sec. 388.

Now, the law is clear as laid down in the cases of *The Diana* (1 W. Rob. 131; S.C. 4 Moore's P.C. Cases, 11), and *The Christiana* (7 Moore's P.C. Cases, 160), that in order to discharge the owners, the blame must rest on the pilot, and him only. In this case the pilot had been obliged to quit the deck for a few minutes. He had left the deck in the actual charge of the second-mate, directing him to keep his course north-east, as they were then steering, and at the same time to keep clear of vessels. He did not tell him in so many words that this direction was subject to any contingencies that might occur, but such was the fair and obvious meaning of his directions. While the pilot was below, the second-mate was acting in charge of the vessel, and then occurred the circumstance of the schooner suddenly heaving-to and going round. The mate did nothing to meet the contingency, and on the pilot's return to the deck he found the vessel in a very critical position, with reference particularly to *The Fenix*, and ordered the helm to be put hard a-port. Their Lordships, with the advice of the Sailing Masters, assisting them, think he was wrong in so ordering; but they are also of opinion that the mate had previously done [472] wrong, and brought *The Mobile* into a critical position by allowing her to get too close to the schooner on a wind.

Their Lordships cannot acquit the pilot of all blame, yet they are clearly of opinion that he was not solely and alone to blame, and, therefore, according to the cases of *The Diana* and *The Christiana*, the owners of *The Mobile* are not exonerated.



Their Lordships will report to Her Majesty, that in their opinion this appeal ought to be dismissed with costs, and the cause remitted.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 1. *Negligence*; b. *In Particular Cases*, x. GOING ABOUT, 10. *Compulsory Pilotage*, e. *Duties of Shipowner, Master and Crew*, 11. *The Regulations*; b. *Cases in the Regulations*. S.C. 4 W.R. 708; Swab. 69, 127.]

## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY IN ENGLAND.

JOSEPH GEORGE CHURCHWARD,—*Appellant*; AMBROSE REEVE PALMER and others,—*Respondents* \* [July 3 and 4, 1856].

### THE "VIVID."

A vessel at anchor in Dover Roads, in a fair way, about a mile from the shore, opposite the harbour, waiting the ebb tide on a dark night, where vessels were accustomed to anchor, having a bright light burning, which was placed on a spar under the boom of the foresail, about four feet on the starboard side of the mast, and about twenty feet above the bulwarks, was run down by a steamer.

Held: that the Statute, 17th and 18th Vict., c. 104, sec. 298, did not apply, as the light was in a position as visible to the steamer as if it had been hoisted at the mast-head; and that as there was no such departure from the Admiralty Regulations as to cause the collision, it did not prevent the owners of the vessel from recovering from the steamer for the loss.

Construction of Statutes, 14th and 15th Vict., c. 79, sec. 26; 17th and 18th Vict., c. 104, sec. 298; and 17th and 18th Vict., c. 120.

Whether the Admiralty Regulations issued under the provisions of Statute, 14th and 15th Vict., c. 79, are repealed by Statute, 17th and 18th Vict., c. 120, which repeals the 14th and 15th Vict., c. 79. *Quære?* [10 Moo. P.C. 481].

This was a cause of damage, promoted by the Respondent, the owner of the late Brigantine *The* [473] *Henry*, and the personal representative of the late master, mate, and a boy, and the two survivors of the crew of the Brigantine, against *The Vivid*, a steam vessel, carrying the mails between Dover and Calais, and also against the Appellant, the Government contractor for conveying the mails. The Brigantine was of the burthen of 89 tons, and *The Vivid* a steamer of 300 tons, and 120 horse power. It appeared from the evidence, that about nine o'clock on the 11th of August, 1855, the Brigantine brought up with her small bower anchor in Dover Roads, about a mile from the shore opposite the entrance of the Harbour, to wait for the ebb tide, and the collision in question occurred at about half-past eleven P.M. On the 11th of August, 1855, *The Vivid* having at the time quitted Dover Harbour for Calais, and steaming at the rate of twelve miles an hour, ran into the Brigantine. The result of this collision was, that the Brigantine went down, and the master, mate, and a boy were drowned, two only of the crew being saved.

The principal question was, whether, at the time of the collision, there was such a light burning on board the Brigantine, as was required by the Admiralty Regulations (see Regulations, printed in a note to the case of *The Telegraph*, 8 Moore's P.C. Cases, 168). On the part of the Appellant it was insisted, that anterior to and at the time of the accident, there was no light burning on board the Brigantine, [474] visible to those on board the steamer, and that if there was a light, it was

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.

not suspended according to the Admiralty Regulations; and it was also pleaded by the owners of *The Vivid* in defence, that she was under a contract with the Government to convey the mails at the rate of thirteen miles an hour. The Respondents' case, on the other hand, was, that from the time the Brigantine anchored in the Downs up to the time of the collision, she had a bright light burning, which was placed under the boom of the foresail, about four feet on the starboard side of the mast, and about twenty feet above the bulwarks, and that she was anchored in a fair way where vessels were accustomed to anchor. The evidence upon the question of the light being visible was conflicting. The material part of the witnesses' testimony, however, is sufficiently set forth in the judgment, to render any further statement here unnecessary. The Judge of the Admiralty Court (The Right Hon. Dr. Lushington), assisted by the Elder Brethren of the Trinity House, were of opinion (see case reported, *nom. The Vivid*, 1 Swabey's Adm. Rep. 88), that the Brigantine had a suitable light hoisted, and was not in an improper anchorage. That the exhibition of the light on board the Brigantine, as proved by the evidence, was as visible to the steamer approaching her, as if it had been hoisted at the mast-head. That the collision was not occasioned by any departure from the rule of the Admiralty, and that no blame attached to her, and that the blame of the collision attached solely to the steamer, in not keeping a good look-out.

The present appeal was brought from this sentence by the owners of *The Vivid*.

[475] Sir Fitz-Roy Kelly, Q.C., and Dr. Robertson, in support of the appeal.—The light was not exhibited on the mast-head of the Brigantine as required by the Admiralty Regulations, made pursuant to the Statute, 14th and 15th Vict., c. 79, sec. 26. *The Telegraph* (8 Moore's P.C. Cases, 167). No necessity for a departure from the Admiralty Regulations is pleaded or proved. The penalty, therefore, of neglecting the Admiralty Regulations operates as a bar to the Respondents recovering against *The Vivid*. Statutes, 17th and 18th Vict., c. 104, sec. 298, the 14th and 15th Vict., c. 79, sec. 26, and 17th and 18th Vict., c. 120, were referred to upon this point, and their operation upon the Admiralty Regulations commented upon.

Sir Frederic Thesiger, Q.C., and Dr. Jenner, for the Respondent.—The evidence establishes the fact that there was a bright light burning on board the Brigantine from the time she anchored, and that it was burning at the time of the collision. The Court below were quite right in imputing the blame to *The Vivid*, who did not keep a good look-out. In any circumstances, as the night was clear, though dark, even if the Brigantine had been to blame, it was the duty of the steamer to have exercised ordinary care, by which the collision might have been avoided. *Davies v. Mann* (10 Mee. and Wels. 546). The 14th and 15th Vict., c. 79, having been repealed by the 17th and 18th Vict., c. 120, the Admiralty Regulations issued under the repealed Statute are no longer in force, so as to prevent a party recovering who may have committed a breach of those Regulations.

[476] Judgment was delivered by

The Right Hon. The Lord Justice Turner (July 7, 1856).—This is a case of collision. Many of the facts are not in dispute between the parties. It appears that on the 11th of August, 1855, about nine o'clock in the evening, *The Henry*, a Brigantine, bound from Newcastle to Rouen, cast anchor in Dover Roads opposite, or nearly opposite, to the mouth of the Harbour, and at a distance of three quarters of a mile, or a mile from the shore. That she afterwards drove from her anchor and drifted some short distance backwards to the east. That about half-past eleven on the same night the mail steamer *The Vivid*, came out of Dover Harbour on her voyage to Calais, and that, about six or seven minutes after she had emerged from the Harbour, she came into collision with the Brigantine, and struck her with such violence that she filled and went down.

These facts are not disputed. In addition to these facts, their Lordships consider it to be established by the evidence and by conclusions necessarily resulting from it, that the Brigantine was lying with her starboard side to the shore; that there were no other vessels near her; that in the collision the steamer first carried away her jib-boom and bowsprit, and then struck her with the larboard paddle-box on her starboard bow. That the Brigantine, notwithstanding she had drifted,



was still lying in the fair way of vessels proceeding from Dover Harbour to Calais, and that the night was clear, although exceedingly dark.

There are some other points in the case, as there having been a bright fire burning in a caboose on the deck of the Brigantine; as to the speed at which the [477] steamer was proceeding; and as to the conduct of her crew after the collision in rescuing the crew of the Brigantine, three of whom were unfortunately drowned and two only saved; and these points were relied on upon the one side or the other, as furnishing either inferences in support of their view, or matter affecting the credit of the witnesses; but their Lordships do not consider that the evidence upon these points furnishes any inference from which a just conclusion can be drawn, or any observations fairly affecting the credit of the witnesses, and they do not, therefore, deem it necessary to enter further into these points.

The true questions in this case, as their Lordships view it, are, whether there was a light exhibited on board the Brigantine; and if there was, whether it was exhibited in such a position as that it must have been seen by vessels approaching her, if a proper look-out was kept by them.

The case on these points stands thus upon the pleadings: By the fourth article it is alleged, that immediately the anchor of the Brigantine had been let go, Holmes, the mate (now deceased), took the signal lantern, which was made of glass, and was lighted and trimmed with a sufficient length of wick and the proper quantity of oil, and hung up the same on a span under the boom of the foresail, about four feet on the starboard side of the foremast, and about twenty feet above the bulwarks of the Brigantine; and that there was also a bright fire burning in an open caboose in the galley which was upon a wooden frame placed on the fore-hatches upon the deck of the Brigantine, and which fire was above the level of the bulwarks, and was strongly reflected on the bottom of the Brigantine's boat, which was painted red, and [478] was standing in the clocks near the galley, and just in the rear of the fire. The sixth article alleged that although the night of the 11th of August was dark, the weather was clear, and Folkestone lights were visible from the Brigantine, and the lights on board the Brigantine (to wit the lantern so as aforesaid suspended to the boom of the foresail and the fire in the galley) were distinctly visible from the hour of nine P.M. until half-past eleven P.M., when the collision occurred, by several persons on shore, and on the pier at Dover, and that on the morning after the collision and sinking of the Brigantine, her topmasts were visible on the same spot where the said lights had been so seen by the persons on the shore and pier the previous evening. The ninth article alleged that the collision was entirely owing to the want of a good look-out, or other the default of those in charge of the steamer, for that at the time thereof the light was suspended to the boom of the foresail of the Brigantine, and the fire in the galley was burning brightly, and which were distinctly visible from the steamer, and if a good look-out had been kept, might have been seen by the crew of the steamer at a sufficient distance to have enabled the steamer to alter her course and to avoid the collision. The answers to these articles were: To the fourth, the Appellant denied that immediately the anchor of the Brigantine had been let go, Holmes, the mate, took the signal lantern, which was of glass, and was lighted and trimmed with a sufficient length of wick and proper quantity of oil, and hung the same up on a span under the boom of the foresail, about four feet on the starboard side of the foremast, and about twenty feet above the bulwarks of the Brigantine; [479] and he also denied that there was also a bright fire burning in the open caboose in the galley, as pleaded in the fourth article. To the sixth article he answered and admitted, that the night of the 11th of August was dark, and that the weather was clear; and that Folkestone lights might be visible from the Brigantine; but he denied that the two lights on board the Brigantine, namely, the lantern suspended to the boom of the foresail, and the fire in the galley, were distinctly visible from the hour of nine P.M., until half-past eleven P.M., when the collision occurred, by several persons on shore, and on the pier of Dover, for that the Respondent, was on the quay at Dover at the time of the departure of the steamer, and watched her departure from the Harbour, and at such time he did not see any light ahead of the steamer; and he further denied that on the morning after the collision and sinking of the Brigantine, her topmast was visible on the same spot where the light had been so seen by persons on the shore and pier the previous evening. To the ninth

article he answered, denying that the collision was entirely owing to the want of a good look-out, or other the default of those in charge of the steamer, and he disbelieved that, at the time thereof, the light was, as alleged to be, so suspended to the boom of the foresail of the Brigantine, or that the fire in the galley was burning brightly, and was distinctly visible from the steamer, and if a good look-out (which he alleged was kept) had been kept, might have been seen by the crew of the steamer at a sufficient distance to have enabled the steamer to alter her course, and avoid the collision.

There is also a counter-allegation on the part of the Appellant, the second and third articles of which [480] are as follows: Second. That at about half-past eleven o'clock P.M., of the 11th of August, the night being very dark, but clear, the steamer left Dover Harbour, bound for Calais, having the lights required by the Admiralty Regulations burning, namely, a bright white light at the foremast head, a green light on the starboard side, and a red light on the port side; that she then had on board a crew of seventeen hands, including Watson, the master; that at such time Watson was on the bridge in command of the steamer, and two seamen (Kidhara and May) were stationed forward as look-out men, the one on the port, and the other on the starboard-bow; and Pittoch, the first-mate of the steamer, and Comporo, the second-mate, were at the wheel; that Watson ordered the look-out men to keep a good look-out, which they accordingly did; and immediately upon quitting the Harbour, one of the look-out men reported two lights on the port bow of the steamer, and one on the starboard bow, which were also seen by Watson, but neither of such lights were on board *The Henry*. The third article pleaded, that in a few minutes after the men on the look-out had reported the lights, as pleaded in the preceding article, Watson (who was on the bridge) saw ahead of *The Vivid*, and almost under her bows, a dark object, which appeared to be a vessel's topsail yard; that thereupon he called out, "Hard-a-port!" two or three times; "Ease her!" "Stop her!" and "Turn her a-stern!" in quick succession; but that, notwithstanding such orders were instantly obeyed, the steamer came in contact with the starboard of the Brigantine; and the article further alleged that at the time of such collision the bow of the Brigantine was towards the steamer, her foretop-sail was lowered [481] on the cap, with the reef tackles out, and the foresail was clewed up; that prior to and at the time of the collision, there was a good look-out on board the steamer, and there was not any light on board the Brigantine visible from or on board the steamer; and that the Brigantine had not any light at her mast-head, nor in any part of her rigging; and there was not any shouting or hailing from on board the Brigantine heard on board the steamer, and that the collision was occasioned by the Brigantine having been brought up, or permitted to drive to, and in the fair way of vessels leaving Dover Harbour for Calais (it being well known that the steam-packets run with the mails between Dover and Calais, and Dover and Ostend, by night), and otherwise by want of caution or neglect, on the part of those on board the Brigantine, in not showing a proper light in accordance with the Admiralty Regulations.

It is to be observed that reference is here made to the Admiralty Regulations. In the course of the argument doubts were suggested whether the Admiralty Regulations have any bearing upon this case, and the 298th section of the Act, 17th and 18th Vict., c. 104, disabling owners from recovering in cases of collision, arising from breaches of the Admiralty Regulations, applying, as it was said, only to Regulations issued in pursuance of that Act, and the existing Admiralty Regulations having been issued under the Act, 14th and 15th Vict., c. 79, which latter Act is repealed by the 17th and 18th Vict., c. 120, with a proviso saving indeed the then existing Regulations themselves, but not, as it was said, saving the penal consequences, which by the Act of the 14th and 15th Vict., c. 79, were attached to the non-observance of those Regulations. [482] This point, however, was not fully argued, and their Lordships, although they see great room for doubt upon the question, do not, therefore, desire to give any final opinion upon it. They think it unnecessary in this case to do so. They are satisfied upon the facts of this case, that the collision could in no event be held to have been occasioned by the non-observance of the Admiralty Regulations, and that the case, therefore, cannot fall within the 298th section of



the 17th and 18th Vict., c. 104, but must be decided upon the same principles, whether the Admiralty Regulations have or have not any bearing upon it.

To proceed then to the real question on which the case depends. What is the evidence as to there having been a light exhibited by the Brigantine, and as to the position of that light? There is first the evidence of Rudrum, one of the surviving crew of the Brigantine. He says, in answer to the fourth and ninth articles, "Immediately the anchor of the Brigantine had been let go, Holmes, the mate (since deceased), took the signal lantern and hoisted it in our Brigantine. He went below to fetch it before all our chain had been quite let go. I know that it was properly trimmed, with a sufficient length of wick, and the proper quantity of oil, because I had myself seen Holmes trim the light in the afternoon of that day. On the anchor being let go as aforesaid, I saw him light the lamp and hang it up on the span, under our fore-boom, on the starboard side, about three feet on the starboard side of our foremast, and upwards of twenty feet above the bulwarks of our Brigantine. There was also a large fire burning in an open caboose in the galley, which stood upon a wooden frame, placed on the fore-hatches, upon the deck of the [483] Brigantine, and the caboose was in such manner elevated above the level of the bulwarks, and the light of the fire reflected strongly through the after-side of the galley, which was all open, upon the bows of the Brigantine's boat, the outside of which was painted red, and which was standing in the chocks, fore and aft, near the galley. That the collision was entirely owing to the want of a look-out on the part of those in charge of the steam-vessel. Our light was burning brightly at the time, but I am convinced that they never saw us until at the very moment of the collision, or until just before their steam-vessel struck us. I heard the captain of the steam-vessel sing out to her helmsman, 'Hard-a-port,' and she struck us just as these words were out of his mouth, which is to me a plain proof that he only saw us just at that moment, in consequence of no proper look-out having been kept on board the steamer."

This evidence, so far as respects the light having been suspended, and having continued to burn up to ten minutes past eleven, is confirmed by Hastings, the other survivor of the Brigantine's crew. He says in answer to the fourth, sixth, and ninth articles, that "immediately the anchor of the Brigantine had been let go as aforesaid, High, the master of her, ordered Holmes the mate (now deceased) to go below and get the light and hoist it, and accordingly Holmes got the signal-lantern, which was made of glass, and lighted it, and hung it up on the span of the fore-boom about three or four feet on the starboard side of the foremast, and about eighteen or twenty feet above the bulwarks of the Brigantine. I believe I had seen Holmes trim the lamp in the afternoon of the said day; at any rate I know that he did then trim it, and [484] I know that when he so hung the same up it was trimmed with a sufficient length of wick, and filled with the proper quantity of oil. The lamp burnt brightly, and there was also a bright fire burning in an open caboose in the galley, and the galley stood upon a wooden frame, placed upon the fore-hatches, upon the deck of the Brigantine, so that the fire was just above the level of the bulwarks of the Brigantine, and just showed over the bulwarks. There was the boat of the Brigantine on her deck: the lower part of the outside of her boat was painted red; and it stood between the mainmast of the Brigantine and the galley, with its bow near the galley, and as it stood amidships, the fire from the caboose reflected strongly upon its bows on either side. That although the night of the 11th of August was a dark night, it was a very fine night, and the weather was remarkably clear. I could see Folkestone lights from the Brigantine perfectly. The aforesaid two lights on board the Brigantine, namely, the aforesaid lantern suspended from the span of her fore-boom and the aforesaid fire in her galley, were distinctly visible from nine o'clock P.M., when I went below as aforesaid. I could see the lights on shore at Dover perfectly from the Brigantine, and I am satisfied that our lights must have been visible to persons at Dover on shore. That there could be no doubt that the collision was entirely owing to the want of a proper look-out on the part of those in charge of the steamer; had they been keeping a look-out, they must have seen our lights at a sufficient distance to have avoided the collision, by shaping their course so as to have gone clear of us." We see no reason to doubt the testimony of these witnesses. It may be true that they [485] have an interest in respect of their

own loss and a bias in favour of their own vessel; but the testimony of interested witnesses being admissible by law, we cannot hold that the evidence of these witnesses is to be disregarded on the ground of their interest or their bias. The case, however, does not rest upon their evidence alone. There is the testimony of seven other witnesses who saw from the shore the light on board the Brigantine at different periods from nine to half-past eleven, two of these witnesses, Reynolds and Godden, speaking to having seen it up to half-past eleven. This body of evidence proves not merely that there was a light on board the Brigantine, but that it could well be seen in the position in which it was hung: as to which latter point, indeed, evidence could hardly be necessary. The position of the light is sufficient of itself to prove it. We may add that there is a collateral fact in this case which, in our judgment, tends very much to support the evidence as to there having been a light exhibited by the Brigantine. Rudrum, in his evidence, says, that the master had before brought up a vessel in Dover Roads; and Hastings, in his evidence, says, that on this voyage the light was exhibited whenever the vessel was brought up, if it was dark; and surely it is not probable that the master, acquainted with Dover Roads and in the habit of exhibiting the light, should on this night, which is proved to have been exceedingly dark, have omitted to do so.

Such is the evidence on these points upon the part of the Respondents. It is distinct and positive, and applies to the fact of what the witnesses themselves saw.

What is the evidence on the part of the Appellant? [486] It consists of the depositions of some of the crew of the steamer and of some of the passengers on board her, that they did not see any light on board the Brigantine: that a good look-out was kept, and that the Brigantine's light must have been seen if it had existed and been visible; but evidence as to what has not been seen is clearly not entitled to the same weight as evidence as to what has been seen, except in cases where the object of vision is so bright and distinct that the eye must necessarily be attracted to it, which is certainly not the case with a ship's light. Whether such a light is seen or not must depend upon whether the eye is or is not directed to it. Upon this general ground we think that the evidence on the part of the Appellant is not sufficient to countervail the evidence on the part of the Respondents; but in addition to this general ground, we think that the evidence in this case shows that it would be most unsafe to rely upon no light on board the Brigantine having been seen on board the steamer, as proof either that there was no light on board the Brigantine, or that the light on board her was not visible; for we think that the Commander of the steamer would naturally rely on his look-out men; and it appears that one of those men, and the one on the starboard bow, the bow which came into collision with the Brigantine, had left his post and gone to the bridge where the Commander was stationed, to report other lights, and the report of those lights may have distracted the Commander's attention. It is to be observed, too, that it appears clear from the evidence that there were some other lights which were not reported, and it is not to be forgotten that there must in all probability have been some degree of [487] confusion on board a vessel just setting out upon her voyage with so large a number of passengers.

It was suggested on the part of the Appellant, that the light of the Brigantine might have been inefficiently trimmed and gone out; but this suggestion is met by the evidence of Hastings and Rudman, and of the witnesses who saw the light from the shore.

It was also suggested on the part of the Appellant, that the light of the Brigantine might have been obscured by her sail; and the Sailing Masters, whose assistance we have had in this case, rather favoured that supposition; but this is merely a question of evidence, and it is clear from the evidence, that the sails had been stowed before eleven o'clock, and the light was seen from the shore after that time, and that there is no assignable cause for the sails having obscured the light at the time of the collision, and not having obscured it before. Even the drifting, if it could have produced this result, had taken place before eleven o'clock.

Upon the whole, therefore, we feel bound to conclude that there was a light exhibited on board the Brigantine, and in such a position that it must have been seen by the steamer, if a proper look-out had been kept, and we agree, therefore, in opinion with the learned Judge of the Admiralty Court; but having regard to the



evidence, we think that the case was fairly open to doubt, and that there was reasonable ground for the appeal. We shall, therefore, humbly recommend Her Majesty to dismiss this appeal, but without costs.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 1. *Negligence*; b. *In particular cases*; ii. *Speed*; 11. *The Regulations*; b. *Cases on the Regulations*. S.C. 4 W.R. 755; and, below, 4 W.R. 504; Swab. 88. See Merchant Shipping Act 1894, s. 419 (4).]

[488]

*In re* CARDWELL'S PATENT \* [Dec. 1, 1856].

A Patentee agreed, by deed, with a Public company to grant them exclusive licence to use his patented machine, and also covenanted with them to obtain, at the expiration of the term, a renewal of the Patent for the same purpose. Under this deed the Company alone used the Patent. An application by the Patentee for a prolongation refused, on the ground that the agreement was contrary to public policy, and repugnant to the provisions of the Statute, 5th and 6th Will. IV., c. 83, relating to prolongation of Letters Patent.

In this petition, Cardwell, the Patentee, applied for a prolongation of the term of Letters Patent, dated the 15th of December, 1842, which had been granted to him for an invention described as "Improvements in the construction of presses for compression of cotton and other articles." The petition alleged the great public advantage of the invention in facilitating the preparation of cotton obtained from India for manufacturing purposes, and the want of adequate remuneration for such invention. The Petitioner was examined, and from his evidence it appeared that a Company called "The Colaba Press Company" at Bombay, consisting of a large number of shareholders, with a capital of £50,000, had exclusively worked the patent presses, and of which Company the Petitioner had been a shareholder, and had received dividends from the profits made by the Company. He had also received a royalty from the Company upon each bale of cotton compressed by his patent press. An agreement between the Petitioner and the Colaba Press Company, dated the 13th of September, 1851, was put in evidence, which contained the following clauses:—"The said Thomas Cardwell doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise and agree with and to the several persons, parties hereto of the [489] first part, their executors, administrators, and assigns, that he the said Thomas Cardwell, his executors, administrators, or assigns, shall not, nor will, at any time or times hereafter during the continuance of these presents, grant any other license or licences than the license so granted to the said Colaba Press Company as aforesaid, or otherwise permit or suffer any person or persons whomsoever other than the said Colaba Press Company to make or put in practice the said invention within fifty miles of the sea coast of Western India, between the latitude of 11 and 24 degrees north latitude. And further, that at the determination or expiration of the said Letters Patent, under which the said Thomas Cardwell now has the sole privilege of using and licensing the said invention, he the said Thomas Cardwell, his executors, administrators, or assigns, shall and will, if requested so to do in writing, under the hands of the Chairman and Directors of the said Colaba Press Company, use his and their interest, to obtain a renewal of the said Letters Patent in respect of the said invention for a further period, and in case of obtaining a renewal thereof, shall and will observe and fulfil the covenants herein contained on his part during the period of such renewed Letters Patent." There was no opposition.

Mr. Webster supported the petition; and The Attorney-General (Sir Richard Bethell) appeared for the Crown.

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Patteson.

The Right Hon. The Lord Justice Knight Bruce.—Considering that the present application is substantially rather the application of other persons than [490] of the Petitioner; considering also the great advantages the Colaba Press Company appear to have derived from this Patent, and that, though originally granted to the Petitioner, if there be a renewal, the Company will probably take substantially more interest in the Patent than Cardwell himself; their Lordships doubt very much, to say the least, whether, independently of the particular circumstances to which I am about to advert, there would be any case for extending the period of the present privilege. There are, however, certain clauses in the agreement of the 13th of September, 1851, between the Petitioner and the Colaba Press Company, which the Petitioner has produced in evidence, which appear to their Lordships so decisive of the question, that they do not find it necessary to say more upon the point which I have previously alluded to. The agreement contains this clause.—[His Lordship read the clauses, *ante*, p. 488, and proceeded.]—Such provisions appear so manifestly to interfere with the public interest, and so much at variance with the spirit of the law under which the Petitioner is permitted to come here, that their Lordships rest their decision upon this portion of the Petitioner's case, without giving any decisive or conclusive opinion upon the other part: however much they are inclined to think that such other part of the case fails the Petitioner in his application, and notwithstanding that there is no opposition, and the Crown does not object, their Lordships consider it their duty to refuse the application.

[As to delay in bringing patent into use, cf. *Pieper's Patent*, 1895, 12 R.P.C. 292; *Dolbear's Patent*, 1896, 13 R.P.C. 203; *Henderson's Patent*, 1901, 18 R.P.C. 449. As to extension generally, see s. 25 of the Patents Act, 1883 (16 and 17 Vict., c. 57), and Privy Council Rules, 1897 (Stat. R. and O., 1899, p. 1837).]

#### [491] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Our SOVEREIGN LADY the QUEEN, and FRANCIS HART DYKE, Her Majesty's Procurator-General,—*Appellants*: JOHANN PETER HILDEBRANDT,—*Respondent* \* [July 9, 10, 1856].

##### THE "ALINE AND FANNY."

Rule as to the admission of further proof by the Captors [10 Moo. P.C. 497].

By the law of Prize, the evidence, whether to acquit or condemn the ship, must, in the first instance, come from the ship's papers and the primary depositions of the master and crew: and the captors are not, except under circumstances of suspicion arising from the primary evidence, entitled to adduce any intrinsic evidence in opposition [10 Moo. P.C. 497].

In a case where no suspicion of an intention to break a blockade appeared from the ship's papers, or the primary depositions, the Judicial Committee (affirming the interlocutory decree of the Admiralty Court) refused the admission of further proof by the captors to contradict the depositions with respect to the place of capture.

The principle laid down in the *Ostee* (9 Moore's P.C. Cases, 157), that a claimant upon restitution of the ship is entitled to costs and damages from the Captors, only in circumstances where the ship was in no fault, and was not by any act of her own, voluntarily or involuntarily, open to any fair ground of suspicion, approved.

A neutral vessel was seized for breach of blockade. She was chartered for a voyage from Umea to the neutral port of Haparanda in Sweden, at the head

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.



of the Gulf of Bothnia, and had come across the Gulf of Bothnia from the Swedish towards the Finland coast, but not in a straight course from the neutral port she started from to the neutral port she was bound to; and when descried and followed by Her Majesty's ships did not slacken sail, but pursued her course till brought-to by a shot from the Captors. Held, to be such an appearance of an intention to commit a breach of the blockade as to warrant the suspicion of the Captors, and to entitle the Claimants upon restoration to a decree of simple restitution only, without costs and damages [10 Moo. P.C. 501].

The appeal in this case was brought from an interlocutory decree, refusing to allow the Captors to bring [492] in further proof, and rejecting a statement and report made by two of the officers on board the Captors' ship in opposition to the depositions made by the Claimant, the Master, and Crew, as to the place of capture, and decreeing simple restitution of the ship, without costs and damages (see case, *nom.* The *Aline and Fanny*, 1 Spink's Adm. Prize cases, 322).

The facts were these:—

The *Aline and Fanny*, a neutral ship under Lubeck colours, sailed from Lubeck on the 24th of October, 1855, with a general cargo, bound, according to the ship's papers found on board, to Haparanda, in Sweden, and while in the prosecution of such voyage was captured on the 14th of November, 1855, by Her Majesty's ships, the *Tartar* and *Dragon*, for a breach of the blockade of Jacobstadt, which, with other Russian ports in the Gulf of Bothnia, had been blockaded from the 12th of June previous.

A claim was made by the Respondent, the master, on behalf of the owners, citizens of Lubeck. The bills of lading, and papers found on board, showed that the vessel was destined for Haparanda; and in the depositions the master stated her destination to be that port, and that the ship was captured between the 63rd and 64th degrees north latitude, about twenty English miles from the land, and just within sight of the coast of Finland; that the ship's company first saw the *Tartar* at about sixteen miles distant, [493] but that the ship had continued her course without lessening or increasing sail; and the master denied that any attempt was made to break the blockade, or to enter a Russian port.

The Captors prayed for leave to bring in, as further proof, a certificate, or statement, by the officers on board the *Dragon*: that they were on board the *Dragon*, then at anchor inside the Island of Masker, off the town of Jacobstadt, and saw the *Aline and Fanny* apparently running for the anchorage off Jacobstadt, about three or four miles off; that there was an opening at the point of the Island of Maskar, which gave a full view to the *Aline and Fanny* of the *Tartar* and *Dragon* at the anchorage; that the *Aline and Fanny* then set her boom-mainsail and hauled out on the port tack; that she was kept in view until she was captured by the *Tartar*, about seven miles N.N.W. of Jacobstadt; and that the *Aline and Fanny* did not slacken sail until she was brought to by a shot of the *Tartar*, after a chase of two hours.

The Judge (The Right Hon. Dr. Lushington), by his interlocutory decree, rejected the prayer of the Captors for the admission of the further proof; and decreed simple restitution of the ship and cargo, without costs and damages, as he was of opinion that the place of capture, as originally described by the Master himself, proved that the seizure and detention were not without justifiable cause. He was further of opinion that although cases might occur where the captors' evidence as to the place of capture might be received, it was not receivable in the present case, as no serious doubt arose on the primary evidence, the depositions, and ship's papers, that the ship was taken for a breach of blockade twenty miles from the coast of Finland.

[494] Against this decree the present appeal was prosecuted by the Captors, to which the Claimant adhered, insisting that the Judge ought to have decreed the ship and cargo to have been restored, with costs and damages.

The Queen's Advocate (Sir John Harding), and Dr. Deane, for the Appellants.—This case involves an important question in Prize Law. If the principle laid down in the judgment of the Court below, that where there is no doubt from the depositions of the Master and Crew the Captors' evidence cannot be received, but that in special cases in which there may be doubt it may be proper to admit further proof,

be maintained, in future blockade will be but an empty ceremony. What is to be done when a claimant's case may be *prima facie* quite consistent, but where it is, nevertheless, deliberately and knowingly false? Nothing can be easier than to have the ship's papers correct for a legal destination. Surely, the Captors in a case like the present, when they offer to give distinct and material evidence in total contradiction of that of the primary depositions of the Master and Crew as to the place of the capture, namely, that the seizure was twenty miles from the enemy's coast, ought not to have been excluded from giving evidence. The relevancy of such evidence cannot be doubted, for the ship, according to the Claimant's own evidence, was nearer the coast of Finland than was necessary, if in the honest prosecution of her voyage to Haparanda. There is no inflexible rule to exclude such evidence. Story "On Prize Courts" (Edit. by Pratt), pp. 23, 26, is an illustration that the Captors' evidence may [495] be admitted, as in the cases of *The Maria* (1 Rob. 340), *The Sarah* (3 Rob. 330), *The Der Friede* (not reported; cited in Court below from Dr. Burnaby's MS. See 1 Spink's Prize Cases, p. 330), *The Haabet* (6 Rob. 54), *The Ghektigheit* (6 Rob. 58, note), *The Charlotte Christine* (6 Rob. 101), *The Gute Erwartung* (6 Rob. 182), *The Rapid* (in 1810; not reported), *The Sally* (1 Gall. Amr. Rep. 401), *The Bothnia and Jahnstoff* (2 Wheaton, 169). The learned Judge of the Court below relied upon the case of *The Haabet*, but that case is qualified by *The Romeo* (6 Rob. 351). Although the admission of further proof might not lead to the condemnation of the vessel, yet it would justify the Captors in her seizure. The case of *The Ostsee* (9 Moore's P.C. Cases, 157) has introduced a new and material alteration in respect to costs and damages. If the Court below thought there was no suspicion, why did it not condemn the Captors in costs and damages? The Claimant, however, has adhered to the appeal, and prays for costs and damages, which ought never to be given without allowing the Captors to show that the whole of the depositions of the Master and Crew were false.

Dr. Addams, for the Respondent.—This ship was seized whilst in the prosecution of her voyage between two neutral ports, without any ground to justify her capture. The bills of lading and documents found on board proved that the destination of the ship was Haparanda, in Sweden, as the Master deposed. The case is one removed [496] from all possible doubt or suspicion, which alone could necessitate further proof. *The Maria* (1 Spink's Prize Cases, 321). The authorities relied upon by the Appellants have no direct bearing upon this case, for there is no reason to doubt that the Master has not deposed to the truth. He was in ignorance of any technical rule excluding the Captors' evidence. If, then, the judgment of the Court below was correct in restoring the ship and cargo, the restoration ought to have been with costs and damages, as in the case of *The Fortuna* (1 Spink's Prize Cases, 307), which decision was founded upon *The Ostsee* (9 Moore's P.C. Cases, 157); the rule there laid down being, that if no probable cause appears from the ship's papers and depositions, the claimant is entitled to restitution with costs and damages, and not to a decree for simple restitution only. So far I submit the judgment of the Court below is erroneous.

Judgment was reserved and now (16th July, 1856) delivered by

The Right Hon. T. Pemberton Leigh.—In this case an interlocutory decree was pronounced by the Judge of the Court of Admiralty, on the 30th of January, 1856, refusing to allow the Captors to bring in further proof as prayed on their behalf, and decreeing the simple restitution of the vessel and cargo, without costs and damages. Against this sentence the Captors have appealed, on the ground that the Court ought to have admitted evidence on their part. The Claimant has presented a separate petition of appeal, on the ground that costs and damages ought to have been awarded to him.

[497] With respect to the admission of evidence on the part of the Captors, the rule of the Prize Courts in this country appears to us to be accurately stated by Story, "On Prize Courts" (Pratt's Edit.), referred to in the argument. At page 18, he says:—"By the law of Prize, the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel. The Captors are not, unless under peculiar circumstances, entitled to adduce any extrinsic testimony."

At page 24, he observes:—"The Court is in no case concluded by the original



evidence, but may order further proof on a doubt arising from any source or quarter ; and it will sometimes direct it where suspicion is produced by extrinsic evidence. But this is rarely done unless there be something in the original evidence which lays a suggestion for prosecuting the inquiry farther ; and when the case is perfectly clear, and not liable to any just suspicion, the disposition of the Court leans strongly against the introduction of extraneous matter, and against permitting the Captors to enter upon farther inquiry."

The first question is, whether the circumstances of this case were such as to require or to justify a departure from the general rule of acquitting or condemning the ship and cargo on evidence furnished by the ship's papers and the depositions of the crew.

Now, in the depositions of the Master and the two other witnesses who were examined, it is stated that the ship belonged to owners at the neutral port of Lubeck ; that she was chartered for a voyage to the neutral port of Haparanda, in Sweden (at the head of the Gulf of Bothnia) ; that she sailed from Lubeck on the 24th of October, 1855, with a general cargo, con-[498]-signed by various merchants at Lubeck to their several correspondents at Haparanda ; and that in the regular course of her voyage up the Gulf of Bothnia, she was captured on the 14th of November, 1855, by Her Majesty's ships *Tartar* and *Dragon*, for an alleged breach of the blockade of the coast of Finland. It is positively denied that there had been any attempt or any intention to break blockade or to enter any Russian port.

As far as regards the ownership of the ship and cargo, the port from which she had sailed, and the port to which she was destined, and the parties to whom the cargo was consigned, the statement of the Master and the other witnesses was entirely confirmed by the ship's papers, which were all perfectly regular.

There was nothing in the story told by the Master in itself improbable or inconsistent with any facts of public notoriety ; but with respect to the ship's course, and the fact of her having been captured in the regular prosecution of her voyage to Haparanda, it was urged by the Captors that the place in which she was captured showed that the account given could not be true ; for that, according to the Claimant's own statement, she was nearer to the coast of Finland, at the time when she was captured, than she ought to have been in the honest prosecution of her voyage ; and they proposed to prove that while they were at anchor off the town of Jacobstadt, on the coast of Finland, on the morning of the 14th of November, 1855, and at about half-past 8 o'clock, A.M., they saw the schooner apparently running for the anchorage of Jacobstadt, about three or four miles off, and that on coming within view of Her Majesty's ships *Tartar* and *Dragon* she set her boom-sail, and hauled out [499] on the port tack ; and that she was detained by Her Majesty's ship *Tartar*, about seven miles N.N.W. of Jacobstadt.

Now, with respect to the approach to the coast of Finland, the account given by the Master is, that the ship had gone into the port of Umea, which is a port on the Swedish coast, nearly opposite to the port of Jacobstadt, on the coast of Finland ; that she left Umea on the 13th of November, and was captured on the 14th, about twenty miles from land (which clearly means the land of the coast of Finland). He says he first saw the *Tartar* about half-past 8 o'clock in the morning, at the distance of about sixteen miles ; that he did not change his course, but was pursued, and at 11 o'clock was brought-to, by a shot fired by the *Tartar*. It does not distinctly appear how near the ship had approached to the coast of Finland, but the state of the wind and of the currents, and the nature of the channels, might make it necessary or advisable for this ship, without any evil intention, to keep to the Russian side of the Gulf of Bothnia, or, at all events, in tacking to approach nearer to the coast of Finland than would appear to be necessary by a mere reference to a direct course from Umea to Haparanda as appearing upon a chart. There was no such suspicion, therefore, arising from her being found so near the blockaded coast as could throw reasonable doubt upon the truth of the statement contained in the depositions, and confirmed by the ship's papers. We think that the learned Judge exercised a perfectly sound discretion in restoring the ship upon the evidence before him, and rejecting any evidence of the Captors.

We may observe that the evidence tendered by the [500] Captors would not have materially altered the case. The ship might have appeared to them to be steering

for the anchorage of Jacobstadt, and might have appeared to them to have changed her course, in consequence of seeing Her Majesty's ships of war; but the impressions produced upon their minds by these appearances cannot prevail against the positive statements of the Master and Crew, and the strong evidence from the ship's papers. As to the precise distance from the coast of the place of capture, no great certainty, from the nature of the case, is possible; and whether the actual capture took place twenty miles or seven miles from the shore, or, as is probable, at some intermediate distance, is not very important.

But then it is said by the Claimant that the ship being restored, costs or damages ought to have been awarded to the Claimants, on the authority of the decision of the Judicial Committee in the case of *The Ostsee*. (9 Moore's P.C. Cases, 150.) This must depend upon the question whether this ship has brought herself within the class within which *The Ostsee*, in the opinion of the Judges who decided that case, was clearly brought—that is to say, in the language there used, of a capture, “where not only the ship was in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion.” (9 Moore's P.C. Cases, 157.)

It has been suggested at the Bar that a decision which proceeded expressly on this ground has in some measure altered the practice of the Admiralty Court. If that be so, it should seem that such alteration can only have occurred because the practice itself had insensibly deviated from the principles by which it professed to be governed.

[501] But however that may be, this case does not fall within the principles of that decision. Here there were appearances created by the act of the ship herself, which might justly excite suspicion. She had come across the Gulf of Bothnia, at a point where, as we understand, the Gulf is between fifty and sixty miles broad, from the Swedish towards the Finland coast; she was not in the straight course from Umea to Haparanda. When she was deserted and followed by Her Majesty's ships then lying off the port of Jacobstadt, she did not slacken sail, but pursued her course, till she was brought to by a shot from *The Tartar*, after what seems to have been a chase of above two hours. Surely these circumstances were abundantly sufficient to excite the just suspicion of the Captors as to the character and purpose of this vessel, and to afford probable cause for capture, though those suspicions have been removed by the investigation which has taken place in the Admiralty Court.

We are, therefore, of opinion, that the learned Judge was perfectly right upon both points, and we shall humbly report to Her Majesty our opinion that both appeals ought to be dismissed with costs.

With reference to an observation which we find in the judgment, it may be proper to remark that there does not appear to us to be anything in the decision of *The Ostsee* [9 Moo. P.C. 157], which ought at all to affect the exercise of the discretion of the Court in directing, or refusing to direct, further proof. Whatever the law upon that subject was before that decision was pronounced, such, in our opinion, it still remains.

[Mews' Dig. tit. WAR; 3, *Prize of War*; a, *Rights as to*. S.C. below 2 Jur. N.S. 143; 4 W.R. 321. As to Admiralty jurisdiction of Privy Council, see note to *The Ostsee*, 1855, 9 Moo. P.C. 184.]

## [502] ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

DOE, on the several demises of DEVINE and another.—*Appellants*: FELIX WILSON and Others.—*Respondents* \* [July 23, 24, and 25, 1855].

Grants of Crown lands made by the Lieutenant-Governor of New South Wales.

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir John Patteson.



in 1794 and 1799, though imperfectly described, and impeached as void for uncertainty, upheld; possession having been had by the grantee for more than thirty years, of lands answering the description in the grant, and quit-rents paid in respect thereof by the grantee and his successors to the Crown [10 Moo. P.C. 526, 527].

Handwriting of a deceased witness, made at the time of his examination by Commissioners, but not returned with the depositions, is sufficiently in evidence to admit of being produced in Court for the purpose of comparison with his signature to a deed the genuineness of which is impeached [10 Moo. P.C. 530].

The *onus* of proving the genuineness of a witness to a deed in a civil suit lies on the party setting up the deed, not on the party impeaching it, as in a criminal proceeding; and it is a misdirection in a Judge to tell the jury in a civil suit, that under such circumstances they must try the question as to whether the deed was forged or not, in the same manner as if the Defendant was on his trial for forgery. Such misdirection will entitle the Plaintiff to a new trial [10 Moo. P.C. 531].

A witness to a deed being dead, his daughter, who was called at the trial to prove his handwriting, deposed that the signature to the deed was not her father's handwriting, and in her examination spoke of a letter which she had with her, from her father to her mother, which letter, at the request of the Judge, she produced in Court, and the Judge handed it to the jury to compare with the witness's alleged signature to the deed: Held, that as the letter was not in any way in evidence in the cause it ought not to have been handed to the jury [10 Moo. P.C. 530].

This was an appeal from the judgment of the Supreme Court of New South Wales, refusing a motion made on behalf of the Appellant, as lessor of the Plaintiff, in an action of ejectment, to set [503] aside the verdict found, on the trial of the action, for the Respondents, as Defendants, and for a new trial.

The action was brought to recover a tract of land, comprising 210 acres, situate in New Town, in the parish of Petersham, in the county of Cumberland, in New South Wales. There were two demises in the pleadings, one by Edward Devine, the other by John Devine. The trial, however, turned upon that of John Devine alone. John Devine claimed as heir-at-law of one Nicholas Devine, who came to New South Wales in the year 1788, and was resident there until his death, in 1830, and whom the Appellant alleged died seised of the land in dispute.

At the trial in the Supreme Court of New South Wales, before Sir Alfred Stephen, the Chief Justice, and a special jury, the Plaintiff gave in evidence two grants from the Crown, made by former Governors of New South Wales, the first dated the 8th of January, 1794, which grant, after reciting that full power was vested in the Lieutenant-Governor for the time being, to grant lands in New South Wales, by instructions under the Sign manual, proceeded in these terms:—"In pursuance of the power and authority vested in me, I do, by these presents, give and grant unto Nicholas Devine, his heirs and assigns, to have and to hold for ever, 120 acres of land, to be known by the name of Burrin Farm, lying and situated in the district of Bulanaming, and separated on the north side by a road of 200 feet in width from the land allotted for the maintenance of a schoolmaster without the town of Sydney; the said 120 acres of land to be had and held by him, the said Nicholas Devine, his heirs and assigns, free from all fees, taxes, quit-rents, and other acknowledgments, for the space of five years [504] from the date of these presents, provided that the said Nicholas Devine, his heirs or assigns, shall reside within the same, and proceed to the improvement and cultivation thereof (such timber as may be growing and to grow hereafter upon the said land, which may be deemed fit for naval purposes, to be reserved for the use of the Crown), and paying an annual quit-rent of one shilling for every fifty acres after the expiration of the term or time of five years before mentioned."

The ground grant was dated the 8th of October, 1799. The material part of this grant was as follows:—"I do, by these presents, give and grant unto Nicholas Devine, his heirs and assigns, to have and to hold for ever, ninety acres of land

lying and situated in the district of Bulanaming, bounded on the south-west side by Page, Candells, Jenkins, and Field Farms, from which it is separated by a road of sixty feet, and on the south side by an allotment granted unto Samuel Burt. The said ninety acres of land to be known by the name of Burrin, and to be had and held by him, the said Nicholas Devine, his heirs and assigns, free from all fees, taxes, quit-rents and other acknowledgments whatever, for the space of five years from the date thereof (such timber as may be growing or may grow hereafter upon the said land, which may be deemed fit for naval purposes, to be reserved for the use of the Crown), and paying an annual quit-rent of two shillings after the term or time of five years before mentioned."

Evidence was given by the Plaintiff of the continued possession of Nicholas Devine, for more than thirty years immediately before his death, of a house and a considerable quantity of land adjoining, called Burrin Farm, at Newtown, answering to the grants, which was [505] formerly surrounded by an undefined extent of wild and uncultivated lands, uninclosed, over which Devine's cattle grazed. Evidence was also given by the Plaintiff to show that Nicholas Devine had cattle running on the land, called Burrin Farm, for many years before his death, and that in the year 1822 he employed a Government surveyor, named Mayne, to go over the whole of the land in his occupation with him, and mark his boundaries, which was accordingly done, from a Government chart, and that the land so surveyed comprised about two or three hundred acres. The Chief Justice, however, refused to receive evidence offered by the Plaintiff to show the boundaries of the land occupied by Nicholas Devine, or to receive the deceased surveyor's field-books as proof of what he measured. It was further proved by the Plaintiff that all or most of the Defendants occupied land within the boundaries marked in the survey of 1822, formerly occupied by Nicholas Devine. The fact of the heirship of the Plaintiff, John Devine, to Nicholas Devine was also proved.

At the close of the Plaintiff's case the Defendant's Counsel submitted that the Plaintiff ought to be nonsuited, on the ground that he had not sufficiently established his title, for that the grants under which he claimed were void for uncertainty. The Plaintiff refused to be nonsuited, but consented that the question should be reserved for the Court. The Defendants then went into their case. The case of the Defendants rested upon the title to the above lands, which they set up in one Bernard Rochford, a convict, alleging the same to have been assigned to him by Nicholas Devine. To establish which they produced certain documents, purporting to be deeds of convey-[506]-ance, dated respectively the 27th of October, 1827, from Nicholas Devine to Rochford. Two of these deeds purported to be a lease and release of the lands in question, by the descriptions contained in the above grants. The other of the deeds purported to be a lease for life of the premises, bearing date the following day, from Rochford to Nicholas Devine. These deeds purported to be signed and delivered by Nicholas Devine and Rochford; the lease and release in the presence of three witnesses, Egan, Murray, and Maher, alias Dunn, whose names were subscribed as witnesses thereto, and the lease for life by the same witnesses. The Defendants gave evidence of the death of the attesting witnesses, and offered proof of their handwriting. The Defendants also gave in evidence a Will alleged to have been made by Nicholas Devine, dated the 8th of May, 1830, which recited that Rochford held "a deed of gift and assignment," by the act and deed of Nicholas Devine, but not further specifying what the deed and gift of assignment was, or to what it had reference.

The Plaintiff, in answer to Defendant's case, gave evidence that Rochford was, at the time of making the above deeds, a convict without remission, assigned as servant to Nicholas Devine, and that the several instruments relied on by the Defendants were not the deeds of Nicholas Devine, and that his signature and those of the attesting witnesses were forgeries; and, further, that at the time of making the deed he was imbecile and *non compos*, and incapable of making or executing a deed, and that, consequently, they were fraudulent and void, even if genuine. On the question of the genuineness of the signature of Nicholas Devine and the attesting witnesses, Egan Murray, and [507] Maher, alias Dunn, the Plaintiff produced a deposition of Maher, taken *de bene esse* before his death, denying that he had attested any deed by Nicholas Devine, and swearing that his signature, as attesting witness to the aforesaid deeds of lease and release, was a forgery. The Chief Justice, not-



withstanding a protest from the Plaintiff's Counsel, directed certain papers containing signatures made by Maher, when under examination as aforesaid, to be submitted to the jury for the purpose of comparison with the signatures to the aforesaid deeds of lease and release, in order to decide whether his signature as an attesting witness was genuine.

The Defendants, in order to prove the competency of Nicholas Devine, and also the genuineness of his signature to the above-mentioned deeds, produced other papers signed by him in other matters not in evidence in the cause. These papers were in like manner submitted by the Chief Justice to the jury, they being permitted to form from them an opinion as to the genuineness of the signatures. As to Egan's signature, evidence was given that it was hardly possible he could have been on the spot at the time when he was supposed to have affixed his signature to these deeds; and his daughter denied the genuineness of his signature, and on her producing a letter received by her mother from her father, the Chief Justice submitted it also to the jury for the purpose of comparison.

The Chief Justice, in summing up, told the jury that in considering the question of the genuineness of the deeds adduced by the Defendants, they were to consider the presumption of innocence as strongly in favour of Rochford, as it would be in a criminal case if he were on his trial for forgery. He also informed [508] them that the fact of the Counsel for the Plaintiff having objected to a witness being called to contradict one of the Defendants' witnesses was a reason for disbelieving that witness, and finally he left six questions to the jury, four on the case of the Plaintiff, and two on that of the Defendants—First. Whether the land in dispute was claimed in fact by the Plaintiff under the two grants of 1794 and 1799 respectively. Second. Whether they believed that those grants related to the land which was in fact possessed by the grantee? Third. Whether, independent of these grants, they were satisfied that Nicholas Devine was in possession, claiming the fee of the land in dispute in this action? Fourth. Whether the lessor of the Plaintiff was the heir-at-law of Nicholas Devine? Fifth. Whether the conveyance in writing relied on as a conveyance of October, 1827, was executed in fact by Nicholas Devine? Sixth. Whether, at the time when he so executed it, he was in a state to know, and did know, what he was doing? The jury found all these questions in the affirmative, and the verdict was, by the direction of the Chief Justice, entered for the Defendants.

The Plaintiff moved for a new trial, on the following grounds:—First. On the several points reserved by the Chief Justice at the trial. Second. Because the verdict was against law. Third. Because the verdict was against evidence and the weight of evidence. Fourth. Because the Chief Justice handed to the jury certain paper writings not being in evidence in the cause on either side, for the purpose of comparison of handwriting, although this course was strongly objected to by the Plaintiff's Counsel, and the paper writings were not then tendered as evidence for [509] the Defendants. Fifth. Because the Chief Justice addressed one of the Plaintiff's witnesses, named Hickman, after he had given his evidence and before he left the box, and told the witness that he was "a great rascal," thereby manifestly depreciating the character of the witness, and lessening the weight and value of his evidence in the minds of the jury; and because the Chief Justice, in his charge to the jury, repeated the same observations, and thereby unnecessarily and unintentionally damaged the credit of the witness in the opinion of the jury. Sixth. Because the Chief Justice misdirected the jury, in telling them that there was no distinction whatever between the duties of jurors in civil and criminal cases, in deciding on the weight of evidence, and that the jury were not to find a verdict for that party in whose favour the weight of evidence prevailed; but that if they entertained any doubt as to the forgery of the documents in evidence, they were to give Defendants the benefit of that doubt, and decide on the evidence just in the same way as if Rochford, through whom they claimed, was then on his trial for forgery. Seventh. Because the Chief Justice, in commenting on the evidence of Egan, a witness for the Defendants, told the jury that it was an additional reason for disbelieving that witness, because the Counsel for the lessors of the Plaintiff objected to the examination of a witness to contradict the Defendants' own witness. Eighth. Because the Chief Justice did not leave it as a question for the jury to decide, whether "the deed of gift or assignment," mentioned in the instrument produced as the Will of Nicholas Devine, was the deed of release of the 22nd of October, 1827, or what

other deed of conveyance, but assumed that the [510] said deed of release was and could be the only instrument referred to. Ninth. Because His Honour stated to the jury that the same observations he had applied to the witness, Hickman, were equally applicable to the witness Maher, alias Dunn, whose evidence had been taken *de bene esse*, thereby lessening the weight and effect of the said Maher's, alias Dunn's, evidence in the minds of the jury. Tenth. Because the lessors of the Plaintiff were taken by surprise at the trial by the production of various deeds, vouchers, receipts, and other papers put in by the Defendants, with the signature "N. Devine" and other signatures, all purporting to be genuine signatures; and which neither the lessors of the Plaintiff, nor their Attorney or Counsel, had any opportunity of inspecting or examining, or of producing to witnesses, in order to disprove the genuineness thereof, prior to the commencement of the trial. Eleventh. Because the Chief Justice did not instruct the jury that inasmuch as Rochford was proved to be a convicted offender, serving under a sentence of transportation for life, he was civilly dead, and could not take, hold, or convey real property.

On the motion being made, the Court required the Plaintiff's Counsel to confine himself, in the first instance, to the question of the invalidity of the title adduced by the Plaintiff, inasmuch as, even if there had been no valid conveyance to Rochford, yet it was clear that the Plaintiff could not recover, unless the evidence at the trial made out such a title as would countervail the Defendants' possession. The Court was divided in opinion. The Chief Justice decided against the Plaintiff on all the points made. Mr. Justice Dickinson was in favour of the Plaintiff on the fourth and sixth points, and Mr. Justice Therry [511] upon the sixth point. The result of this ruling was; that the Court intimated their opinion that the grants to Devine were void for uncertainty, as the description therein respectively showed no boundaries. Other grounds of argument were urged, but the Court decided that the first of the two grants put in evidence was void for uncertainty; that, under the circumstances, the Defendants were not estopped from taking that objection; and, therefore, that as to the lands claimed under the first grant, the Plaintiff could not, in any event, recover; but, with respect to the second grant, the Court felt unable to say, without further information, whether that grant was void or not, and, therefore, directed the question of a new trial to be fully entered into, it being their opinion that even if the second grant was good, the Defendants would be entitled to retain their verdict, unless successfully impeached on some or one of the grounds taken by the Plaintiff.

The motion for a new trial was then proceeded with, but the second ground taken in the notice was not argued, the eleventh was abandoned, the fifth and ninth were withdrawn, and the remaining points fully argued. The Chief Justice thereupon delivered the judgment of the Court, at great length, on all the points argued, except the fourth and sixth objections, and his opinion on those points were, that a new trial ought not to be granted. Mr. Justice Dickinson was, however, of opinion that upon these two grounds a new trial should be allowed, whilst Mr. Justice Therry held that a new trial ought to be refused on the fourth ground, and allowed on the sixth ground of objection only.

The Plaintiff appealed from the disallowance of the several grounds of motion, and against the decision [512] of the Court that the first grant was void, and the refusal of a new trial in respect of the lands comprised in the first grant.

The appeal now came on for hearing.

Sir FitzRoy Kelly, Q.C., and Mr. Vernon Harcourt, for the Appellant.—A new trial ought to have been granted to the Appellant, as a matter of right, upon two grounds; first, the misdirection of the Judge; and, secondly, the reception by him of improper evidence. The grant of a new trial is a common-law right, and this Court, in such circumstances, to prevent a failure of justice, will order a new trial. —(Mr. Pemberton Leigh: The principle this Court has proceeded upon is, not to grant a new trial if evidence improperly rejected by the Court below contain nothing material to the issue, or calculated to influence the verdict. *The East India Company v. Oditchurn Paul* (7 Moore's P.C. Cases, 85).)—A Court of common law in this country would have granted a new trial, had the case been before them. *Baron de Rutzen v. Farr* (4 Ad. and Ell. 53). There was error in law sufficient to justify the Appellant's tendering a bill of exceptions, if he had thought fit, to the Judge's ruling.



under the Statute of Westminster, 13th Edw. I., St. 1, c. 31. That Statute must be assumed to apply to New South Wales. Now, if a bill of exceptions may be tendered, an application for a new trial may be made instead, if that course is preferred. *Bernasconi v. Farebrother* (3 Bar. and Ad. 372). The first question is, the validity of the grants of 1794 and 1799, under which the [513] Appellant claimed. It is urged by the Respondents that both these grants are void for uncertainty, although the Court has only declared the first void, and they say that no length of possession proved in Nicholas Devine would, in such circumstances, entitle the case to be left to the jury as evidence of title, because the lands in the grants are not sufficiently described. Such an objection is untenable. We established that the grants were valid grants, and that they comprehended the lands in dispute. They, therefore, could not be void for uncertainty. 2 Co. Inst., 496. If an objection such as is here made could prevail, almost all the Crown grants of land in New South Wales would be questionable. There was, however, sufficient and conclusive evidence of title in Nicholas Devine, independent of the grants. There was possession by him of certain lands, called "Burrin Farm," which fully answered to the lands contained in the original grant. There was, therefore, no necessity to prove the boundaries, and the want of such proof could not be urged as fatal in ejectment. *Cottingham v. King* (1 Burr. 630), *Conner v. West* (5 Burr. 2673), *Doe dem. Bassett v. Mew and Gunning* (7 Ad. and Ell. 240). But the Appellant did not rely solely upon the grants. Possession of the lands by Nicholas Devine was proved for upwards of thirty years, which created in him a good title, and one not to be questioned upon ejectment. *Stokes v. Berry* (2 Salk. 421). Uninterrupted possession of lands for twenty years gives a complete possessory title, *Stocker v. Berny* (1 Lord Raym. 741), *Denn v. Bernard* (2 Cowp. 597), *Doe dem. Carter v. Barnard* (13 Jurist. 915), *Doe dem. Fisher v. [514] Taylor* (Cowp. 217). Assuming, then, that the grants might be vitiated by uncertainty of description, upon the ground of possession alone the Appellant was entitled to a verdict. But the Appellant was not bound to rely solely upon the deeds. Here is an adverse possession for upwards of thirty years set up, not only against the Crown, but against an individual who claims adversely through the grantee of the Crown. A grant from the Crown is presumed from long possession. *Bedle v. Beard* (12 Co. Rep. 5), *Viner's Abr.*, tit. "Evidence" (Q. a 2), *Goodtitle v. Baldwin* (11 East, 488), *Holcroft v. Heel* (1 Bos. and Pull. 400), *Campbell v. Wilson* (3 East, 294), *Gibson v. Clark* (1 Jac. and Wal. 159), *The Queen v. East Mark* (11 Q.B. Rep. 877), *The Earl of Stamford v. Dunbar* (13 Mee. and Wels. 822), *The Mayor of Exeter v. Warren* (5 Q.B. Rep. 773). Then there has been payment to the Crown of quit-rents. *Eldridge v. Knott* (Cowp. 214). But the most important point is that of estoppel. Even if the grants were void for uncertainty, yet as the Respondents' claim is derived from Rochford, who himself claims through the grantee, Nicholas Devine, the Respondents are estopped from taking advantage of any defect in the grants. The Appellant was not bound to prove his title. It was, therefore, not an estoppel on record, but an estoppel *in pais*. *Veale v. Warner* (1 Williams, Saunders, 325, n. 4). The Respondents were estopped from disputing the title of Nicholas Devine. *Blewett v. Tregonning* (3 Ad. and Ell. 554), *Cooper v. Blandy* (1 Bingh. N.C. 45), *Fleming v. Gooding* (10 Bingh. 549), *Dolby v. Hes* (11 Ad. and Ell. 335), *The King v. [515] Stacey* (1 Term Rep. 4), *Jackson v. Ayres* (14 Johnson's New York Rep. 224); *Com. Dig.*, tit. "Estoppel," 13; *Greenleaf's "Law of Evidence"* (5th edit.), secs. 22, 24, 25; *Starkie "On Evidence,"* p. 100 (4th edit.). Then we are entitled to a new trial, First, by reason of misdirection. The Chief Justice misdirected the jury by telling them that there was no distinction between the duties of jurors in civil and criminal cases in deciding the weight of evidence, and that the jury were not to find a verdict for that party in whose favour the weight of evidence prevailed, but that if they entertained any doubt as to the forgery of the documents in evidence, they were to give the Defendants the benefit of that doubt, and decide on the evidence, just in the same way as if Rochford, through whom they claimed, was on his trial for forgery. *Hodge's case* (2 Lewin Crown Cases, 42). *Best's "Principles of the Law of Evidence,"* sec. 90; *Greenleaf's "Law of Evidence,"* sec. 34; *Burnett's "Crim. Law of Scotland,"* p. 522; 1 *Bentham. Jud. Ev.*, p. 88. In civil cases, as in criminal proceedings, there is a presumption of innocence. *The King v. The Inhabitants of Turney* (2 B. and Ald. 386), which

case is explained in *Lapsley v. Grierson* (1 H.L. Cases, 498), *Williams v. The East India Company* (3 East, 192), *The King v. The Inhabitants of Harborne* (2 Ad. and Ell. 540). Again, the Chief Justice did not leave it as a question for the jury to decide whether "the deed of gift or assignment," mentioned in the instrument produced as the Will of Nicholas Devine, was the deed of release of the 22nd of October, 1827, or what other deed or conveyance, but assumed that the deed of release was and [516] could be the only deed referred to. Secondly, We are entitled to a new trial by reason of the improper reception of evidence. The Chief Justice was wrong in not instructing the jury that inasmuch as Rochford was proved to be a convicted felon, serving under a sentence of transportation for life, he was civilly dead, and could not hold or convey real estate. Moreover, the Chief Justice left to the jury certain writings not being properly in evidence in the cause on either side, for the purpose of comparison of the handwriting. *Doe dem. Perry v. Newton* (5 Ad. and Ell. 514), *Allesbrook v. Roach* (1 Esp. 351), *Hughes v. Rogers* (8 Mee. and Wels. 123), *Griffiths v. Ivery* (3 Per. and D. 179; 11 Ad. and Ell. 322).—[Sir John Patteson: The Common Law Procedure Act, 17th and 18th Viet., c. 125, sec. 27, gives power to the Court to compare disputed handwriting.]—That Statute is not declaratory, and does not apply to New South Wales. The Court also refused to receive the evidence tendered by the Appellant as to the boundaries of the land occupied by Nicholas Devine, or to receive the field-books of the deceased surveyor. Upon these grounds we submit that the findings of the jury in favour of the Appellant were sufficient to entitle him to a verdict, and that the findings for the Respondents were vicious, by reason of the misdirection of the Judge.

Mr. Bramwell, Q.C. and Mr. Ayrton, for the Respondents.—It was established by evidence at the trial, that the Appellant was not entitled to recover. The grants of the Lieutenant-Governor in 1794, of 120 acres of [517] land, and in 1799, of ninety acres, to Nicholas Devine, are void for uncertainty. In Bacon's Abr., tit. "Grant" ii. (5), it is laid down that if A., seised of a great waste, grant the moiety of a yard of land lying in the waste without ascertaining what part, or the special name of the land, or how bounded, this may be reduced to a certainty by the election of the grantee. But it is otherwise in the case of a king's grant, for there can be no election in that case, and therefore the grant is void for uncertainty; and Bacon refers to Hungerford's case (1 Leon. 30), Stockdale's case (12 Co. Rep. 86), *Brand v. Todd* (Noy, 29). These cases show that in a Crown grant, if there be no description by name or abutments, but only as containing so many acres, the grant is absolutely void, and these old authorities are confirmed by Blackstone, Comms. (2 Vol. p. 347 15th edit.), 2 Shepp. Touchstone (Prescott's edit.), pp. 229, 246. *The Attorney General v. Burridge* (10 Price, 369). *The Duke of Newcastle v. The Hundred of Bratton* (4 Bar. and Ad. 273). The grants being void, Nicholas Devine was not entitled at his decease to any estate of inheritance in the lands in question.—[Sir John Patteson: The Court below held that in these grants there was no description, which is not correct: both grants mention boundaries.]—There must be some extrinsic circumstances by which you can identify the lands; here there are no such circumstances.—[Mr. Pemberton Leigh: There is a description which may enable the Court to identify the lands: perhaps it was the best that at that time could be given; as it appears, upon the face of the grants, that the lands at the period of the grants were a wild and unculti-[518]-vated country.]—It was assumed throughout in the Court below, that the 120 acres named in the first grant was part of a larger district; the words of the grant are "of 120 acres," not "the 120 acres. This grant was, therefore, void. Now, it is apparent from the Appellant's own case, that if one of the grants was void, it is impossible to distinguish and identify the lands intended to have been granted. We do not dispute the consequence: if our arguments that the grants are void be correct, then we are at the mercy of the Crown. But the fallacy of the Appellant's argument is, that we are estopped from showing that the grants are void for uncertainty. Assuming that upon the Appellant making out a good *prima facie* case of heirship and possession, the Respondents would have been estopped from producing the grants, and showing them to be void for uncertainty. But the case is widely different when the grants are produced by the Appellant. The Respondents are not then estopped. *Right on the dem. of Jefferys v. Bucknell* (2 Bar. and Ad. 278), and the cases there cited. Rochford could only be estopped by the deeds of 1827, on the supposition that they



were duly executed by Devine; the Appellant's case is, that they were void for fraud. The law is clear that there can be no estoppel unless it be reciprocal, it must bind both parties, Co. Lit. 352, a., *Gaunt v. Wainman* (3 Bing. N.C. 69). Now the true way to place the case is this: If Devine never executed the deeds, the Appellant was not bound by any estoppel, in which case the Respondents claiming through Rochford were equally not bound. There was no mutuality. This point was not strongly urged in the Court below, and cannot now be sustained.

[519] We now proceed to the question of title raised by the possession of Nicholas Devine. On this point, also, we submit that the judgment of the Court below was correct. We have established that if Nicholas Devine was entitled to the lands, he duly conveyed them to Bernard Rochford in fee, and that, at the time of Devine's death, he had only an estate for life in the lands. The Appellant must be satisfied with the case made by him in the Court below; he there claimed under grants from the Crown, and his title as heir-at-law of Nicholas Devine must be dealt with as being derived from the Crown grants. It was not competent to the Appellant at the trial to set up a title upon the presumption of an estate in fee, arising from the unlawful possession of Nicholas Devine. He founded his title upon the grants, and his title must be decided upon that ground alone, *Doe dem. Woodhouse v. Powell* (8 Q. Ben. Rep. 576), *Goodtitle dem. Parker v. Baldwin* (11 East, 494), *Harper v. Charlesworth* (4 Bar. and Cr. 574). Another of the grounds relied upon by the Appellant for a new trial is the reception of improper evidence by the Court below as to the handwriting of the attesting witnesses. The mode taken by the Court to test the signature was in accordance with the rules of evidence adopted by our Courts. *Stanger v. Searle* (1 Esp. 43). Taylor, "On Evidence," sec. 1669 (3rd edit.), says, "Any person whose handwriting is in dispute, and who is present in Court, may be required by the Court to write in its presence, and such writing may be compared with the document in question;" and such a test is further provided by the Common Law Procedure Act, 17th and 18th Vict., c. 125, sec. 27. The exception to this rule is shown [520] in *Doe dem. Perry v. Newton* (5 Ad. and El. 514), *Hughes v. Rogers* (8 Mee. and Wels. 123). Again, it is insisted that the ruling of the Chief Justice was wrong, in directing the jury that the case as to the handwriting was to be viewed as in a criminal case, where a party is on trial for forgery, and the case of *The King v. The Inhabitants of Twynning* (2 Bar. and Ald. 386) was relied upon. That case, however, is distinguishable, as it relates to a question of bastardy, in which the Court were favourable to the presumption of the death of a first husband. The rule as to presumption of innocence is laid down in *Williams v. The East India Company* (3 East, 192).

Sir FitzRoy Kelly, Q.C., in reply.—Two principal questions have to be determined. First, the admissibility of the evidence as to the handwriting; and secondly, the misdirection of the Judge, who, confounding the distinction between the rules of evidence of the civil and the criminal law, told the jury that there was no distinction whatever between the duties of jurors in civil and criminal cases in deciding on the weight of evidence, and that if they entertained any doubt as to the forgery of the documents in evidence, they were to give the Defendants the benefit of that doubt, and decide on the evidence just in the same way as if Rochford, through whom they claimed, was then on his trial for forgery. Upon this latter ground alone we are entitled to a new trial. The only cases in which the Court has refused a new trial are, when the Court sees that the case would not have been advanced further by admitting the rejected evidence, *Doe dem. Welsh v. Lang* [521]-field (16 Mee. and Wels. 497), *Crease v. Barrett* (1 Cro. Mee. and Ros. 919), *Brook v. Middleton* (10 East, 268). Unless it be manifestly against the justice of the case, or in a penal action, it is a common-law right of a party to have a new trial where there has been a misdirection on the part of the Judge. The grants are valid. There are boundaries. The cases of *The Abbot of Strata Mercella* (9 Co. Rep. 30), *The Earl of Shrewsbury's case* (9 Co. Rep. 46 (b)), *The Earl of Rutland's case* (8 Co. Rep. 55), *Stockdale's case* (12 Co. Rep. 86), *Bewley's case* (9 Co. Rep. 130), *Chad v. Tilsed* (2 Brod. and Bing. 403), *Calmady v. Rowe* (6 C. Ben. Rep. 893, note), are all in favour of our right. If the contrary was to be held, it would create the utmost alarm in New South Wales. The Crown does not question the validity of the grants. The quit-rents have been paid to and received from the first by the Crown.

Judgment was postponed, and was now pronounced by

The Right Hon. Sir John Patteson (Nov. 27, 1855).—This was an action of ejectment, to recover possession of 210 acres of land, upon which many houses have been built in the last fifteen years, and which has become a very valuable property. The Plaintiff claimed as heir-at-law of one Nicholas Devine, who died in 1830.

At the close of the Plaintiff's case, the Defendants' Counsel applied for a nonsuit, but the Plaintiff's Counsel refusing to be nonsuited, it was agreed that the question should be reserved for the Court.

[522] The Defendants then entered into their case, and the jury found a verdict in their favour. A rule *nisi* was granted to set aside their verdict, and to have a new trial.

On the hearing of that rule, the Court were unanimously of opinion that the Plaintiff's case had failed as to parts of the lands, and that he could not in any event recover that part. But they entertained some doubt, whether the Plaintiff's case had wholly failed as to the residue of the lands.

Assuming that the Plaintiff's case had not wholly failed, the question arose, whether the verdict could be supported on the Defendants' case.

One objection was, that the verdict was against the evidence; but this was, rightly as we think, abandoned. A second objection was, that the learned Chief Justice, before whom the cause was tried, had misdirected the jury. The learned Chief Justice adhered to the opinion which he held at the trial, and thought that there was no misdirection. The other two learned Judges, however, held, that there was a misdirection entitling the Plaintiff to a new trial, supposing that his own case had not wholly failed. A third objection was, that improper evidence had been received; as to which point the learned Chief Justice, and one of the other learned Judges, held, that the evidence had been properly received; the other learned Judge held the contrary. Ultimately the rule *nisi* for a new trial was discharged generally, and leave was given to appeal.

The case has been most elaborately argued in all its bearings, and the cases applicable to it in every view have been fully examined by the learned Judges at the Court below; and again by Counsel before [523] their Lordships here, and it certainly is one which presents considerable difficulties.

The first question is, whether the Plaintiff, at the close of his case, had made out such a *prima facie* case as entitled him to have the opinion of the jury upon it, so that on his refusing to be nonsuited, the Judge would not have been justified in telling the jury that they must find for the Defendants.

Now, the Plaintiff proved, that Nicholas Devine died in 1830, in possession of a farm, and from fifty to sixty acres of land cleared and cultivated, and more land not cleared. All this Nicholas Devine had occupied for at least thirty years; the farm by inhabiting there, the cleared land by cropping it, and the rest by feeding it with sheep and cattle in such manner as it was capable of being occupied. The Plaintiff also proved that he was heir-at-law, and the action was brought within twenty years after the death of Nicholas Devine.

It is not doubted that if the evidence had stopped here, such a *prima facie* case of seisin in fee and dying seised on the part of Nicholas Devine, and of heirship on the part of the Plaintiff, was made out, as would have called on the Defendants for an answer, and proof of a better title. But the Plaintiff proceeded further, and put in evidence two grants of land made by the Governors of the Colony to Nicholas Devine. One in 1704 of 120 acres, the other in 1799 of 90 acres, and the Defendants contended that both these grants were void for uncertainty, or at all events that the first of them was void on that ground, and so that the Plaintiff by his own showing was out of Court, and could not avail himself of the presumptive seisin in fee of Nicholas Devine arising [524] from his possession, which the Plaintiff himself had shown to be unlawful in the beginning and throughout the thirty years of possession; or at most, that Nicholas Devine was only tenant at will to the Crown, and so had no estate that could descend to his heir.

In this stage of the case the Defendants must be taken to be wrong doers, not having yet shown any title. The first of the grants in question, namely, that of 1794, grants to Nicholas Devine, his heirs and assigns, "120 acres of land to be known by the name of Burrin Farm, lying and being in the district of Belahamney, and separated on the north side by a road of two hundred feet in width from the



land allotted for the maintenance of a schoolmaster within the town of Sidney," free of fees, etc., for five years, provided Nicholas Devine shall reside within the same, and proceed to the improvement and cultivation thereof (timber fit for naval purposes to be reserved for the use of the Crown), and paying an annual quit-rent of one shilling for every fifty acres, after the first five years.

The second grant, that of 1799, grants to Nicholas Devine, his heirs and assigns, ninety acres of land lying and situated in the District of Bulahaming, bounded on the south-west side by Page, Candells, Jenkins, and Field's farms, from which it is separated by a road of sixty feet; and on the south side by an allotment granted unto Samuel Burt, reserving timber as in the first grant, and a quit-rent of two shillings after five years.

Nothing is said in this second grant about residence, possibly because Devine was already residing under the first grant. The cases principally relied on to show that these grants were void, are Hungerford's [525] case (1 Leon. 30); Stockdale's case (12 Co. Rep. 86); *Brand v. Todd* (Noy. 29). These cases show that if in the King's grant there be no description by name, abutments, etc., but only so many acres, the grant is void, for "the Patentee shall not have his election, as he shall in the case of a common person." In *Brand v. Todd* the distinction is taken, that if the King grants all the waste in D, and after an *ad quod damnum* it is returned that the waste contains 120 acres, yet, if it contains 300 acres, all shall pass, for the grant is general. But if the grant be of 120 acres, and on an *ad quod damnum* it be returned that there are 300 acres, the grant is void. The *ad quod damnum* is to inquire as to damage, not as to quantity. 2 Shepp. Touchstone, vol. ii., p. 246, does not carry the point further. In 2 Shepp. Touchstone, p. 229, (Preston's edit., 1821.) there is this passage: "*In acquirendo rerum dominio scilicet quod donationes non valent licet sine inceptae nisi sint perfectae.*" and Bro. Abr., tit. "Grant," 89, is referred to. But if grants be very ancient, and the things granted have been enjoyed according to the grant ever since the making of it, in such case the grant may be good, notwithstanding some legal defect in some of these particulars (as in absence of livery, etc., for from possession, livery, etc., will be presumed).

It was argued on both sides of the argument, that when a Crown grant refers with certainty, though *in pais* only, that reference will be sufficient; and that if by one construction a Crown grant would be avoided, but by another it might be made good, the latter shall be adopted.

These propositions are fully established by the following, amongst many other cases, Priddle and Nap[526]-per's case (11 Co. Rep. 8); Whistler's case (10 Co. Rep. 65); The Earl of Shrewsbury's case (9 Co. Rep. 46 b); The Earl of Cumberland's case (8 Co. Rep. 166 b); Stockdale's case (12 Co. Rep. 86). Vin. Abr. Prerogative. Grant. Such is the law as to grants of the Crown made *ex certâ scientiâ et mero motu*. It is true that such grants are according to the books construed most favourably for the grantee. It is also true that the grants now in question are not made *ex certâ scientiâ et mero motu*, but for consideration, namely, quit-rents, after five years, and a condition in the first grant, that the grantee shall reside on the granted land and proceed to the improvement of it, and that timber fit for the navy is reserved in both. But the principles above stated surely apply to all Crown grants. It should seem, therefore, that if there be such a description in a Crown grant, whether by descriptive words, or by reference to a matter *in pais*, or otherwise, as that by evidence connected with such description the identity of the lands granted is capable of being established, the grant may be good, although the description be in itself never so imperfect. The sufficiency of such a description and the legality and mode of supplying by evidence any defect in it, are hardly touched by the cases.

The grants in question are not wholly without description, as the Court in its judgment seems to consider. The second grant mentions boundaries on the south-west and the south side; and even the first grant mentions a boundary on the north side. The evidence showed the possession by Nicholas Devine for thirty years, of lands the position of which is consistent with the grants, and, so far as there is any description in the grants, tallies with it. This pos-[527]-session of Nicholas Devine might indeed, if it stood alone and unsupported, be possibly referred to some supposed election made by him, which election he could not by law make against the Crown; but when it is coupled with the receipt of quit-rent by the Crown, and

with the survey made in 1822 by Nicholas Devine and the Government Surveyor, Mayne, having with him a Government chart, or map, as was proved by the witness, Davis, there was surely some evidence to go to the jury as to the identity of the lands, and as to the probability that possession was given to Nicholas Devine by the Government officers, at or soon after the time of the grants in conformity with them; by which the grants, though imperfect on the face of them, might be made good.

Besides which their Lordships are of opinion, that from the long possession of these lands, the jury would have been justified in presuming not a substitutional, but a supplementary and confirmatory grant by the Crown. It was competent to the Crown to make such a confirmatory grant, and it appears from the case of *Goodtitle v. Baldwin* (11 East, 488), that the Court will direct a jury to presume in favour of possession against the Crown any grant which might be legally made; the refusal to direct such a presumption in that case proceeding entirely from an express prohibition contained in the Statute, 20 Car. II., c. 3.

Their Lordships, under these circumstances, are of opinion that the grants in question were not wholly void and incapable of being supported by the evidence adduced, and that the questions as to the identity of the lands partially and imperfectly described in them, and of the presumption of a con-[528]-firmatory grant, ought to have been submitted to the jury; not meaning to say that the jury were bound to find for the Plaintiff, but that the case he had made was proper for their consideration. This being so, and supposing that the Plaintiff might have succeeded, if the Defendants had not set up any title in themselves, it remains to be considered whether the verdict establishing the title which they did set up can be supported.

The Defendants' case rested upon an alleged conveyance of Nicholas Devine to Rochfort (under whom the Defendants claimed) in 1827. Much argument was raised both in the Court below, and before their Lordships, as to a question of estoppel. But their Lordships agree with the Court below, that such question did not arise upon the Plaintiff's case, and when the Defendants came to their case, they themselves claimed through Rochfort and Nicholas Devine under those very grants, as to which it was contended that they were estopped. It follows that the question of estoppel did not arise on their case, nor did they, by entering on their own case, waive the objection to the grants which was reserved to them on the close of the Plaintiff's case.

Two objections are, however, insisted on by the Counsel for the Plaintiff, namely, the admission of improper evidence, and a supposed misdirection by the learned Chief Justice in his summing up to the jury.

As to the first. A person of the name of Maher (one of the alleged witnesses to the conveyance), being dangerously ill, was examined upon interrogatories after commencement of the action, and denied that he had witnessed the conveyance, and swore [529] that the name of Maher appearing as that of a witness on the deed was not his handwriting. He was asked by the attorney attending on behalf of the Defendants, to write his name, and he did so three times.

The witness Maher died before the trial, at which time all the other witnesses to the conveyance were also dead. At the trial, the Defendants gave evidence of the handwriting of Maher and the other witnesses to the conveyance, by calling persons professing to be acquainted with their handwriting, but did not put in the examination of Maher taken on interrogatories. The Counsel for the Plaintiff, in reply, put in that examination returned by the officer, who took it in order to prove Maher's denial of his alleged signature. The officer had not returned with the examination the signatures which Maher wrote at the request of the Defendants' attorney, but the attorney produced them in Court on the requisition of the learned Judge in the course of the Defendants' case, and swore to them. The learned Judge afterwards submitted these three signatures to the jury, in order that they might compare them with Maher's alleged signature on the deed, to which the Counsel for the Plaintiff objected.

Another witness to the deed of the name of Egan, being also dead, the Defendants gave evidence of his handwriting, and having called his daughter to prove his death, she, on her cross-examination by the Plaintiff's Counsel, denied that the name of "Egan" on the deed was her father's handwriting. She spoke of a letter



from her father to her mother, which she (the witness) had, and on the requisition of the learned Judge, she produced it in Court, and the learned Judge handed [530] it to the jury in order that they might compare it with Egan's alleged signature to the deed, to which the Counsel for the Plaintiff objected. Now, as to this letter of Egan, it was not in any way in evidence in the cause—the jury could not have it before them for any other purpose than for comparison of handwriting. Their Lordships are of opinion, that under such circumstances it was not admissible in evidence, and ought not to have been handed to the jury. There are several cases in our Courts which establish this to have been the law, until it was altered by a recent Act of Parliament, namely, the Common Law Procedure Act, 17th and 18th Vict., c. 125, sec. 27. Little stress seems to have been laid on this matter in the arguments in the Court below, but their Lordships think it proper to express their opinion upon it.

The signatures of Maher stand on a different ground. They may, in some sort, be said to have been evidence in the cause. Their Lordships have no doubt that if on a trial in *Nisi Prius*, a witness had denied his signature to a document produced in evidence, and upon being desired to write his name had done so in open Court, such writing might be treated as evidence in the cause, and be submitted to the jury, who might compare it with the alleged signature to the document. The three signatures of Maher in question were made by him when he was properly under examination as a witness in this cause, and although they were not returned by the officer who took that examination, yet they were sufficiently identified, and their Lordships are of opinion that they may fairly be treated as evidence in the cause, that they were admissible, and were properly submitted to the jury. Their Lordships have thought it right to [531] express their opinion upon this question as to the admissibility of the letter of Egan, and of these signatures of Maher, for the guidance of the Court below; though it is not absolutely necessary, by reason of the opinion which their Lordships are about to express with regard to the other objection taken by the Plaintiff's Counsel. If any Act of the Colony, similar to the recent Act of Parliament above alluded to, shall have been passed before the new trial in this action is held, the Court will of course be guided by the provisions of that Act.

The second objection was, that the learned Judge in his charge to the jury told them, in substance, that they must try the question as to whether the alleged conveyance was forged in the same manner as if Rochfort was then on his trial for forgery. The learned Judge explains that this direction was accompanied with explanation and qualification; but their Lordships cannot but think that the jury understood the direction as above stated.

Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless [532] he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.

Now, the charge of the learned Judge appears to their Lordships to have in effect shifted the *onus* from the Defendants, who assert the deed, to the Plaintiff, who denies it, for in substance he tells the jury that whatever be the balance of the probabilities, yet, if they have a reasonable doubt the Defendants are to have the benefit of that doubt, and the deed is to be established even against the probabilities in favour of the doubt. Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty, or from any other reason, it may not be material to inquire, but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even

then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply.

Their Lordships cannot but think that this misdirection of the learned Judge was calculated materially to influence the verdict of the jury, and they must, therefore, hold, that it entitles the Plaintiff to a new trial, having already expressed their opinion that the Plaintiff at the close of his own case was entitled to have it considered by the jury upon the points above stated.

Their Lordships will, therefore, humbly recommend to Her Majesty that a new trial in this case should be granted generally, and that the costs of this appeal, [533] and also those of the Court below, should abide the event of such new trial.

After delivering the above judgment, his Lordship added, that since their Lordships had prepared their judgment, a map had been discovered in the Colonial Office of grants in the Colony, which contained Nicholas Devine's name for 200 acres, distinctly marked out, and which tallied with the evidence of Davis, that Mayne, the Government Surveyor, had gone over the land, and measured it with the Government map.

[See *Des Barres v. Shey*, 1873, 29 L.T. 592.]

#### ON PETITION FROM THE ISLAND OF GUERNSEY.

*IN RE SARCHET* \* Nov. 28, 1856, and July 21, 1857].

After a delay of eight years from the date of the judgments of the Court below, the Judicial Committee refused to grant leave to appeal *in forma pauperis*, no sufficient explanation being given to account for the Petitioner's laches.

In this case the Petitioner applied for leave to appeal *in forma pauperis*, from two judgments of the Royal Court of Guernsey, dated respectively the 22nd of December, 1849, and the 26th of February, 1850. It appeared from the petition that the Petitioner had previously applied to the Judicial Committee for leave to appeal from the above judgments, the Court in Guernsey having refused to permit such appeal; which their Lordships allowed upon terms of the Petitioner giving security for costs in the sum of £100. The Petitioner failed to comply with this condition, and [534] again applied upon petition on the 28th of November, 1856,† to their Lordships to be allowed to prosecute his appeal *in forma pauperis*, alleging that the delay in the prosecution of the appeal was occasioned by the inability of the Petitioner to obtain the required security for costs; but in the absence of any affidavit their Lordships directed the petition to stand over, reserving leave to the Petitioner to file affidavits to account for the delay in the prosecution of the appeal from the period when he was allowed to prosecute his appeal *in forma pauperis*. The Petitioner now renewed the application upon two affidavits. The first affidavit was by the Petitioner, and alleged that he had been unable to obtain security for the costs, and that the delay was occasioned by the long illness and death of his former solicitor, and his ignorance of the form of procedure in the Privy Council Office, as well as his hopes of an arrangement of the matter with the Plaintiff. The other affidavit was by the clerk of his solicitor in England, regarding the Petitioner's impoverished circumstances and inability to obtain the requisite security, and accounted for the delay by stating that the Petitioner had sent a petition, to be allowed to prosecute his appeal, to Sir George Grey, the Secretary of State for the

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

† Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Patteson.



Home Office, instead of lodging it at the Council Office, which mistake caused considerable delay, and that from the long illness of the Petitioner's former solicitor, the matter had been neglected, and the papers mislaid, and that it was not until the month of Octo-[535]-ber last, that the papers relating to the matter were found.

Mr. F. Lawrence, in support of the application.

The Right Hon. Dr. Lushington.—In this case, leave to appeal from certain decrees and judgments of the Royal Court at Guernsey, dated the 22nd of December, 1849, and the 26th of February, 1850, was granted to the Petitioner so long back as the year 1853, upon terms of giving security in the sum of £100, for costs. In November, 1856, a motion was made here upon petition for leave to appeal from those judgments and decrees, *in forma pauperis*, but as their Lordships were not then satisfied, in consequence of the delay that had taken place in prosecuting the appeal, they directed the matter to stand over, reserving to the Petitioner leave to renew the application upon affidavits accounting for the delay. After a long interval the present petition is preferred. Affidavits have been filed to account for the delay, but their Lordships are of opinion that the Petitioner has not assigned in such affidavits sufficient reason for making the order he asks for, as it is apparent that he has not prosecuted his appeal within a reasonable time, and the grounds assigned in the affidavits are not a satisfactory answer for his very long neglect.

[As to special leave to appeal in civil cases generally, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

REPORTS OF CASES heard and determined  
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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SAMUEL TERRY HUGHES, and others,—*Appellants*; MARTHA FOXLOWE  
HOSKING, and others.—*Respondents* \* [July 11, 1856].

Testator, by his Will, executed in 1824, made a general devise of all the residue of his real estate, not otherwise disposed of, whether in possession, reversion, remainder, or expectancy, to E. T. and the heirs of his body. By a Codicil made in 1834, he revoked that devise, and devised all his real estate "not otherwise disposed of" by his Will or Codicil to trustees, in trust for E. T. for life, and at E. T.'s decease, if he should have lawful issue, to E. T.'s heirs, and in default, to the Testator's own right heirs. Subsequent to the date of this Codicil, and in the year 1835, the Testator acquired by purchase other real estate. In 1836, he executed another Codicil, by which he altered the devises contained in the Will and Codicil, but made no mention of the estate acquired in 1835. This Codicil contained these passages: "And whereas by my said Will or Codicil, or one of them, I did give and bequeath all my real estate not specifically otherwise disposed of to trustees therein named in trust for my son, E. T." "Now, I hereby revoke and annul such part of my said bequest as relates to my own right heirs, and hereby devise and bequeath the same real estate, in the event of my said son's death without issue, to all the children of J. T. and of my nephew J. H., and of my daughter H., who shall be then living, share and share alike, as tenants in common." Held (affirming the judgment of the Supreme Court at New South Wales), that the last Codicil did not amount to a republication of the Will and former Codicil so as to pass the real estate subsequently acquired, but was confined to the dispositions of the estate he was seized of at the date of the Will, and that the Testator died intestate as to the after-acquired real estate.

The question in this appeal was, whether certain real estate situate in New South Wales, purchased by [2] the testator, Samuel Terry, of Sydney, in New South Wales, after the date of a second Codicil to his Will, but before the execution of a third Codicil, was included in and formed part of his residuary estate, and passed under the devise contained in the Will of his residuary real estate, or whether the same descended to his heiress-at-law. The Appellants claimed to be entitled under the residuary devise. The principal Respondent, Hosking, was the heiress-at-law of Samuel Terry.

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\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.



The Testator, by his Will, dated the 25th of October, 1824, among other things, gave and devised as follows:—"I give, devise, and bequeath unto my dear wife Rosetta, all that my messuage or tenement and premises, with the appurtenances thereto belonging wherein I now reside, situate in Pitt Street, in Sydney aforesaid: and also all and singular other my messuages or tenements, and all the allotments of ground which I shall be possessed of or entitled unto at the time of my decease, of whatsoever description or quality the same may be, situate, lying and being in the towns of Sydney aforesaid, and Liverpool, to hold the same to her, my said wife, and her assigns for and during the term of her natural life. And from and [3] after her decease I give and devise the several messuages or tenements, and allotments in the manner hereinafter mentioned:" and after devising other parts of his real estate, he proceeded: "Also I give and devise unto my son, Edward Terry, my several estates and lands situate in the Five Islands, Bathurst, and the Devil's back, or Eastern creek, respectively: also my estates called Boxhill and Mount Pleasant, and all and singular other my messuages, farms, land and hereditaments of every description, not hereinbefore disposed of by me, and wheresoever situate, lying and being, and whether in possession, reversion, remainder, or expectancy, to hold the same unto my said son, Edward Terry, and the heirs of his body for ever." After the execution of this Will the Testator executed three several Codicils. The first was dated the 25th of October, 1825, which contained nothing material to the question at issue, as it did not affect the devise of his real estate. The second Codicil was dated the 1st of February, 1834, whereby he revoked the devise to his son, Edward, and devised to certain trustees, the estates before devised to him, and all other his real estate not otherwise disposed of by his Will or his Codicil, in trust, to permit his son, Edward, to receive the rents and profits during his natural life, with remainder to the use of his son Edward's heirs, and in the event of his son, Edward, dying without lawful issue, then upon trust to convey the estates to the right heirs of the Testator, and he ratified, republished, and confirmed his Will in every respect, except as to certain devises, not requisite to specify, which he altered and revoked. After the date of this Codicil, and in the month of August, 1835, the Testator purchased a parcel of land [4] containing 1400 acres, which was afterwards conveyed to him: and on the 5th of July, 1836, the Testator, by a third Codicil, altered the disposition of certain portions of the real estate, made by his Will and the second Codicil: and after making certain specific devises not affecting the 1400 acres of land, which were not mentioned, this Codicil proceeded as follows:—"And whereas by my said Will or Codicil, or one of them, I did give and bequeath all my real estate (not specifically otherwise disposed of) to the trustees therein named, upon trust for my said son, Edward Terry, for life, and at his decease for the heirs of his body, if any, and failing his issue to my own right heirs: now, I hereby revoke and annul such part of my said bequest as relates to my own right heirs, and I do hereby give, devise and bequeath the same real estate in the event of my said son's death without issue, to all the children of John Terry, of Boxhill, and of my nephew, John Terry Hughes, and of my daughter, Martha Foxlowe Hosking, who shall be then living, share and share alike, as tenants in common: and I direct my said Trustees upon such event, to convey the said real estate unto and to the use of such the children of John Terry, John Terry Hughes, and Martha Foxlowe Hosking accordingly." The Testator died in the year 1838, without having revoked his said Will or Codicils.

Suits were instituted in New South Wales for the purpose of administering the Testator's estate, part of which consisted of a farm called Terry's meadows, and a question having arisen as to what part of the farm was included in the residuary estate, or passed by the residuary devise in his Will, an order of reference was made in the suits, by the Supreme Court of New South [5] Wales, by which it was referred to the Master to inquire what part of such estate, or farm, called Terry's meadows, was included in and formed part of the residuary estate of the Testator. The Master by his report found, that the estate called Terry's meadows, contained 4100 acres of land, or thereabouts, and was composed of two several portions of lands amounting to 2700 acres, which, together with the 1400 acres purchased by the Testator in 1835, made the total amount of 4100 acres: and he found that the 2700 acres, and no other part of the estate of Terry's meadows, were included in or formed part of the Testator's residuary estate. The Appellants took exceptions to this finding of the Master, on the ground, that thereby the above-mentioned 1400

acres of land were excluded from the residuary estate of the Testator. These exceptions were argued before His Honor, Roger Therry, Esquire, Primary Judge in Equity, and on the 27th of August, 1853, that Judge overruled the exceptions with costs.

The Appellants appealed against this Order, to the Supreme Court of New South Wales, praying that the exceptions might be allowed. On the 12th of October, 1853, the Chief Justice and the Puisne Judges of the Supreme Court, by an Order of that date, decreed that the Order of the Primary Judge in Equity should be affirmed with costs. The grounds upon which the Supreme Court proceeded were, that the Testator was not seized of the parcel of land containing the 1400 acres, at the date of his Will, or of the first or second Codicil thereto, and that although he was seized thereof at the date of the third Codicil, and that such third Codicil operated as a republication of the Will, yet that the Testator intended by the third Codicil to confine the devise of his real estate, "not specifically [6] otherwise disposed of," to the same residuary real estate as was devised by his Will, and did not intend by his third Codicil to devise the parcel of land containing the 1400 acres, which was purchased by him after the date of his Will.

The Appellants having obtained leave to appeal from the Order of the 12th of October, 1853, the appeal now came on for argument.

Mr. R. Palmer, Q.C., and Mr. Dickinson, for the Appellants.—The question raised in this appeal is upon the construction of a Will made before the passing of the Wills Act of this country, the 1st Vict., c. 26, and is irrespective of the provisions of that Statute. It is apparent from the language of the Will, that the Testator supposed himself capable of disposing of after-acquired estate, and the Will is made upon that assumption. The Testator by his Will gives to his wife a life estate in all his messuages or tenements, and all allotments of ground he should be entitled unto "at the time of his decease" in the towns of Sydney and Liverpool. This declaration expresses a clear intention to devise the real estate he would be entitled to at the time of his death in Sydney and Liverpool. The gift over to his son and the heirs of his body alone mentions the property described. There is nothing material in the first Codicil. But the second Codicil clearly brings down the Will to the date of that Codicil. It ratifies and confirms his Will, save as altered. Instead of limiting to his son a remainder in tail as was limited by the Will, he gives him an estate for life, with remainder over to his children, and, in default, to the Testator's own right heirs. Here then again is clear evidence of intention which distinguishes the [7] present case from *Bowes v. Bowes* (2 Bos. and Pul. 500). By the third Codicil the Testator alters the disposition of part of his residuary estate, and he uses this expression, "whereas by my said Will and Codicil, or one of them, I did give and bequeath all my real estate (not specifically otherwise disposed of) to Trustees," and then he revokes the limitation to his own right heirs, and devises "the same real estates" in the event of his son's death to certain persons therein named. It is apparent, then, that the Testator intended to pass all his real estates, and it lies on the other side to show that such was not his intention: we submit that this being manifestly his intention, his Will was republished by this third Codicil so as to pass the after-acquired estate. The words "the same real estate" used in this Codicil, cannot mean the same property as passed by the residuary gift in the Will, for that had been altered by the second Codicil, but meant the residue generally. The word "same" in this case is used merely as a word of reference, not of identity. The case *Bowes v. Bowes* [2 Bos. and P. 500] is an exception to the general rule as to republication depending on the language of the particular instruments. The rule is thus stated by Jarman, "On Wills," 1 Vol. p. 175 (Edit. 1844): "Lands of inheritance acquired since the execution of the Will were [under the old law] often brought within the operation of any general or residuary devise contained in such Will, and that, too, though the Codicil expressed no intention to republish, and though it was not annexed to, or declared to be a part of, and did not in terms confirm the Will, and whether the Codicil related to real estate or personalty, the result being precisely the same as if the general or residuary devise had been incorporated into the Codicil itself." It is immaterial if the Codicil devises part of lands acquired since the execution of the Will. Thus in *Hulme v. Heygate* (1 Mer. 285), the Testator by Will devised all his freehold, copyhold, and real estates. He afterwards contracted to purchase several other



estates; and, by a Codicil specifying some of the estates he had so contracted to purchase, he devised them to the same Trustees upon the trusts of his Will. The Master of the Rolls (Sir William Grant) held that the Codicil amounted to a Republication of the Will, so as to pass not only the estates therein specified, but all the estates contracted to be purchased between the dates of the Will and Codicil. In this case the Codicil must be held to be a republication of the Will, and unless it is so decided, the intention of the Testator upon the face of the Codicil will be defeated. It is not a case for election as was held in *Churchman v. Ireland* (1 Russ. and Myl. 250). So in *Goodtitle v. Meredith* (2 Mau. and Sel. 5), a Codicil "to be taken as part of his Will" was considered as a republication of the Will, so as to pass estates contracted before, but conveyed between the dates of the Will and Codicil. The case of *Bowes v. Bowes* (2 Bos. and Pul. 500) was strongly relied upon by the Court below. That case, however, is distinguishable from the present. In that case there was no intention shown by the Testator to pass more than the law authorized him to devise, and he gave wholly and conclusively by the Codicil what was given by the Will. Lord Thurlow in that case seemed to impute an intention in the Will to pass after-acquired estate, but Lord Eldon could not discover such intention.

[9] In the present case the Testator has not given wholly what he gave by the Will, but he certainly has manifested an intention to pass after-acquired estate. Subsequent cases do not carry the doctrine further than is laid down in *Bowes v. Bowes* [2 Bos. and P. 500]. In *Monypenny v. Bristow* (2 Russ. and Myl. 117), Sir John Leach, the Master of the Rolls, and, upon appeal, the Lord Chancellor Brougham, held that, notwithstanding the generality of the Testator's recited intention respecting his wife, the terms of the dispositive part of the Codicil prevented its operating to republish the residuary devise in the Will, so as to comprise two freehold houses which the Testator had acquired since its execution. Again, in *Hughes v. Turner* (3 Myl. and Keen. 666) it was held that a Codicil did not operate as a republication of a Testatrix's Will, so as to pass an estate purchased between the date of the Will and the date of the Codicil. *Ashley v. Waugh* (4 Jurist, 572) is really a caricature of *Bowes v. Bowes* [2 Bos. and P. 500]. It has been so treated. 2 Jarman "On Wills," p. 724. In that case Lord Cottenham considered that, where a Testator in his Codicil recited his Will as an instrument of a certain date, and then proceeded to revoke the appointment of a Trustee in his "said Will," and nominated another person to be a Trustee of his "said Will," he, by this reference to the particular instrument constituting his Will, negatived the republishing effect of the Codicil. The words, the "said Will" being in his Lordship's opinion equivalent to the words "the said lands," used in *Bowes v. Bowes* [2 Bos. and P. 500].—[Mr. Pemberton Leigh.—There must be some inaccuracy in the report of *Ashley v. Waugh* [4 Jur. 572]. The point really did not arise.]—The third Codicil in this case [10] operated as a republication of the Will, and brought down the Will to the date of that Codicil; and as no contrary intention appears, we submit that the lands in question passed under the residuary devise in the Will of the real estate of the Testator.

The Solicitor-General (Sir Richard Bethell), and Mr. Hobbhouse, for the Respondents.—According to the true construction of the terms of the third Codicil, and the settled rules which control the doctrine of the republication of a Will by a subsequent Codicil, affecting intermediately acquired real estate, the Will and third Codicil of the Testator did not operate as a republication of the Will, so as to pass under the residuary devise, the lands in question. The Testator, we contend, died intestate in respect of such estate. Now, it must be observed that the only expression of intention in the Will of the Testator as to future estates is confined to the devise of lands in Sydney and Liverpool, and to such allotments as he might be entitled to at his decease, and that certainly does not extend to the general residue. The residuary devise is only in the ordinary form, similar to that in the decided cases. Passing over the first Codicil, we come to the second Codicil, which, however, merely alters the enjoyment of the residuary estate which was given to Edward Terry by the Will. It is clear that the gift in the third Codicil did not take away any part of the residue given by the Will. The intention of the Testator is clear by this Codicil to take something away from his own right heirs. This Codicil, therefore, does not affect to dispose the whole residue; only the enjoyment, after the death of Edward Terry, of what by the Will [11] was given to him. This devise

does not deal with the whole property of the Testator, or even his whole interest in any part: it only affects the ultimate remainder reserved to his own right heirs.—[Mr. Pemberton Leigh.—Your argument then goes to this extent, That the Testator does not disturb the previous devises, but only gives the remainder, in the event of his son's death without issue, to certain other parties, instead of to his own right heirs?—Yes. The words relied upon by the Appellant, in the third Codicil, are "the same real estate." The word "same" is equally referential as the word "said" used by the Testator in *Bowes v. Bowes* [2 Bos. and P. 500]. The construction put by the Appellants upon this word is forced and unnatural, and contrary to the Testator's intentions. It is a principle well known in the Court of Chancery, that to authorize the rejection of words in a Will, there must be an absolute impossibility of construing the Will if the words be retained. *Chambers v. Brailsford* (2 Meri. 25). Here the word "same" has its definite meaning, and effect must be given to it as in the interpretation of the word "*Idem*" in Co. Litt. As a general rule it is conceded that a Codicil operates as a republication of a Will, unless its effect to do so is negatived by the contents of the Codicil itself. 2 Jarman, "On Wills, p. 724; but that rule is not applicable where evidence of intention exists that such is not intended to be the case. Upon principle and authority the case is concluded by *Bowes v. Bowes* (2 Bos. and Pul. 500). In a branch of that case, *Strathmore v. Bowes* (7 Term. Rep. 482), Lord Kenyon says, what in fact is the question here, that the point is, "whether it was the intention of [12] the devisor to pass anything more than he could have passed by the Will itself." And that was the opinion of the Court in *Pigott v. Waller* (7 Ves. 123).

Mr. Dickinson replied.

Judgment was pronounced by

The Right Hon. T. Pemberton Leigh (15th July, 1856).—In this case their Lordships have been assisted by a very able judgment of the Court below (*a*), and by an admirable argument at this bar, and they have no doubt as to the advice that it will be their duty to tender to Her Majesty.

The question is simply this. The Testator made his Will in 1824, and that Will contained a general devise of all the residue of his real estates in favour of his son, Edward Terry, and the heirs of his body. That Will can apply only to the estates which the Testator possessed at the time he made it. Subsequently to the date of that Will, and in the year 1835, he purchased further real estate, and, in the year 1836, he made a Codicil to his Will; and the only question to be determined is this; whether the effect of that Codicil was to bring down the residuary clause contained in the Will, to the date of the Codicil, as if it had been contained in the Codicil and not in the Will.

Now, the rules of law which are applicable to this [13] subject have been conclusively settled by authority. A Will at the date of the instrument in question could only pass estates which the Testator had at the time, and if, therefore, he afterwards purchased other real estate, it became necessary for him to make a new testamentary disposition, for the purpose of disposing of that after-acquired estate. He might make that new testamentary disposition either by a Codicil directly applying to it, or by a new Will, or, if the words contained in the old Will were sufficiently extensive to include all that he possessed, then the clause contained in the old Will would be read as if it had been introduced into a new Will at the date of the Codicil. The effect of such further disposition obviously and necessarily would be, to include in the residuary devise all that he possessed at the time of its execution.

In the case of *Acherly v. Vernon* (Comyn's Rep. 381; S.C. 3 Bro. P.C. Toml. Edit. p. 83, 2 Eq. Ca. Ab. 769, pl. 1), this principle was carried to an extent, the propriety of which great doubts have been, and as it appears to us reasonably, entertained. For it was there held, that the effect of a Codicil referring to an existing

(*a*) The judgment his Lordship here alluded to was that in the case of *Clarke and Others v. Terry and Others*, pronounced by the Chief Justice of the Supreme Court of New South Wales, which involved the same point as was the subject of dispute in this appeal. A manuscript copy was handed in to their Lordships by Counsel.



Will was not merely to amount to a recognition of that Will in the state in which it existed and to the interpretation which it then bore, but that the effect of it was to bring down the date of such Will to the date of the Codicil, and, therefore, in truth not merely to recognize the existing instrument, but to create a new instrument. This case was followed by other cases, which in effect declared that the execution of a Codicil is a recognition, and equivalent to a republication of the previously executed Will, and, therefore, that you must read the [14] residuary clause contained in the Codicil, just as if there had been a republication in the more ordinary form of the Will itself.

This principle, whether reasonable or not, was at all events not open perhaps to any great objection so long as there was nothing in the Codicil itself inconsistent with that construction: but, if a Codicil contained a residuary disposition, referring to the same property as that devised by the Will, property which the Testator possessed at the date of the Will, it was quite impossible that you could impute to the Testator a presumed intention which his declared intention in the Codicil expressly contradicted. You could not read the clause in the Will as contained in the Codicil; if you found in that very Codicil a clause directly inconsistent with that interpretation. That was the case of *Bowes v. Bowes* (2 Bos. and Pul. 500), which was considered by Lord Kenyon as a perfectly clear case. In that case the Testator by his Will made a general devise of his real estate to trustees upon certain trusts; he afterwards purchased other real estates, and then made a Codicil; and by that Codicil after reciting that he had by his Will devised all his real estates to two trustees, he thereby revoked that devise, and gave all his "said lands, tenements, and hereditaments" to two new trustees. And it was held by the House of Lords that the Will was not republished so as to pass real estate acquired between the dates of the Will and the Codicil, on the ground that the word "said" confined the operation of the Codicil to the lands which had actually been devised by the Will. And it seems certainly to have been very difficult to contend that under such circumstances you could introduce into the Codicil an [15] intention to dispose, not of those estates which by the Codicil he declared his intention of disposing of, but to dispose of those estates which were not included in the Will, and, therefore, by the express language of the Codicil, were excluded from the Codicil.

*Bowes v. Bowes* [2 Bos. and P. 500] was followed by *Monypenny v. Bristow* (2 Russ. and Myl. 117), and by *Hughes v. Turner* (3 Myl. and Keen. 666), and these cases do not carry the principle further. The case of *Hulme v. Heygate* (1 Meri. 285), which was referred to in the argument, is not in the least degree inconsistent in principle with those authorities. There the Testator made a Will containing a general devise of all his real estate whatsoever, upon certain trusts: he afterwards purchased other real estates, some of which were conveyed to him before the date of the Codicil, and others for which he had contracted, had not been conveyed. Those last estates, however, were in equity as much his property as those which had been legally conveyed to him. By the Codicil he expressly devised the estates which had been conveyed to him, and he expressly ratified and confirmed in all other respects his Will. It was, therefore, a case in which there was a clear declaration according to the principles established in *Acherty v. Vernon* [3 Bro. P.C. 83], that the Will was to be read with the residuary clause as applying to the time at which that Codicil was made, and not as confined to the time at which the Will was made; and the only question was, whether because the Testator had made a devise of two of the estates expressly, you could, therefore, infer that he did not intend to devise under the residuary clause those estates which, but for the previous devises, would [16] clearly have been included. Sir William Grant decided that the Codicil amounted to a republication of the Will, so as to pass the estates contracted to be purchased between the dates of the Will and Codicil.

The question, therefore, in these cases is simply this: Does or does not a Codicil, which is supposed to have the effect of extending the operation of the Will, by its language exclude that interpretation? Is there, or is there not, contained in the Codicil, a declaration, that the property with which the Testator is intending to deal, is the same property with which he had dealt by his Will—or does he intend only to alter the objects of its destination, and in no degree to affect its substance?

Now, applying these principles to this case (with the exception of two points

which were taken in the very ingenious argument of Mr. Palmer, and to which I shall afterwards refer), this case is infinitely stronger, as it appears to their Lordships, than any one of the authorities which have decided: whether there is, or is not, a clear limit by the Codicil, of the residuary clause, to the estates which were devised by the Will.

Now, here the Testator by his Will, after giving to his son certain particular estates, then devises: "All and singular other my messuages, farms, land, and hereditaments, of every description, not hereinbefore disposed of by me, unto my said son, Edward Terry, and the heirs of his body for ever." He afterwards, by the second Codicil to his Will, dated the 1st of February, 1834, revoked this devise in favour of his son, and instead of giving them to his son and to the other heirs of his body, he directed that they should be held in trust [17] for his son for life; and after the decease of his son, if he should have lawful issue, to the use of the heirs of his son; and if he should die without leaving lawful issue, then upon trust to convey the same estates to his the Testator's own right heirs. It is plain, therefore, that in this Codicil, the only disposition which was made was of the estates which had already by the Will been given to the son. At this time no purchase had been made of the property which is in question in this case. So that upon the 5th of July, 1836, the date of his third Codicil, his estates stood thus limited: all the estates which he was possessed of at the time of making his Will, with the exception of certain portions which had been devised away to other persons, were limited to his son for life, with remainder to his son's children; and if the son's children should die without issue, then there was an executory devise to the right heirs of the Testator. On the 5th of July, 1836, the Testator executed a third Codicil, upon the terms of which we must determine the present question. And that question is, whether this Codicil can authorise the Court to read the devise contained in the Will as a general devise of all the real estates existing at the time of this Codicil; which must of course depend upon the language used in the Codicil. It begins, "I, Samuel Terry, do hereby revoke so much of my Will and the Codicils thereto as relate to the undermentioned estates and property." He is, therefore, employing this Codicil to alter dispositions which he has already made of property passed by preceding testamentary instruments. And he makes, in the first place, an alteration in certain property which had been bequeathed to his daughter, Mrs. Hosking, and then he goes on in [18] these terms: "And whereas by my said Will or Codicil, or one of them, I did give and bequeath all my real estate (not specifically otherwise disposed of) to the trustees therein named, upon trust for my said son, Edward Terry, for life, and at his decease to the heirs of his body, if any, and failing his issue to my own right heirs, now, I hereby revoke and annul such part of my said bequest as relates to my own right heirs, and I do hereby give, devise, and bequeath the same real estate in the event of my son's death without issue," in the manner therein mentioned.

Now, how is it possible upon this Codicil, which contains no clause ratifying or confirming the Will, which in the outset is expressly confined to the purpose explained, of revoking and altering dispositions already made; which in the dispositive part refers expressly to the estates already devised; which leaves unaffected the earlier dispositions of that estate in favour of his son, Edward, and alters only the ultimate contingent remainder, or executory devise, in favour of the right heirs of the Testator himself; how is it possible consistently with that clause, to say, that the Testator intended by the execution of this instrument, not to do that which he has expressly said that he intended to do, but to do something perfectly different from it, and to devise estates which at the time of making the Will he had no power to devise, and which by the very terms and the express language of this Codicil are excluded from the operation of the instrument itself?

It cannot be contended with any success, that this case is distinguishable from *Bowes v. Bowes* [2 Bos. and P. 500], and the subsequent authorities, unless it could be distinguished on one of two grounds urged in the argument. [19] It was contended by the Appellants, in the first place, that the Testator could not mean the same real estates which he had devised by the Will, because he had already altered the disposition of those real estates, he had destroyed their identity by excepting, in the second Codicil, a certain portion of them from the residuary clause. Now, that



argument would not have much weight even if it were founded in fact, for the only question is this: does this Codicil confine itself to dealing with the residuary disposition of the property which was contained in the Will, or does it operate to extend the language of the Will, so as to include after-acquired property? And we think the third Codicil shows no intention to pass more than the Testator devised by the Will.

But it was contended, secondly, that the Testator by his Will has shown that he supposed he could by that instrument dispose of property other than that which he possessed at the date of it: for that by the first disposition in the Will to his wife, he has given not only all the property which he possessed in the town of Sydney, but also "all that my messuage, etc., at Sydney aforesaid, and also all and singular my messuages and tenements, and all the allotments of ground which I shall be possessed of or entitled unto at the time of my decease." And it was argued by the Appellants that these words include in their natural interpretation, a gift not only of what then belonged to the Testator, but that they have been held to extend to property which he might afterwards acquire, and, although they could not of course operate, by immediate devise, upon the estates after-acquired, still they might be sufficient to raise a case of election. But, assuming that to be so, and that the Testator [20] supposed he could, by words properly adapted to the purpose, dispose of after-acquired estate, he has shown no such intention in the residuary clause: he has not given or affected to give any property which he should afterwards acquire; he has expressly given the estates which he then had; and by his third Codicil he has confined the dispositions which are thereby made to the estates which he was possessed of at the time he made his Will.

Their Lordships, therefore, are clearly of opinion, that the learned Judges in the Court below have formed a perfectly correct view of the law applicable to this subject; that, notwithstanding the ingenious arguments of the Appellants, the judgment below must be affirmed, and, there being no ground for this appeal, of course the affirmance must be with costs.

[Mews' Dig. tit. WILL: VI. REVIVAL AND REPUBLICATION; a. *General Principles*; b. *By Codicil*; 3. *Effect on after-acquired Property*. S.C. 4 W.R. 755. Distinguished in *Castle v. Fox*, 1871, L.R. 11 Eq. 555.]

## [21] ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

ROBERT HOW and JOHN WALKER,—*Appellants*; WILLIAM KIRCHNER, JOSEPH SHARP, and ROBERT WATERSTON,—*Respondents* \* [Nov. 26, 1856, and Dec. 16, 1857].

A shipowner has a lien upon the cargo for freight (*i.e.*, for the carriage, conveyance, and delivery of goods), but such lien is destroyed by his entering into a contract at variance with that lien; as where he by contract agrees to be paid after delivery of the cargo, and not at the time of delivery [11 Moo. P.C. 34].

A bill of lading contained this form: "Freight for the same goods to be paid by the shippers;" and in the margin of the bill: "Freight payable one month after sailing, ship lost or not lost." The owner of the ship on the arrival at her destination claimed a lien on the goods for the freight, and refused to deliver the goods to the consignees until the freight had been paid. Held (affirming the judgment of the Supreme Court of New South Wales) that the shipowner had no lien on the goods consigned, as the sum claimed was not freight, properly so called, and was concluded by the contract, which stipulated for a payment to be made in lieu of freight, and to be made at a

\* Present: The Right Hon. Lord Wensleydale, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir William H. Maule.

fixed period having no reference to the delivery of the goods [11 Moo. P.C. 35].

An appeal was allowed by the Supreme Court in New South Wales in July, 1855. No step was taken in England by the Appellants to prosecute the appeal either by entering an appearance or lodging a petition of appeal. The transcript was transmitted by the Court below to the Council Office. Motion by Respondents in November, 1856, to dismiss the appeal for non-prosecution. The Judicial Committee declined to make any order upon the motion [11 Moo. P.C. 31].

*Quære.* If the Judicial Committee has any jurisdiction over an appeal before the petition of appeal is lodged and referred to them! [11 Moo. P.C. 31].

The Appellants and Respondents in this case were merchants at Sydney, and the Respondents having commenced an action in the Supreme Court of New [22] South Wales against the Appellants, they both agreed to submit the following special case for the opinion of the Court:—

'This is an action brought by the Plaintiffs, as holders of the bills of lading annexed hereto, to recover from the Defendants, as owners of the ship *Allan Kerr*, certain goods consigned by that ship under the said bills of lading. The freight has not been paid, and the Defendants claim to be entitled to hold the goods until freight be paid.

'The question for the opinion of the Court is, whether the Defendants, as owners of the said ship, are entitled to detain the said goods, or any of them, for freight.'

There were four bills of lading annexed to the case, three of which stated that there had been shipped in the *Allan Kerr*, then in the harbour of Glasgow, and bound for Sydney, the goods in the bill specified, to be delivered at the port of Sydney unto the Respondents, or their assigns, freight for the same goods to be paid by the shippers, at rates mentioned in the bills, with five per cent. primage and average accustomed; and in the margin of each bill there was a note as follows:—"Freight payable one month after sailing, ship lost or not lost." The fourth bill of lading was like the rest, except that the consignees' names were omitted, a blank being left instead, but the bill was endorsed to the Respondents.

The special case having been argued, the Court took time to consider, and, on the 28th of April, 1855, gave judgment in favour of the Respondents. Judgment was delivered by Sir Alfred Stephen, the Chief Justice, as follows:—"In this case, which was argued before us the term before last, we announced [23] our decision in the following term, undertaking to prepare a written judgment, as the question is one of much importance, on a future occasion. That judgment we now proceed to deliver. The action is brought by the consignees of certain large shipments of goods, against the owners of the ship *Allan Kerr*, trading lately between Glasgow and this port, for the non-delivery of those goods. The Defendants admit the receipt of the goods in Glasgow, and their conveyance hence to this Colony by the *Allan Kerr*, under the bills of lading presently to be mentioned; but they claim a right to detain the goods for the freight, which, it is admitted by the Plaintiffs, has in fact not been paid. The question whether that right exists under the circumstances was submitted for the opinion of the Court by special case stated for that purpose. In each of the bills of lading (there being four sets for separate parcels of goods respectively), the shipment is stated to be by 'Dickson and Co.' The goods are made deliverable in three instances to 'Messrs. Kirchner and Co.' (the Plaintiffs) or their assigns. In the fourth the goods are deliverable to 'order' or assigns, and indorsed to the Plaintiffs. In each case the freight is made payable as follows:—"Freight for the said goods to be paid by the shippers' at certain rates specified; and in the margin of each bill are the following words, 'Freight payable one month after sailing, ship lost or not lost.' It did not appear in what character Dickson and Co. were shippers; whether as principals selling the goods to the Plaintiffs, or consigning them to the Plaintiffs for sale, or as themselves agents, procuring the goods for the Plaintiffs, or for some third party. The *Allan Kerr* was a general ship. The Defendants' counsel maintained [24] that the payment of freight was a condition, in every case, where not clearly and unequivocally abandoned, precedent to the right of possession; and that here the condition was not abandoned; that a lien on goods for freight was



not waived, even by the taking of a negotiable bill, if it were dishonoured before delivery of the goods, and certainly not, therefore, by merely looking in the first instance to the shipper. It was suggested that the latter might perhaps be, as he often was, the consignee's agent only, or that, on the contrary, the consignee might be, as more frequently happened, the agent and factor of the shipper; and that, in either case, the claim of the consignee to obtain the goods, while the freight remained unpaid, was untenable. In the one case the consignee, it was said, would be liable, as the actual contractor, for the payment. In the other he was reasonably bound to pay as an agent on behalf of his contracting principal. But in any event it was urged the goods were liable: and the shipowner was not bound to deliver them till the stipulated price for their carriage had been paid by somebody. As to the arrangement, that the amount should be paid whether the ship was lost or not, that was a mere matter of shifting the burthen of insurance. Ordinarily, the shipowner insures his freight. Here, in consideration, doubtless, of a reduced rate, the owner of the goods took the risk himself. For the Plaintiffs it was submitted, that in this case there never had been a contract for freight; that freight was a reward payable for the conveyance of goods from one stated place to another; but that the stipulation here was for a payment, in lieu of freight, to be made absolutely a month after the sailing of the vessel, whether the goods should then have been conveyed to [25] their destination, or indeed should ever be so conveyed, or not: and that to secure this arrangement the Defendants made the amount payable by the shipper, thereby excluding the consignee (and consequently his goods) from liability to the payment. A lien under such circumstances, it was insisted, could not be maintained. The following cases (in addition to sundry passages from Abbott 'On Shipping') were cited:—*Andrew v. Moorhouse* (5 Taunt. 435); *Howard v. Tucker* (1 Bar. and Ad. 712); *Birley v. Gladstone* (3 Mau. and Sel. 215); *Lucas v. Nockells* (4 Bingham 741); *Christie v. Lewis* (2 Brod. and Bingham 443); *Crawshaw v. Homfray* (4 Bar. and Ald. 50); *Chase v. Westmore* (5 Mau. and Sel. 180); *Campion v. Colvin* (3 Bingham N.C. 26); *Towne v. Lewis* (7 Com. Ben. Rep. 608). We are of opinion, under the circumstances stated in this case, that the Plaintiffs are entitled to recover the goods in contest without payment of the sums claimed as freight by the Defendants. It is clear that in the true sense of the term the amount in each case contracted for was not freight, nor could it be recovered by that name. Abbott 'On Shipping' (8th ed.), p. 406; *Blakey v. Dixon* (2 Bos. and Pul. 321); and *Andrew v. Moorhouse* (5 Taunt. 435). The money was, as the Plaintiffs rightly have contended, a remuneration for receiving the goods, with a qualified contract to convey them, not a reward for the actual conveyance. Now, the foundation of the right of lien is, we take it, ordinarily service rendered to the chattel by conferring on it additional value. *Jackson v. Cummins* (5 Mee. and Wels. 342). A lien arises also, in some cases, by rescuing the chattel from destruction, as in the instance of salvage; or it may arise by agreement expressed between the parties, or implied by the [26] existence of usage. (See our recent judgment in the case of *Kirchner v. Venus*, 4th Term. 1854.) On which of these grounds could the claim be rested here? In the case of carriers, whether by land or water, as in the case of innkeepers, the right appears to be founded on the custom of the realm. The lien, however, here also (so far as we can ascertain) is in respect of service rendered. In other words, it springs from the conveyance of the goods. We find no authority for saying that a lien exists for money payable, not on that account, but under a contract which stipulates for payment irrespective of the conveyance. It may be urged that when the service has in fact been rendered, the lien then at least will arise; but for what? Not for freight, because freight (that is to say, reward for the conveyance) has been excluded by the contract. Something else, not being freight, is thereby made payable. In the absence, however, of any agreement to that effect, has the shipowner a right of lien for anything except freight? Assuming, however, that a lien might exist in respect of money thus made payable (notwithstanding its not being freight, nor due for conveyance performed), provided it were payable by the consignee, the next question is, whether here the amount be so payable. The terms of the contract show that it is not; for the freight (so called) is expressly made payable by the consignor: and to make it clear that payment by the consignee was never contemplated, words are introduced stipulating for it within a month after sailing, and whether the goods should ever reach the port of delivery

or not. The case, therefore, stands thus: A contract has been made by these Defendants through their agent, the master of the vessel, with the shipper of [27] the goods, to deliver them to the consignees, in consideration of certain sums which that shipper is to pay at a certain date, whether the ship be then lost or not. The Plaintiffs, being such consignees, are presumably in their own right the owners. *Coleman v. Lambert* (5 Mee. and Wels. 502). They are, at any rate, by the terms, or the indorsement, of the bills of lading, constituted the owners, to whom delivery of the goods is to be made. The Plaintiffs claim the possession therefore (although not as assignees of the contract to which they are presumably strangers), under the instruments of title thus conferred, with no indication or means of knowledge thence derivable, that the carriage money of these goods—or sum agreed on in lieu of carriage money—has not been paid, but with notice on the contrary that it was to be paid by another party at a date then past. They, therefore, have apparently nothing to do with the payment. The goods obviously were not looked to for payment; for whatever their fate, the shipper, the person trusted, was equally to be liable. Why then should his default create in these owners, or impose on their goods, responsibility for the payment? We think that such a claim cannot be supported; but that by stipulating for a payment in lieu of freight, to be made at a fixed period having no reference to the delivery of the goods, and by the shipper, not the consignees, the supposed right of lien, or of resorting to any other party, has been destroyed. A lien which has once commenced, but been suspended by the taking of security, or the giving of credit, may be revived by failure of the security, or perhaps by non-payment after expiry of the credit. *Stevenson v. [28] Blakelock* (1 Mau. and Sel. 543). But Lord Ellenborough in that case states the general rule of law to be, that ‘Where there is an express antecedent contract between the parties, a lien, which grows out of an implied contract, does not arise.’ That position was established, indeed, by the cases there cited in page 539. When, however, did the lien commence in this case? Not when the goods were shipped; for their reception was but one step preparatory to conveyance, and it was under an express contract (antecedent, therefore, to the earning of freight), by which one month’s credit was to be given, for a demand which never could have arisen under an implied contract. So that the demand itself had no existence until that credit had expired. The case, therefore, on the ground alone of credit having been originally given, would seem to be not distinguishable on principle from those of *Hutton v. Bragg* (7 Taunt. 14), and *Raitt v. Mitchell* (4 Camp. 146), mentioned in *Lucas v. Nockells* (4 Bingham 735). In the first and last mentioned cases the reliance on the personal credit of the freighter may appear to have been more plainly marked. But this case is stronger in respect that the question arises between the shipowner and persons who never contracted with him, nor ever employed his ship; and never, therefore, agreed to pay freight under any circumstances, nor are (so far as we can discover) morally bound to see it paid. The contract for freight, indeed, always is with the shipper. But if the freight, by the terms of the bill of lading, be payable by the consignee, and the latter accept the goods, he will then become liable, the law implying under such circumstances a promise to pay [29] on a new contract of his own. Here no such question can arise. But it was suggested the Plaintiffs may have owned these goods at the time of shipment, and if so, the contract by their agent, shipping the goods on their account, will render the Plaintiffs or their goods liable for the freight. For this no authority was cited. Taking it, however, that such might be the state of things under ordinary circumstances, see *Domett v. Berkford* (5 Bar. and Ad. 521); and assuming that credit was not here given exclusively to the agent, the difficulty would still remain to be disposed of, that the contract made was not for freight, and the question would equally arise, whether a lien on goods can be supported in such a case as for freight. If, on the other hand, adopting the converse suggestion, we assume that these Plaintiffs are only agents, and that the goods have throughout belonged to the shipper, the same answers would present themselves. In either case the ownership of the goods, as between the shipper and the consignee, would not have changed, but the express contract in each would exclude the supposition of an implied one; and it would still have to be considered whether a shipowner can claim a lien, which the law gives him for carrying goods to their assigned destination (in respect of the additional value thereby conferred on them), when he has in effect abandoned all



remuneration for such carriage by substituting a payment to be made at all events, whether the goods be in fact carried or not to that destination. The provision for that payment, moreover, by, not the consignees, but the party shipping the goods, may materially affect the claim, whether credit was or was not exclusively [30] given to him; and whether the consignees be the principals or be agents only; for, if agents, they may have advanced money on the goods before arrival, in the natural expectation that all freight was paid; or, if principals, they may have accepted a draft for the freight relying on such payment; and if not in either predicament, yet with a bill of lading so framed, if the goods can be detained for the money, the consignee must ever be at the carrier's mercy; for if on the arrival of the goods he asserts that the amount is unpaid, how is the consignee to prove the contrary? There is nothing before us, however, from which we can infer that the relation of principal and agent, as supposed, did in fact exist between these Plaintiffs and the shipper. The latter may have sold the goods to them, or have been the broker merely of some other vendor; and in either case no property in the goods may have passed to the consignees until after shipment. The freight, moreover, by stipulation, or the course of dealing, may have been a matter with which they were expressly to have nothing to do. Dealing with the case as stated on the record, we can determine only that the Plaintiffs were legally owners of the goods at the time of the detention; but how or when they became so, further than the bills of lading respectively indicate, we have no knowledge. A lien is a right to detain goods till satisfaction is made of a demand due in respect of them. But to exercise a lien in such a case as this would be to detain the goods at a time when possibly the demand may have been satisfied; and the special agreement, we think, is so inconsistent with the very nature of lien, as to exclude the common law right which the shipowner [31] usually enjoys for goods carried by him. Our judgment, therefore, on the special case stated in this action is for the Plaintiffs."

The Appellants applied to the Supreme Court for leave to appeal to England, which, by an Order dated the 28th of July, 1855, was granted.

No steps having been taken by the Appellants to prosecute the appeal, and no petition of appeal having been lodged at the Council Office, the Respondents now moved to dismiss the appeal for want of prosecution (29th Nov., 1856 \*). The transcript had been transmitted to the Council Office under the Order of Council of 13th of June, 1853 [Stat. R. and O. Rev. iv. p. 305], but no agent had been appointed to act on behalf of the Appellants.

Mr. Manisty in support of the motion.

A question being raised whether the Court had jurisdiction to make an Order to dismiss in such circumstances, there being no petition of appeal to Her Majesty lodged in the Privy Council Office, and no reference of such appeal to the Judicial Committee, their Lordships declined to make any Order upon the motion. (Upon this point, see *Gungadur Seal v. Sreemutty Raddamoney Dossee* (9 Moore's P.C. Cases, 411), where it was held by the Judicial Committee that they had no jurisdiction to entertain an application for extension of time to appeal until the petition of appeal was lodged; see also *Cutto v. Gilbert* (9 Moore's P.C. Cases, 131) upon the same point.)

The Appellants having, however, subsequently ap-[32]-peared and taken the proper steps for prosecuting the appeal, the same now came on for hearing.

Sir Frederick Thesiger, Q.C., and Mr. Ayrton, for the Appellants.—The judgment of the Court below is contrary to law and the facts stated in the special case. The Court held, that our lien for freight was concluded by the contract contained in the bills of lading, but we submit that the moneys payable for the conveyance of the goods were by the bills of lading taken to be, and were, both in fact and in law, freight; and that there was no ground for the Court below holding to the contrary. Freight is an inchoate right which commences on the beginning of the voyage and continues to the end. The Appellants, the owners of the ship, had, therefore, a lien on the goods shipped on board their vessel for freight. Whether the

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\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Patteson.

freight is payable either before or contemporaneously with the delivery of the goods, the lien on the goods still remains. Assuming the moneys could not properly be called freight, yet the same being payable for the conveyance of the goods, and there being nothing in the contract inconsistent with the detention of the goods until the same were paid, the Appellants were legally entitled to detain the goods until the stipulated price of their carriage was paid. Their lien as shipowners for freight was not waived by the bills of lading. They referred to, and commented upon, the following cases: *Lucas v. Nockells* (4 Bingham, 729), *Alsager v. The St. Katherine's Dock Co.* (14 Mee. and Wels. 794), *Blakey v. Diron* (2 Bos. and Pul. 321), *De Silvele v. Kendall* (4 Mau. and Sel. 37), *Manfield v. [33] Mantland* (4 Bar. and Ald. 582), *Curling v. Long* (1 Bos. and Pul. 634), *Raitt v. Mitchell* (4 Camp. 116), *Hutton v. Bragg* (7 Taunt. 14), *Campion v. Colvin* (3 Bingham, N.C. 17), *Tindall v. Taylor* (4 Ell. and Bla. 219), *Small v. Moates* (9 Bingham, 574), *Christie v. Lewis* (2 Brod. and Bingham, 410).

Mr. Manisty, Q.C., and Mr. H. James, for the Respondents.—Upon the true construction of the bills of lading, it is clear, that the Respondents were not liable to pay the money claimed by the Appellants as freight for the carriage of the goods in question. Freight is the reward for the conveyance of goods from one stated place to another, but here there has been no contract for freight. The stipulation made by the bills of lading was for a payment in lieu of freight, to be made within a month after the sailing of the vessel, whether the goods were conveyed to their destination or not. The Appellants' argument that a lien on the goods for freight in such circumstances was not waived, cannot be maintained. They cited and relied on *Coleman v. Lambert* (5 Mee. and Wels. 505), *Andrew v. Morehouse* (5 Taunt. 435), *Stevenson v. Blakelock* (1 Mau. and Sel. 543), *Chase v. Westmore* (5 Mau. and Sel. 180), *Campion v. Colvin* (3 Bingham, N.C. 26), *Christie v. Lewis* (2 Brod. and Bingham, 443), *Thompson v. Gillespy* (5 Ell. and Bla. 209), *Hutton v. Bragg* (7 Taunt. 14).

The Right Hon. Lord Wensleydale.—In this case their Lordships have had the advantage [34] of the very elaborate judgment of the Chief Justice Stephen, and also of the able argument at this Bar, which has certainly been conducted with great ingenuity upon the part of the Appellants, and we have now to decide whether or not the judgment of the Court below ought to be affirmed. We are all clearly of opinion that it must be affirmed.

The question lies in the narrowest possible compass, and we have no doubt as to the law upon the subject, which is, that for freight, properly so called, that is, for the carriage, conveyance, and delivery of goods, a shipowner is entitled to a lien upon the cargo, unless he has entered into a contract at variance with that lien; as, for example, in some of the cases which have been cited in the argument, where the contract is to pay after the delivery of the cargo, and not at the time of the delivery of the cargo.

The question here resolves itself simply into the construction of a written instrument, the bill of lading, which governs the conditions for payment, and we can decide that only by reference to the instrument itself, without having any evidence of the usage of the trade at Glasgow, from which port the goods were shipped, and with respect to which, whether such evidence was admissible or not, is a matter upon which their Lordships are not called upon to give an opinion. Our duty is a very simple one: to look and see whether, according to the provisions of the bill of lading, the freight stipulated for, is such as to give the shipowner a lien on the goods. It has been urged, that notwithstanding the apparently contradictory terms of this instrument as to the payment of the freight, the shipowner was to have a lien upon the cargo, however difficult it may be to reconcile such [35] lien with some of the provisions of the instrument; yet, that if such express stipulation exist it would prevail, notwithstanding the great inconvenience which has been pointed out in the argument.

We have, then, to decide whether, looking at the whole of the instrument together, there is any contract between the parties that will give the shipowner a right of lien. There is no such contract. The freight was to be paid one month after the sailing of the ship, irrespective of the safe delivery of the goods, and was to be paid by the



shipper, not by the consignees of the goods. Their Lordships are perfectly satisfied that in this instrument the word "freight" is not used in the sense that will give a right of lien, and that, therefore, there was no lien upon the cargo; and that the judgment of the Court below must be affirmed with costs.

[Mews' Dig. SHIPPING, A.; XIII. FREIGHT; 4. *Lien on Cargo*; a. *Creation of*. S.C. 6 W.R. 198. Followed in *Kirchner v. Venus*, 1859, 12 Moo. P.C. 361, as to lien for freight payable in advance. But see *Allison v. Bristol Marine Insurance Co.*, 1876, 1 A.C. 209, and Carver, *Carriage by Sea*, 3rd ed. s. 663. As to expression of unanimity or divergence of opinion among members of Judicial Committee (10 Moo. P.C. 34), see O. in C. of 4th Feb. 1878, and authorities collected in Phillimore *Eccl. Law*, 2nd ed. p. 975.]

[36]      ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT, NORTH-  
WESTERN PROVINCES.

NANA NARAIN RAO,—*Appellant*; HURREE PUNT BHAO and SHREE NEWAS  
RAO,—*Respondents* \* [Nov. 29, 1856].

Cross appeal allowed from part of a decree of the Sudder Court appealed from to England; although the Respondents had not applied in India for leave to appeal within the proper time; the Respondents being mistaken in the practice of the Judicial Committee upon a cross appeal.

Such cross appeal directed to be prosecuted and heard upon one printed case, if the principal appeal was proceeded with; but in the event of the principal appeal being dismissed for want of prosecution, liberty was reserved to the Respondents to prosecute the cross appeal as a separate appeal.

This was an application by the Respondents for special leave to enter a cross appeal against portions of a decree of the Sudder Court, appealed from to England, so far as it affected their interests in that decree.

The petition stated, that by a decree of the Sudder Dewanny Court of the North-Western Provinces, dated the 2nd of April, 1855, made on an appeal from a decree of the Zillah Court of Cawnpore, in a suit in which the Petitioners (the Respondents) were the Plaintiffs, and the Appellant (Nana Narain Rao) was the Defendant, that Court decided in favour of the Petitioners for two-thirds of the two anna [37] eight pice share in Mouza Bheekur; also for two-thirds of a two anna share of Mouza Brishur; also for two-thirds of each of the two dwelling-houses and gardens specified in the Appellant's schedule and also for Rs. 3,10,226.; 10. 2., being two-thirds of the value of the property, with interest and mesne profits from the date of the institution of suit to that of obtaining possession, with costs in both Courts; and the Court dismissed the rest of the Petitioners' claim which related to Lallpore and Bulwapore, which the Court found that the Appellant was the sole proprietor of by purchase, and the excess in their valuation of the personal property. That the Appellant appealed from this decree, and that the transcript had arrived in England, but that no steps had yet been taken by the Appellant, who had not put in an appearance. That the Petitioners had applied to the Sudder Court for a review of judgment with regard to the two last portions of the decree regarding the Mouzas Lallpore and Bulwapore, and the finding of the Court as to the whole of the personal or moveable estate, which the Sudder Court had rejected. That the Petitioners had instructed agents in England to obtain at the hearing of the appeal, a reversal of the two portions of the decree affecting them, believing that they would be entitled to state their objections at the hearing, to such two portions

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Patteson.

of the decree, and to obtain a reversal of the decree, so far as had relation to those portions, without any formal and separate appeal being instituted by them, such being the practice of the Sudder Courts in India, when an appeal was brought by one party from the decree of the Zillah Judge to the Sudder Dewanny Adawlut, and that relying on [38] that practice they had not applied to the Sudder Dewanny Adawlut for leave to appeal against the decree within six months, the time prescribed for presenting a petition of appeal. That they had been advised that they had acted in error, and that it was necessary for them to institute a separate or cross appeal against so much of the decree as related to the two portions aforesaid; and the Petitioners prayed that leave might be granted to them to appeal against such two portions of the decree of the Sudder Court.

Mr. Leith in support of the petition.

Their Lordships granted the application upon the terms contained in the following Order in Council:—

"That leave be granted to Hurree Punt Bhae and Shree Newas Rao, to enter and prosecute their cross appeal from so much of the decree of the Sudder Dewanny Adawlut of the 2nd of April, 1855, as regards the Mouzas Lallpore and Bulwapore, and also from the finding and decree of that Court, as to the amount and value of the personal and moveable estate and property of Soobadar Ranchunder Punt, upon lodging in the Council Office the certificate of a recognizance to be entered into by some proper person (to be approved by the Registrar of the Privy Council), before one of the Barons of Her Majesty's Court of Exchequer, in the penalty of £300 sterling, conditioned to pay such costs as might be awarded by their Lordships in case the appeal be dismissed, and the cross appeal to be prosecuted and come on for hearing on one printed case, and on the same printed transcript record as the principal appeal in this suit, provided the same be duly proceeded with by the Appellant [39] herein; but if such principal appeal be dismissed for non-prosecution, then the Petitioners were to be at liberty to prosecute their cross appeal as a separate cause."

[S.C. 6 Moo. Ind. App. 464. See now Code of Civil Procedure (Act XIV. of 1882), ss. 540 *et seq.* As to special leave to appeal in civil cases generally, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

## ON APPEAL FROM THE SUPREME COURT AT BOMBAY.

STAFFORD BETTESWORTH HAINES.—*Appellant*; THE EAST INDIA COMPANY,  
*Respondents* \* [Dec. 2, 1856].

A., in the custody of the Sheriff, and confined in the gaol at Bombay, under a writ of execution issued against him upon a judgment of the Supreme Court at Bombay, was permitted by the Sheriff, with the sanction and authority of the judgment creditors, by reason of illness, to go out of prison, and temporarily reside outside the precincts of the gaol, upon the condition that he should continue under the surveillance of the Sheriff's officers, and to which condition A. agreed, and continued for a time to reside out of gaol at a private house, where he was constantly under such surveillance. Upon A.'s becoming convalescent, the Sheriff, at the instance of the judgment creditors, took him back to gaol. Upon an application by A., to the Supreme Court at Bombay, to discharge him out of custody, on the ground that the writ of execution was satisfied, that Court held, that A., having agreed to the condition imposed on him by the judgment creditors, of continuing in the custody of the Sheriff's officers while out of gaol, was

\* Present: The Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, the Right Hon. Sir John Patteson, and the Right Hon. Sir Lawrence Peel.



estopped from saying that he was out of the Sheriff's custody when he was permitted to leave the gaol, and that a change of the place of imprisonment in such circumstances did not amount to a discharge out of custody. Such judgment affirmed, upon appeal, by the Judicial Committee [11 Moo. P.C. 61].

Where an execution creditor is willing to allow a debtor to go out of prison for a temporary purpose, the custody continuing, the Sheriff may refuse, unless ordered by a rule of Court; but if, without any rule of Court, all parties agree to the debtor leaving the prison, and from a laxity of surveillance of the Sheriff's officers the debtor escapes, it is a question of fact for the jury, if the judgment creditor brings an action against the Sheriff, whether the judgment creditor did not himself contribute to the escape [11 Moo. P.C. 55].

If the Sheriff alone, on the ground of a debtor's ill-health, makes any relaxation of the imprisonment, by letting the debtor reside out of prison, it would be an escape [11 Moo. P.C. 59].

The appeal in this case was brought from a judgment of the Supreme Court at Bombay, which refused an application to discharge the Appellant out of the custody of the Sheriff of Bombay, and to have satisfaction entered of a judgment obtained by the Respondents against him.

The facts of the case were these:—

On the 25th of August, 1854, an action on promises was brought in the Supreme Court of Bombay by the Respondents, against the Appellant. On the 26th of the same month the Appellant was arrested by the Sheriff of Bombay on mesne process issued out of that Court in the action, and imprisoned in the gaol of Bombay. On the 4th of January, 1855, a verdict in the action passed against the Appellant, and, on the 22nd of the same month, judgment was signed for the Respondents, for Rs. 2,79,917, for damages and costs, and a writ of *Ca. Sa.* issued against the Appellant, under which writ he was detained by the Sheriff in gaol. During his imprisonment in the gaol, the Appellant was in a bad state of health, which being reported by the medical officer of the gaol to the Government of Bombay, that officer was desired by the Government to state "whether he considered it absolutely requisite for his (the Appellant's) recovery, that he should be temporarily released from his present confinement." The medical officer reported, that "a temporary [41] release from his present confinement was essentially necessary for the re-establishment of his (Appellant's) health." Upon which, the Secretary of the Bombay Government wrote to the Sheriff and the Superintendent of Police of Bombay the following letters:—"Sir,—Assistant-Surgeon R. Haines, in medical charge of the Bombay gaol, having reported that the temporary release of Mr. S. B. Haines from his present confinement is essentially necessary for the re-establishment of his health, I am directed by the Right Honourable the Governor in Council to inform you that, under the Report, Government is pleased to permit him temporarily to reside outside the gaol, under such surveillance as may prove as little irksome as possible to the prisoner, while consistent with its perfect efficiency. The Superintendent of Police has been instructed to render you all the assistance of which you may stand in need, for keeping Mr. S. B. Haines under efficient surveillance while without the walls of the gaol. A copy of my letter of this date, to Mayor Baynes, is inclosed for your information." The communication referred to by the Secretary of the Bombay Government was as follows:—"Sir, I am directed by the Right Honourable the Governor in Council to inform you that Assistant-Surgeon R. Haines, in medical charge of the Bombay gaol, having reported to Government that the temporary release of Mr. S. B. Haines from his present confinement is essentially necessary for the re-establishment of his health, Government is pleased to permit him temporarily to reside outside the gaol under surveillance; and I am to request that efficient measures may be adopted by you, in communication with the Sheriff of Bombay, to prevent his quitting the Island. It is the [42] wish of Government, that while the surveillance over Mr. Haines should be completely efficient, it may be rendered as little irksome to his feelings as may be practicable."

These letters were communicated to the Appellant in the gaol at Bombay, by the Deputy-Sheriff, when the Deputy-Sheriff explained to the Appellant, that if he availed himself of the permission of Government to reside temporarily outside the gaol, Sheriff's peons, or officers, would be stationed in and about the house in which he might take up his residence, and that two of the Sheriff's peons would always remain in the house, and asked him if he was willing to avail himself of such permission, on such terms. The Appellant expressed to the Deputy-Sheriff his willingness to avail himself of the permission, both verbally and by the following letter:— "Sir, I shall be grateful for any change, and the consideration of my health is indeed most welcome." In consequence of what had thus passed, on the day following the Deputy-Sheriff went to the gaol, and accompanied the Appellant thence to a small Bungalow situated at Omercarry, near the gaol, and, on that occasion, the Deputy-Sheriff pointed out to the Appellant one of the Sheriff's peons, who had accompanied them from the gaol, as one of the Sheriff's officers who would always be in the house. On the 22nd of July, the Appellant, accompanied by the Sheriff's peons, removed to a more convenient Bungalow, at Mazagon. During the whole of the period that the Appellant was residing at Omercarry and at Mazagon, he was in the custody and charge of the Sheriff's officers, and was within the bailiwick and jurisdiction of the Sheriff of Bombay.

[43] On the 3rd August, in consequence of a communication from the Appellant's wife to the Bombay Government, stating that the Appellant's health was so seriously affected by his recent incarceration that his life might possibly be endangered if he should be again confined in the Bombay gaol, the Government appointed a Medical Committee to examine the Appellant, and report whether the Appellant's life would be endangered by a re-incarceration in Bombay gaol. On the 20th of the same month, the Medical Committee reported to the Government as their opinion that Mr. Haine's impaired health did not arise from any cause connected with the climate of the gaol, but was attributable to mental causes; and that his life would not be endangered by re-incarceration in the Bombay gaol, so far as its climate was concerned, mental suffering often leading to mental and bodily disease, and even to death, in all places and in all climates; but in Mr. Haines' present state of health, bodily and mental, so far as was discoverable by them, they were of opinion that a fatal result would not be more likely to occur in the Bombay gaol than in any other place. In consequence of this report, the Government of Bombay, on the 22nd of August, 1855, directed the Sheriff of Bombay to take immediate measures to remove the Appellant "from the place of his (the Sheriff's) custody of him to the gaol," and on the same day the Deputy-Sheriff went to the Bungalow where the Appellant was residing, for the purpose of removing the Appellant to the gaol. On that occasion, Mrs. Haines, the wife of the Appellant, opposed the Deputy-Sheriff seeing him, on the ground that he was so dangerously ill that the presence of the Deputy-Sheriff might violently excite him, and possibly [44] cause his death; and she informed the Deputy-Sheriff that she expected Dr. Haines, the surgeon of the gaol, every moment, and the Deputy-Sheriff thereupon agreed to wait until Dr. Haines should arrive; and shortly afterwards a note arrived from Dr. Haines, which the Appellant's wife read to the Deputy-Sheriff, and which induced the Deputy-Sheriff to think the Appellant was in such a critical state of health that he ought not to press for an interview with him without further communication from Government, and he accordingly left the house with the note, which the Appellant's wife gave up to him, and which he afterwards forwarded to Government. On the occasion of the above interview, the Appellant's wife told the Deputy-Sheriff that she had been advised he had no right to enter the house, as the Appellant had acquired his liberty by being removed from the gaol; and the Deputy-Sheriff, in answer, explained to her that he considered the Appellant as still his prisoner, as the Appellant had always been in the custody of the Sheriff's officers. It was shown that the Appellant knew that the Sheriff's peons were always in and about the house.

On the 3rd of December, 1855, the Medical Committee having, in pursuance of instructions from the Government of Bombay, examined the Appellant, and reported that his removal to gaol would not endanger his life, the Sheriff of Bombay was instructed by the Government to take immediate measures for his re-incarceration in the gaol; and the Appellant was accordingly removed by the Sheriff



from the Bungalow at Mazagon to the gaol at Bombay, where he remained a prisoner in the custody of the Sheriff. Previous to the Appellant's removal from the gaol, [45] he received subsistence-money, and, after his removal, the Under-Sheriff regularly received subsistence-money for the Appellant from the Government of Bombay, which, however, the Appellant declined to avail himself of.

On the 21st of December, the Appellant moved the Supreme Court of Bombay to be discharged from the custody of the Sheriff, and that satisfaction might be entered on the judgment roll. The motion was grounded upon affidavits setting forth the facts to the purport above stated. The Respondents opposed the motion on the ground that upon these facts, as well as those properly to be inferred from the statements in the affidavits, the Appellant never was discharged from custody, and was properly retaken to gaol. The motion was heard on the 21st of December, 1855, when the Court took time to consider its judgment, and, on the 3rd of January, 1856, Sir William Yardley, Chief Justice, delivered judgment. After stating the above facts he proceeded as follows:—"The case was very fully and ably argued on both sides, and a great array of authorities, more or less bearing upon the question, were cited. Most of those authorities related to the question, whether or not the facts of this case would render the Sheriff liable to an action of debt for the escape, under the Statute of Westminster the 2nd, if the relaxation of the duress of imprisonment had not been made by the licence of the Plaintiffs; and I may at once say that it is perfectly clear that these facts would render the Sheriff liable to such an action. Any relaxation whatever of the rigour of imprisonment by the Sheriff, of his own authority, would entitle the Plaintiffs to maintain an action against him for the whole amount of the [46] debt and costs. That has been settled by a continued series of authorities, extending over several centuries down to the present time; and, moreover, it is equally clear that, if a Defendant be discharged out of execution by the Plaintiff himself, he can never be taken in execution again upon the same judgment, even though it be agreed at the time of his discharge that if he should fail to satisfy the debt he should again be charged in execution. There are several cases to that effect, which were cited at the bar, such as *Vigers v. Aldrich* (4 Burr. 2482); *Jaques v. Withy* (1 Term Rep. 557); *Clarke v. Clement* (6 Term Rep. 525); *Tanner v. Hague* (7 Term Rep. 420); and *Blackburn v. Stupart* (2 East, 243); which last is an exceedingly strong case, for there it had been expressly agreed that the Plaintiff should be at liberty again to take the Defendant in execution if he failed to perform the conditions on which he was discharged; but, in all the cases cited, there is this marked distinction between them and the present case, that there was an actual discharge of the Defendant out of custody, not merely a relaxation of the rigour of imprisonment; and, secondly, that the Plaintiff relied for the recovery of his debt upon some substitute, actual or intended, for the judgment. It is, however, argued by the Counsel for the Defendant that in every case in which there has been such a relaxation of duress as would, if permitted without the licence of the Plaintiff, render the Sheriff liable to an action for an escape, the Defendant, if the relaxation had been permitted by the Plaintiff himself, would be absolutely discharged from the execution, and would not be again liable to be taken in execution upon the same judgment, unless, indeed, he returned volun-[47]-tarily into custody. Let us illustrate this argument by some of the decided cases. It is laid down by Buller, J., in *Benton v. Sutton* (1 Bos. and Pul. 24), that if the Sheriff's officer take the prisoner out of the direct road, it is an escape. So if the Sheriff on a writ of *habeas corpus* carry the prisoner (in execution) round about a great way, for his accommodation, it is an escape, though he be in actual custody all the time. *Mosedell's Case* (1 Mod. 116). Now, could it have been contended in these cases, that if the deviations had been by the licence of the Plaintiff, the prisoner would have been thereby discharged out of execution? There is no decision to that effect to be found in the books; but in all the cases in which it was held that the prisoner was entitled to be released, there had been an actual discharge of him out of all custody. If he be allowed to go at perfect liberty for ever so short a time, by the leave and licence of the detaining creditor, he cannot again be taken in execution upon the same judgment. But a change of the place of imprisonment by the licence of the Plaintiff, and with the consent of the Defendant, is not a discharge out of custody. It manifests no intention on the part of the Plaintiff, no longer to rely upon the judgment and the process of law for the

recovery of his debt. I have not, however, been able to find any case in which it has been actually decided that the Plaintiff may relax the rigour of imprisonment without thereby entitling the Defendant to his discharge. In the absence of authority, therefore, we must be guided by the general principles of the law; and the principle upon which the Sheriff has been made liable to an action for an escape, in every case in which he has allowed an [48] indulgence to the prisoner inconsistent with strict duress, is, that the object of the imprisonment is to compel the Defendant to pay the debt for which he is taken in execution, and the Plaintiff is entitled to the benefit resulting from the full pressure of such duress; and, therefore, if the Sheriff takes upon himself to remove any portion of that pressure, and thereby diminishes the probability of the Plaintiff's recovering the amount of his debt, the Statute of Westminster the 2nd, c. 11, made the Sheriff himself liable on an action of debt, for the full amount—a severe and strict law, which has been mitigated in England by a recent Statute, enacting that the Sheriff shall be liable only on an action upon the case for the damages sustained by the person or persons at whose suit such debtor was taken or imprisoned. But is the principle upon which the Sheriff was held liable for an escape applicable to the cases in which the relaxation of the duress is the act of the Plaintiff himself? Is there any sound reason why the Plaintiff might not allow his debtor an indulgence without sacrificing the whole of his demand? If the argument of the learned Counsel be correct, a detaining creditor could not allow his debtor to be taken temporarily out of the gaol where he was detained, upon the utmost emergency—to visit the deathbed of a wife or child, for example,—without the risk of thereby sacrificing the whole of his debt; for, according to the argument, if the prisoner did not choose voluntarily to return to the gaol, he could not be compelled to do so; because, according to the decided cases, such an indulgence, if permitted by the Sheriff of his own authority, would doubtless be an escape, and, therefore, it is argued, if permitted by the Plain-[49]-tiff, would operate as a discharge out of execution. But I think I have shown that the principle upon which it would be such an escape as to render the Sheriff liable does not apply to make it a discharge by the Plaintiff; and, I confess, it appears to me that it would be repugnant alike to reason and to humanity to hold that a detaining creditor might not partially forego the advantages, such as they are, resulting from the pressure of the duress of imprisonment, and might not mitigate the rigour of such imprisonment, except at the sacrifice of the whole debt and costs. It appears to me to be manifest that there was no intention upon the part of the Plaintiffs, in the present case, to set the Defendant at liberty for one moment, nor to rely upon any other security for the payment of the balance of the debt than the judgment and process of the Court; and that the Defendant, although humanely permitted to reside out of the gaol for several months for the benefit of his health, was, during the whole of that time, in the custody of the Sheriff, and that he cannot, therefore, be held to have been discharged out of execution by the Plaintiffs. It is scarcely necessary to add, that the fact of the Plaintiffs being represented by the Government of this Presidency makes not the least difference in the case. The learned Advocate-General did not for a moment contend that the Government had, or pretended to have, any more right to send the Defendant back to gaol than any private individual would have had under similar circumstances. It was, in short, a licence from the detaining creditors to the Sheriff to change for a time the place of confinement, for the benefit and with the consent of the Defendant, upon a representation that such a change was neces-[50]-sary to his health; which licence was withdrawn when, in the opinion of a medical Committee, the necessity for it ceased to exist, and thereupon the Sheriff reconveyed the Defendant to the usual place of confinement.” The Court accordingly refused the application.

The appeal was preferred from this judgment.

Sir Fitz-Roy Kelly, Q.C., and Mr. J. J. Powell, for the Appellant.—The Sheriff of Bombay, with the consent of the Respondents, having suffered the Appellant to escape from gaol, the judgment entered against the Appellant at the Respondents' suit was satisfied, and the Sheriff had no legal authority to detain the Appellant in custody. It may be urged that the conduct of the Appellant in availing himself of the legal consequences of his having obtained permission to leave the gaol, is an ungrateful return for the indulgence afforded him by the Respondents; but that cannot affect his right in law to be discharged out of custody. The argument, in



this case, is confined to one of a debtor in custody under a writ of execution completely executed, and has nothing to do with *mesne process*. If a writ of *capias ad satisfaciendum* be once executed, and the Defendant in custody of the Sheriff and in prison, it is the duty of the Sheriff to keep him in *arcta et salva custodia*. Comyn's Dig., tit. "Imprisonment" (I). If the Sheriff permits a prisoner to quit the gaol for a single moment, even with a keeper, *Benton v. Sutton* 1 (Bos. and Pull. 24), he is "at large," to use the language of the old authorities; the writ is then satisfied, and the custody at an end. In *Jones v. Pope* (1 Wms. Saunders, 36), all the authorities upon this [51] point are collected. Viner's Abr., tit. "Escape," (A. 5) and (N. 41), Bacon's Abr., tit. "Escape in civil cases" (B), *Buxton v. Home* (1 Shower, 174), *Atkinson v. Jameson* (5 Term Rep. 25), *Clarke v. Clement* (6 Term Rep. 525), *Blackburn v. Stupart* (2 East, 243), Dyer's Reports (p. 296 (b)).—[Sir John Patteson: In *Blackburn v. Stupart*, there was an agreement between the Plaintiff and Defendant that the Defendant was to be perfectly at large, and if he did not pay the judgment debts and costs within a certain time there was to be another execution: that is an important distinction.]—During the plague in London, in the reign of Charles the First, the prisoners in custody in the King's Bench petitioned that they might be allowed to go at large, upon giving security to return; but by a resolution of the Judges (Croke Car. 466), it was determined that if such permission was granted, except by rule of Court, it would be an escape. By the Common Law and Statutes, 1 Rich. II. ch. 12 (3 Chitty's Collec. of Statutes, p. 1066), and 8th and 9th Will. III., ch. 27, a prisoner must be kept in gaol till the debt is satisfied, or by rule of Court he is permitted to leave the gaol. So long as the Appellant was in gaol he was in lawful custody, but as soon as he was let out of gaol, it amounted to an escape. In law there is no distinction between being at large by consent of the Sheriff, or by consent of the Plaintiff. No contract or Bond can confer any power upon a Plaintiff who has allowed his debtor to go at large, to retake him. The writ of execution is satisfied, and he cannot issue a second writ of execution for the same cause, the first having been satisfied by the custody of the [52] body of the Defendant. Neither will the law allow any agreement between the Plaintiff and Defendant as to what shall be custody or liberty. No consent of parties can make a gaol where there is no gaol. The law has defined what shall be lawful custody.—[Sir John Patteson: The real question here is, whether the Appellant was ever at large. He accepts the terms, to be let out of the gaol, but to remain in the custody of the Sheriff. How then can he say he was not in custody?—The Appellant was let out of gaol.—[Sir John Patteson: Yes, but in custody, and continued so.]—You cannot by agreement alter the character of lawful custody. An escape occurs when a Defendant is allowed to be treated otherwise than the writ commands. The prisoner's assent can make no difference, it merely bars an action of trespass at his instance. Neither is it of importance that the Sheriff's officers were in attendance upon the Appellant; it was no less an escape, as he was let out of gaol. At most it was a licence revocable at pleasure; and even if the Court should think that up to the 22nd of August, when the Sheriff went to retake the Appellant, there was such a consent by him to remain in custody of the Sheriff, still when the Appellant's wife refused to let the Sheriff enter the house, the licence was determined, and from that day, and up to the 3rd of December, when he was retaken to gaol, he was at large. What authority had the Sheriff to retake him after an escape? An action would lie against the Sheriff for retaking him after the writ of execution was satisfied. *Atkinson v. Jameson* (5 Term Rep. 25), *Buxton v. Home* (1 Shower, 174). The judgment of the Court below is unsupported by authority.

[53] Mr. Wigram, Q.C., Mr. Forsyth, and Mr. W. H. Melvill, appeared for the Respondents, the East India Company; but their Lordships, without calling upon them, delivered judgment, by

The Right Hon. Sir John Patteson.—This case comes before their Lordships under peculiar circumstances, as, indeed, it came before the Court at Bombay. It should always be remembered that in all cases we must look at the circumstances of the case before us, in order to see whether or not the principles of law are to be strictly applied to the case, or whether there can be any relaxation of what are supposed to be the strict principles of law.

A question was argued before the Court of Bombay, and has been urged here,

as to what will be the consequence to the Sheriff upon the question of escape: but really that is not the question in the case. There cannot be the slightest doubt that if these circumstances had taken place by the authority of the Sheriff alone; if he, upon the representation that the Defendant was suffering very severely in health, had taken upon himself to make this relaxation of the imprisonment, and had permitted the Defendant, accompanied by ever so many of his own officers, to go and reside in a house of his own, it would have been an escape. There can be no question at all about it: and why? Because the Sheriff having taken a party in execution under a *capias ad satisfaciendum*, is bound to keep him in his own gaol, he cannot of his own authority allow the prisoner to make a gaol for himself: he is bound to keep him *in arcta et salva custodia*, in order to enforce payment of the debt, and if he relax [54] that *arctam custodiam* at all, so far the pressure to compel the payment of the debt is relaxed also, which the Sheriff has no right to do. Upon that principle it is, that where the Sheriff had suffered a man to go out of gaol, even in the custody of one of his officers, or, as in the case of *Benson v. Sutton* (1 Bos. and Pull. 24), he had suffered him, before he was taken to gaol, to go away from the lock-up-house in the custody of one of his officers, it was held to be an escape. Whether it was going at large again, or not, may be quite another question, with respect to the mere words "going at large;" but it constituted an escape so far as the Sheriff was concerned, and entitled the Plaintiff, if he thought fit, to bring an action against the Sheriff for that escape. Formerly he would have recovered the whole amount; latterly the law has been altered, and he would recover damages only: but that is immaterial.

There is no doubt, therefore, that the Sheriff, of his own authority, could not have done this act. But then look to the peculiar circumstances of the case. The Plaintiff in any case, in order to be barred from continuing his execution, and from having the benefit of his judgment, must voluntarily discharge the Defendant out of custody. If he does discharge him out of custody, I agree that if it be only for a week, he cannot, by any agreement which he may have made with the Defendant, afterwards retake him, although the Defendant may possibly have agreed that, if he does not pay the money within a week, he shall be retaken. That is decided law.

But the question in this case really is, whether or not the Plaintiffs ever did consent to discharge, and ever did discharge, the Defendant out of custody. [55] Now, supposing that the Defendant was in a bad state of health, as it is said he was, and supposing that it had arisen from his confinement in the prison, and that he had applied to the Supreme Court at Bombay, from which this execution issued, for a rule of Court, to be allowed to be taken from the prison and put into some other place, and there kept by a Sheriff's officer, and that for the sake of saving his life, or for the benefit of his health, the Court had thought fit to grant that indulgence even against the will of the Plaintiffs, and there had been a rule of Court to that effect, and he had been removed out of gaol under that rule of Court, and had been kept in the charge of a Sheriff's officer in a private house, can there be the slightest doubt that he would then still have been in the custody of the Sheriff? I cannot conceive that there would have been any question upon it. Now, here they did not apply for a rule of Court, but they did it at once. It is said that the Defendant did not solicit it. It is true he did not solicit it, but it was done. We have an account of the Plaintiffs, upon the representation of the medical officer, inquiring into the state of the Defendant's health. What then did they do? they wrote a letter to the Sheriff, and they say that in consequence of the state of the Defendant's health, a temporary release from confinement in the gaol itself is essentially necessary, and that "Government is pleased to permit him temporarily to reside outside the gaol, under such surveillance as may prove as little irksome as possible to the prisoner, while consistent with its perfect efficiency." What does that mean? The perfect efficiency of keeping him in custody; it cannot mean anything else by possibility. Then what is the letter to the Superintendent of the [56] Police? Why, it recites that same thing; that the Defendant has been allowed to be so under surveillance, and directs him also to take care that he does not go out of the Island. This is communicated to the Defendant, who verbally agrees to it, and expresses his willingness to avail himself of that permission. But not only that, he actually writes a letter to the Sheriff, in these words:—"Sir, I shall



be grateful for any change, and the consideration for my health is indeed most welcome." Then he goes out of the gaol with a Sheriff's officer. Now really can there be a doubt but that the object of the Plaintiffs was, in consequence of the state of his health, a kindness towards the Defendant? Their object was to keep the judgment and the writ of *capias ad satisfaciendum* still on foot, and to keep the Defendant in the actual custody of the Sheriff. A place where his health might be re-established, was constituted a special prison for that purpose, by consent as it were. The Defendant agrees to that, and is thankful for it. Then, surely, he must be estopped (it is a sort of estoppel), from saying that the custody in which he then was, was not the custody of the Sheriff, when both parties intended it to be so, and that in point of law such custody should be treated as the custody of the Sheriff.

There have been some cases lately, in which a question has been raised whether the party has been estopped from taking advantage of any irregularity, even the non-compliance with an Act of Parliament. There was one case before the Court of Queen's Bench very lately, in which the doctrine was carried to a very considerable extent, and yet I think not further than it may be carried in the [57] present instance. I allude to *Tyerman v. Smith* (25 Law Journ. Q.B. 359), in which the case had been referred under the compulsory powers of the Statute, 17th and 18th Vict., c. 125, sec. 15. The award was not made within three months, and the time was not enlarged by the Court, or a Judge, as it ought to have been, or by the written consent of the parties; but both parties having gone before the arbitrator after the time had elapsed, it was held that the party against whom judgment had been signed upon the award was estopped from taking advantage of the non-compliance with the Statute. In another case, *Andrews v. Elliott* (25 Law Journ. Q.B. 1). There, under the Common Law Procedure Act, the parties chose to refer it to a Judge, and not to a jury, but that, according to the Act of Parliament, ought to have been done by a written consent. It was not done by written consent, but the Court said, that having chosen to act upon the oral consent, the party was precluded from taking advantage of the want of a written consent. So here this Defendant must be precluded from saying that he was not in the custody of the Sheriff, where he intended to be, and where the Respondents intended him to be all along, unless there be any strict rule of law which prevents his being so considered.

Now, with regard to the observations respecting what took place on the 22nd of August. On that day, it seems that there was an order on the part of the Government that the Defendant should be taken back to prison, and the Sheriff's officer goes to the house where he is, for the purpose of taking him back to prison; because the contention is, that he was always in the custody of the Sheriff. In [58] the case on the part of the Appellant, it is stated that his wife resisted it, and told the Deputy-Sheriff that her husband was not legally in custody. The Respondents in their case state that his wife alleged her husband to be in a very bad state of health indeed, and that it would be very dangerous to remove him; and that she did not allege that he did not consider himself to be in the custody of the Sheriff at all. The Deputy-Sheriff, on account of what he considered to be the state of the Defendant's health, did not act upon the order, and remained quiet. The Sheriff's officers, however, still continued about the premises just the same as before; they never had notice to retire, or were warned off, or told to go about their business by the Defendant, but he continued in this house with these officers until the 3rd of December, and then he was taken back to the gaol. Then it is said, that it may be considered that on the 22nd of August, the Appellant revoked his consent, and that from that time he had a right to say that he was at large. But it is to be observed, that the custody, such as it was, remained just the same after the 22nd of August, until the 3rd of December, when he was taken back to gaol, and that there was no voluntary escape permitted by the Sheriff. It was not the intention of the Sheriff to let him go, or that he was to be in any different kind of situation from what he was before, nor was it the intention of the Respondents, nor, as far as I know, the intention of the Appellant; therefore, he was so detained from the first to the last under this agreement.

It is said that if parties can make such an arrangement as this, to substitute one place of imprisonment for another, the Sheriff will be placed in a very unfor-

[59]—tunate situation, and may be liable for an escape in a very different manner, and under very different circumstances from what he would be if the prisoner continued in the gaol itself; and that is very true. If the Sheriff had it communicated to him by the Plaintiffs that they were inclined to grant this indulgence to the prisoner, and that he might go to another house in the custody of the Sheriff's officers, I am not prepared to state that the Sheriff might not say, "I will not do any such thing; I have him here under a *capias ad satisfaciendum*, and unless you have a rule of Court for that purpose, I shall not consent to any such thing, because I cannot have the same strict custody over the party, and the means of keeping him in custody in another house (at this substituted prison as it were) that I have when he is in gaol, and, therefore, I will not consent to anything of the sort; if you mean to take him, discharge him; you have authority to do it yourself, and take him yourself; make your agreement as you please with him; I will have nothing to do with it." Still the Sheriff may consent to do it; and here the Sheriff did consent to do it; and all parties consented to it. I apprehend that the Sheriff, when the Defendant was in this private house with his officers about him, might be liable to an action for escape, if it appeared that he had not used proper care, if he had removed his peons, or had employed persons who had not taken sufficient care to prevent the prisoner from escaping. Still it would be, under all circumstances, for a jury to consider whether, being in some measure instrumental in it, a Plaintiff ought to recover against the Sheriff at all; it would be a question of fact to be decided under all the circumstances of the case.

[60] Now, really, under all these circumstances, the authorities which have been cited do not appear to bear distinctly (I do not mean to say that they do not bear indirectly) upon the case in question, and I feel that the Chief Justice at Bombay was perfectly right in saying that he had not been able to find any authority for saying distinctly, whether there could be such an arrangement as this or not. In his judgment he says:—"I have not, however, been able to find any case in which it has been actually decided that the Plaintiff may relax the rigour of imprisonment, without thereby entitling the Defendant to his discharge. In the absence of authority, therefore, we must be guided by the general principles of the law" (*ante* [10 Moo. P.C.], p. 47). It is perfectly true that there is no case, as far as I know, which goes to this particular point; but there is nothing to show that it is contrary to any principles of law that the creditor and the debtor may agree. The creditor may, under certain circumstances, or if he feels it to be really material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without discharging the debtor from his debt, it clearly not being the meaning of either party that any such discharge should take place.

I should observe, that this opinion must not be taken to go the length of supposing that it would be possible, for instance, for a Plaintiff to say to a Defendant, "Oh, you may go about just where you please, but it shall be considered that you are in custody;" because that would be a fallacy and an absurdity: but here was an actual removal from the gaol to a private house, and an actual custody of some sort [61] continuing, which was intended to continue as a *bona fide* custody, as far as we can judge from all the circumstances of the case.

Under these circumstances, we think that the judgment of the Court below is correct; that there is a distinction between the duty of the Sheriff to keep a man *in arcta et salva custodia*, and the question, whether or not any acts of the Plaintiffs have been such as to discharge the Defendant. They are totally different questions, and here there is clearly no intention to discharge the Defendant; there is no act done by the Plaintiffs which, in point of law, necessarily operates to that effect. It was not the intention of either party that he should be discharged; it was a matter of indulgence and kindness to him, and certainly he does not appear to have made a very grateful return for it. However, if in point of strict law he is entitled to be discharged, the law must take its course, whether he is grateful or not grateful, or whether it is a gracious proceeding on his part or not. There is, however, nothing in law to prevent this from being clearly a continuing custody of the Sheriff by the arrangement of the parties, and, therefore, we think that this appeal must be dismissed, and of course dismissed with costs.

The Lords of the Committee will, therefore, humbly recommend as their opinion



to Her Majesty, that the judgment of the Supreme Court of Judicature at Bombay, of the 3rd of January, 1856, ought to be affirmed, and this appeal dismissed, with costs.

[Mews' Dig. tit. ESTOPPEL, D. BY MATTERS IN PAIS, 12. *In other Cases*; tit. SHERIFF, H. ARREST BY SHERIFF, 13. *Action for Escape*. S.C. 5 W.R. 159, 6 Moo. Ind. App. 467. As to liability of Sheriff, for Escape, see Act VIII. of 1852, s. 8; and Sheriff's Act, 1887 (50 and 51 Vict., c. 55) s. 16.]

[62]

ON PETITION FROM HELIGOLAND.

JACOB SIEMENS,—*Appellant*: THE HEIRS OF BUFE.—*Respondents* \* [26th July, 1856].

Appeal allowed from a sentence of the Lieutenant-Governor of the Island of Heligoland; the sentence having been passed without hearing the Appellant's case.

Execution of sentence ordering a distribution of the property in dispute ordered to be stayed, pending the appeal.

Security ordered to be given in the Island by the Petitioner, for Respondents' costs, and also in the Privy Council Office, for costs of copying transcript and printing appendix to the Appellant's case.

The Petitioner, Jacob Siemens, applied in this case for leave to appeal from a sentence of the Lieutenant-Governor of the Island of Heligoland. The petition set forth that the Petitioner was one of the heirs and representatives of his mother; and that he had instituted a suit before the Court of Magistrates of Heligoland against the Respondents, the heirs of the late Bufo, for division of certain property held in partnership by Bufo and the Petitioner's mother. That the suit was heard before the Court of Magistrates of Heligoland, and the complaint of the Petitioner dismissed. That the Petitioner appealed to the Lieutenant-Governor of the Island, who by a sentence dated the 5th of June, 1856, confirmed the decision of the Magistrates, on the ground that the Petitioner had no claim on [63] the Respondents' estate, and the Petitioner alleged that the decision of the Lieutenant-Governor was taken and published without having heard the case of the Petitioner, either in person or by counsel, and prayed for leave to appeal, and that pending such appeal the distribution of the estate of the late Bufo might be stayed.

Their Lordships granted the application upon the terms contained in the following Order:—"Leave to be granted to the said Jacob Siemens to enter and prosecute his said appeal from the sentence of His Excellency the Lieutenant-Governor of Heligoland of the 5th of June last past, upon lodging in the Council Office a certificate from His Excellency the Lieutenant-Governor of Heligoland, that the Appellant hath given security by two sufficient sureties to be approved by His Excellency jointly and severally in the Island of Heligoland, in the sum of £100 sterling, conditioned to pay the costs of the Respondents in case their Lordships should so direct, and also upon making a deposit in the Council Office of a sum of money sufficient to cover the expense of copying the transcript and printing the appendix to the Appellant's case, and that His Excellency the Lieutenant-Governor ought to be directed to transmit to the Registrar of the Privy Council copies properly authenticated of the proceedings and evidence proper to be laid before Her Majesty in this case and necessary for the hearing of the said appeal, and that pending the said appeal the distribution of the estate of the late J. G. Bufo may be suspended until further order, with leave to all parties to apply to their Lordships' Board.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 1. *When an Appeal lies generally*, 6. *Practice*, k. *Stay of Proceedings*. Heligoland was ceded by Great Britain to Germany by an agreement dated 1st July, 1890, confirmed by Act

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

of Parliament (53 and 54 Vict., c. 32). As to special leave to appeal in civil cases, generally, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

[64] ON PETITION FROM THE ISLAND OF JERSEY.

ADOLPHUS JOHN D'ALLAIN,—*Petitioner*; SIR THOMAS LE BRETON, KNT.—  
*Respondent* \* [17th Feb., 1857].

The number of the Advocates entitled to practise at the Bar of the Royal Court of the Island of Jersey is by legal custom limited to six.

The right of nomination of an Advocate to practise in the Royal Court is vested in the Bailiff of the Island, by virtue of his office.

A petition to the Queen in Council, praying for an Order upon the Bailiff of the Island to admit the Petitioner to take the oaths and practise as an Advocate in the Royal Court, was referred to the Judicial Committee. The Bailiff put in an answer, stating, that by the law of the Island, the number of Advocates entitled to practise in the Royal Court was limited to six, and that that number was complete. Their Lordships held that, sitting as the Judicial Committee, they had no power to make the Order.

The object of this petition was to obtain for the Petitioner, a Barrister-at-law of the English Bar, the right to practise as an Advocate at the Bar of the Courts in Jersey.

The Respondent, Sir Thomas Le Breton, the Bailiff of the Island, insisted that the sole right to nominate Advocates to practise before the Royal Court was vested in him, and refused to allow the Petitioner to take the oaths of an Advocate, or to practise in the Courts in the Island, upon the ground that the number of Advocates was limited to six, and that there was no vacancy. The petition set forth that in the month of August, 1854, Mr. Horman resigned the office of Advocate at the Royal Court of Jersey in order to accept the office of [65] Deputy Viscount in the Island. That the Bailiff had by custom the nomination of the Advocates entitled to plead before the Royal Court. That on the 31st of August, the Petitioner applied by letter to the Bailiff for a place at the Jersey Bar. That on the 2nd of September, the Bailiff, in his official capacity presiding over the Royal Court for the Island of Jersey, informed the Court that Mr. Horman had resigned the place of Advocate in consequence of his being named to the situation of Deputy Viscount, and that immediately after such announcement Horman took the oaths usual and necessary. That shortly afterwards the Petitioner received from the Jurats of the Royal Court a certificate or letter of recommendation, which, on the 30th of September, 1854, he gave to the Bailiff, who, on the receipt thereof, informed him, that he would give him an answer thereon shortly. That on the 5th of October, 1854, the Court or Assize of Heritage was held for the first time that term, and that, as, according to ancient custom, Advocates were obliged, on this first holding of the Court of Heritage, to renew their oaths of office, when such were about being administered, Horman presented to the Royal Court a petition or plea, to the effect "that he should be allowed to prove that the places of Advocate and Deputy Viscount were compatible, and also to renew the oaths of Office." That the Bailiff told Mr. Horman, that he had resigned the place of Advocate, besides that he was Deputy Viscount, and that no man could be both Advocate and Deputy Viscount at the same time, and, therefore, that he (the Bailiff) refused to submit his plea to the Court. That on the 11th of October, 1854, the Bailiff informed the Petitioner that he had chosen [66] him for a place at the Bar, and that on the 19th of the same month, that nomination was confirmed in the Petitioner's favour by the Bailiff. That at the same time Horman preferred before Her Majesty in Council a Doleance against the Bailiff.

Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.



for refusing to admit him to take the oaths of an Advocate. That on the 27th of January, 1855, Mr. Horman presented a Remonstrance to the Royal Court of the Island against the Bailiff. That in consequence of this Remonstrance, two different suits relating to the same subject-matter were instituted at the same time, between the same parties in two different Courts, one of which was the Court of appeal from the other. That after the Remonstrance had been read to the Court, the Bailiff informed the Court that the whole affair was in consequence of a misunderstanding, he the Bailiff having supposed Horman to have resigned the place of Advocate, and that by his present tendered resignation of the place of Deputy Viscount, the exercise of which he considered as incompatible with the former, all obstacles disappeared, and he thought he ought to admit Horman to take the oaths of an Advocate. That thereupon the Petitioner demanded to intervene in the case, setting forth, among other things, in his plea "That he was named by the Chief Magistrate to the place of Advocate, that he was ready to prove the express resignation of the place of Advocate made by Mr. Horman, and that since the matter had been referred to the Royal Court by Horman himself, the Royal Court alone could decide on the question raised." That the Bailiff then declared, that he should neither receive, nor submit to the Court, the demand of intervention made by the Petitioner, that the nomination of the members of the [67] Bar was one of the prerogatives of his office, and that the Court could not discuss his prerogative, or give any decision which might affect the exercise of it. That he the Bailiff acknowledged that he had named the Petitioner to a place at the Bar; but said that at the time he had done so he considered that Horman had ceased to be an Advocate, and he persisted in the determination he had expressed to admit Horman to take the oaths of an Advocate. That the Bailiff then declared, "By virtue of my prerogative, I name you, Horman, an Advocate," and that he immediately afterwards admitted him to take the oaths of office. That the Bailiff refused to place on record the decision made by him alone, as regarded the demand of intervention, and thereby prevented the Petitioner from appealing therefrom to Her Majesty in Council, there being nothing on the record to review. That on the 21st of June, 1856, the Petitioner addressed a letter to the Bailiff, requesting him to admit the Petitioner to take the oaths of an Advocate, and to practise as such in the Court over which he presided. That on the 26th of the same month, the Petitioner received from the Bailiff a letter, in which he declared himself unable to comply with the Petitioner's application. That there were at present six Advocates, who were entitled to plead before the Royal Court of the Island of Jersey. And the petition further alleged, that there were many cases within the Petitioner's knowledge, which could not be pleaded for want of duly-qualified persons to plead them. That there were several provisions of the written law, which could never have been executed if the Bar had not been open, or, at all events, if there had not been more Advocates entitled to practise than there were at present, and the Petitioner, after submitting that he had not been able to find that any special law abrogating the provisions of the written law, or limiting the number of Advocates entitled to practise at the Jersey Bar, had received the sanction of the Crown, he prayed that an Order might be directed to Sir Thomas Le Breton, Bailiff, to transmit an answer to his petition, and that he should admit the Petitioner to take the oaths of an Advocate, and to practise in the Royal Court of the Island of Jersey, and that in the meantime, and until the final determination of the matter, Sir Thomas Le Breton should not appoint any other Advocate to practise in the Royal Court.

This petition having been served on Sir Thomas Le Breton, he appeared and put in an answer, whereby he disclaimed personally having any objection to admit the Petitioner, but submitted that, by virtue of his office, it was a right vested in him to nominate Advocates. That the number of Advocates was by legal custom limited to six, and there was no vacancy at the Bar of the Royal Court, and that he had no power to admit more, and he entered into a full explanation of the manner in which Horman had resigned, and his subsequent re-admission as an Advocate.

The Petitioner put in a case, in which he insisted, that no written law limited the number of Advocates entitled to plead before the Courts in the Island to six, and he urged and illustrated the great inconvenience, delay, and expense, which had been experienced by suitors before the Royal Court, in consequence of there

being a limited Bar, and submitted that it appeared from several provisions of the written law in force in the Island, that such law never could have been executed if the Bar had not [69] been open, or, at all events, if there had not been more Advocates entitled to practise than there was at present. In support of which he referred to Rouillé, tit. *De Conteurs*, ch. lxiv. fo. 86, where, among other things, it is stated, that each party to a suit is allowed to have four Advocates to advise and one to plead. Also to Basnage, tome ii. p. 504, who lays it down, that the publication in a bankruptcy of a landed proprietor must bear the signature of the Judge and Advocates, who must be to the number of seven; and he further submitted that since the annexation of continental Normandy to the Kingdom of France, the powers of the Court of Exchequer of Normandy had been vested in Her Majesty in Council; who, consequently, as regarded Jersey, was invested with judicial and legislative authority.

Mr. Rolt, Q.C., and Mr. W. B. Turnbull, for the Petitioner.—Two points arise upon this petition:—First, we insist that a vacancy having occurred by the resignation of Horman, and his acceptance of the office of Deputy Viscount, the nomination of the Petitioner as an Advocate by the Bailiff was effectual, and ought to have been carried out by the swearing in of the Petitioner as an Advocate; and that the re-admission of Horman by the Bailiff, to practise as an Advocate, was a violation of good faith, and illegal. No objection is raised to the fitness of the Petitioner for the discharge of the duties of an Advocate. Secondly, Even if no such vacancy had occurred, there is no written law in force in the Island, either to be found in the *Grand Costumier de Normandie*, Rouillé, Basnage, Terrien, and Berrault, or in Acts of the States, [70] Charters, or Orders in Council, which are the recognized authorities of the law of Jersey, which restricts or limits the number of Advocates to six, as being alone entitled to practise at the Bar of the Courts there. Rouillé, tit. *De Conteurs*, ch. lxiv. fo. 86, Basnage, tome ii. p. 504, are authorities to show that the Bar is not so restricted. The Bar of the Exchequer in Normandy was open, and upon admission to that Bar, an Advocate could practise in any Court in Normandy. Rouillé, tome ii. p. 32. No special law limiting the number of Advocates can be found to abrogate the written law thus expounded by Rouillé and Basnage. No mention is made in the *Grand Costumier de Normandie* of any peculiar local custom in the bailiwick of Jersey in that respect. But, even if any such power of limiting or restricting the number of the Bar exists at all, the existing limitation or restriction of the number to six is not absolute and final, and such rule ought to be reviewed, and, in the present circumstances of the Island, the number of Advocates enlarged, as the limitation insisted on is insufficient for the purposes of justice.—[Dr. Lushington: This petition is referred to us sitting as the Judicial Committee. It was different in the case of The States of Jersey (9 Moore's P.C. Cases, 185). The reference there was of a legislative nature, relating to a question of taxation of the inhabitants of the Island.]—The Court of Exchequer in Normandy had legislative powers, which, as regards the Island of Jersey, is now vested in Her Majesty in Council.

Mr. R. Palmer, Q.C., and Mr. Le Breton, for Sir Thomas Le Breton, the Bailiff.—[71] The Bailiff appears only in deference to this Court. No case has been made by the Petitioner to entitle him to be incumbent of the office of an Advocate of the Royal Court at Jersey. The Bailiff has by virtue of his office the sole right to nominate Advocates, Le Geyt, tome iv. p. 144, but such nomination can only be made when there is an actual vacancy. There was no vacancy when the Bailiff nominated the Petitioner. Horman's forced resignation was under an erroneous view of the law. The holding of the office of Deputy Viscount was not incompatible with being an Advocate. A Recorder in this country, or a Revising Barrister, is entitled to practise in the Courts. The number being full, the Bailiff had no power in law to order the Petitioner to be sworn in as an Advocate. The number of Advocates entitled to practise is, by immemorial usage and custom, restricted to six. Falle's Hist. of Jersey, p. 215 (2nd Edit., Lon. 1734). Le Gyet, tome ii. p. 308, expressly states it so. "*Ce partage d'Avocats est d'autant plus nécessaire à Jersey, que leur nombre n'y est que de six.*" And no more can be appointed. First Report of Commis. on the State of the Criminal Law of Jersey, 1847, p. xxxii. (see also Le Quesne, Const. Hist. of Jersey, where it is laid down at pp. 19 and 26 that the Bailiff nominates the



Advocates, the number being limited to six). The officers of the Crown, the *Procureur-Général* and *Avocat de la Reine*, have indeed the same right to practise, but it is in their official character only. What power has this Court to order the Bailiff to swear in the Petitioner as an Advocate? In the case of *The King v. The Archbishop of Canterbury* (8 East. 212) the Court of King's Bench [72] held that a mandamus would not lie to the Archbishop of Canterbury to issue his fiat to the proper officer for the admission of a Doctor of Civil Law as an Advocate of the Court of Arches. This Court has no power to do what is asked by the Petitioner. Its functions are judicial only, not legislative. A case somewhat analogous to the present occurred here some years back. *Le Gallais v. De Veulle* (a). In that case, complaint was made to the Bailiff that two *Dénonciateurs* were insufficient for the duties of their office, and the Bailiff of the Royal Court of the Island accordingly appointed a third. It was held to be *ultra* [73] *vires* his authority, and the appointment was set aside, as the office was limited by custom to two only, and it required a special legislative enactment to increase the number. So it must be in this instance. The objection of the Petitioner that there is no passage in any written law contained

(a) PHILIP LE GALLAIS and Others,—*Petitioners*; Sir JOHN DE VEULLE, Knt., and Another,—*Respondents* \* [May 9, 1833].

The Bailiff of the Island of Jersey has no authority to appoint a third *Dénonciateur* of the Royal Court of the Island.

An appointment of a third *Dénonciateur* made by the Bailiff, upon the ground that two *Dénonciateurs* were insufficient for the efficient discharge of the duties of the Office, upon Petition to the Queen in Council, by the Deputy Viscount and the two *Dénonciateurs*, held null and void.

This was a Petition by Philip Le Gallais, Deputy Viscount of the Island of Jersey, John Aubin and Hugh Godfray the younger, *Dénonciateurs* (1), of the Royal Court, complaining of the appointment by the Respondent, John De Veulle, the Bailiff of the Island, of a third *Dénonciateur*, as an infringement of their rights, and *ultra vires* the authority of the Bailiff.

The case arose under the following circumstances:—

In the year 1832, great complaints were made to the then Bailiff, Sir John De Veulle, that the number of the *Dénonciateurs* was insufficient and required to be increased. On referring to the rolls of the Royal Court, it was found that, prior to the year 1645, there had been only one *Dénonciateur*, and that in that year the then Bailiff had appointed a second. It was thought, therefore, by the late Sir John De Veulle, that, as one of his predecessors had within legal memory increased the number of *Dénonciateurs*, he had the power to add to their number, and he accordingly appointed a third.

The Petitioner's case was argued by Sir James Scarlett, K.C., and Dr. Lushington; and by Mr. Pemberton, K.C., and Mr. Follett, K.C., for the Bailiff.

The judgment of their Lordships was pronounced by

The Lord Chancellor.—Their Lordships are of opinion that there is no authority shown in the Bailiff to make the appointment of the third *Dénonciateur*. That, therefore, the appointment is null and void, and must be treated accordingly.

With regard to the appointment of a second *Dénonciateur*, that appointment has been acquiesced in for two hundred years, that would of itself be nothing, it is long within legal memory, but still it may be evidence from that length of time, and after the long acquiescence in it would be evidence of an ancient office suspended or dormant at that time, or might be taken as evidence of a power to appoint to a number not exceeding two *Dénonciateurs*, as the business might require.

\* Present: The Right Hon. The Marquis of Lansdowne (Lord President), the Right Hon. The Lord Chancellor Brougham, the Right Hon. Sir John Leach, the Right Hon. Lord Melbourne (Home Secretary), and the Right Hon. The Vice-Chancellor Sir Lancelot Shadwell, Knt.

(1) As to the duties of these officers of the Royal Court, see Falle's Hist. of Jersey, p. 215 (2nd Edit., Lon. 1734).

in the *Grand Coutumier de Normandie*, Rouillé or Basnage, limiting the Bar to six, is untenable. We rely upon immemorial usage of a legal custom, which enjoyment, as the Chief Justice Tindal says in *The matter of the Serjeants at Law* (6 Bingh. N.C. 238), is the most solid of all titles.

[74] The Right Hon. Dr. Lushington.—This petition prays that the Petitioner may be admitted to take the oaths of an Advocate, and to practise as such in the Royal Court of the Island of Jersey. Upon the petition two questions arise: First, whether there was any vacancy; and, second, whether the number of Advocates in the Royal Court is limited, as alleged, to six. Now, their Lordships are of opinion that it is unnecessary for them to pronounce any opinion as to the incompatibility of Mr. Hornum being an Advocate, and holding the office of Deputy Viscount at the same time, unless they should be of opinion that by the law of Jersey such union of offices was illegal; but that has not been shown to be so. Upon the second point, we are of opinion that we cannot interfere as the case stands. The Bailiff's return is, that the number entitled to practise is complete, and that he has no power to appoint more. It was insisted by the Petitioner, that he was nominated an Advocate by the Bailiff. Now, what does a nomination to the Bar amount to? For we take it to be clear that there must be a nomination. There is certainly strong evidence of the promise of the Respondent, the Bailiff of the Island, to appoint the Petitioner to the office of an Advocate of the Royal Court, and that he so signified to the Petitioner such intention; but that is not sufficient, it is indispensably necessary that there should have been an actual nomination, and that the nominee appointed should take the oath before he can be admitted to practise. We cannot take upon ourselves to advise Her Majesty to make an Order allowing the Petitioner to practise, without such a nomination and admission [75] by the Bailiff. That would open a very large field; and it would be necessary to decide the point whether Her Majesty has such authority, which we do not feel at liberty to do; we must take into consideration now, not so much the intention of the Bailiff to nominate the Petitioner an Advocate, as our power under the reference made to us to advise the Crown to order the Respondent, as Bailiff of the Island, to nominate and admit him, by allowing him to take the necessary oaths as an Advocate. With regard to our jurisdiction, as well as to the argument of the inconvenience arising from a limited Bar, we must observe that this petition is not referred to us as a legislative body having legislative authority, or to advise the Crown acting in its legislative capacity, but as members of the Judicial Committee of the Privy Council, possessing only power to advise the Crown judicially. We are, therefore, under the necessity of refusing to comply with the prayer of the petition: but, as we think the Petitioner was justified in obtaining the opinion of their Lordships, we do not think it is a case for costs (a).

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 13. *Jersey and Guernsey, c. Laws*. See now *In re the Jersey Bar*, 1859, 13 Moo. P.C. 263.]

## [76] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA

GOOROOCHURN SEIN.—*Appellant*: RADANAUTH SEIN and others.—

*Respondents* \* [June 15, 1857].

After an appeal from Calcutta had been set down for hearing, intelligence reached England shortly before the day appointed for the hearing, that the Appellant had been adjudged an Insolvent under the Indian Insolvent Act, 11th Vict., c. 21.

(a) A Bill or "Projet" was introduced into the States of Jersey, on the 5th of February, 1857, for throwing open the Bar of that Island, but was afterwards abandoned.

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir William H. Maule.



Upon the appeal being opened, the Court postponed the hearing for six months, to enable the Official assignee in Insolvency in Calcutta, to revive the appeal and prosecute the same; and in default, the appeal to be dismissed; and directed the Respondents to serve the Official assignee in India with such notice.

No steps having been taken by the Official assignee within the time limited for prosecution, their Lordships refused a further extension of time, and dismissed the appeal.

After this case was set down for hearing, intelligence reached this country just before the day appointed for hearing, that the Appellant had been declared an Insolvent under the provisions of the Indian Insolvent Act, 11th Vict., c. 21, and that by an Order of the Court for the relief of Insolvent debtors at Calcutta, dated the 25th of February, 1857, the estate and effects of the Appellant were vested in the Official assignee of that Court. The fact of the insolvency of the Appellant, and the vesting of his estate, was verified by an affidavit of the Respondents' agents in the appeal. No communication from the Official assignee of the Insolvent Court at Calcutta had been received at the Council Office.

[77] Mr. R. Palmer, Q.C., and Mr. Leith, for the Appellant, Offered to proceed with the appeal, if the Court would permit the hearing.

Mr. Rolt, Q.C., and Mr. W. Knox Wigram, for the Respondents, Submitted that the Court had no authority to bind the Official assignee in Insolvency, in his absence, by any order they might make in the appeal.—[The Lord Justice Knight Bruce: We have no authority.]—That being so, we then ask that the appeal be revived within a reasonable time by the Official assignee in Insolvency, or that the same be dismissed with costs.

The Lord Justice Knight Bruce.—It is impossible to make an Order binding, in his absence, the Official assignee in Insolvency at Calcutta; therefore, their Lordships cannot now enter into the merits of the appeal. The course their Lordships will pursue is this, to let the appeal stand over for a limited time; the Respondents to serve the Official assignee in Insolvency with notice, that unless the appeal be effectually revived, so as to be ripe for hearing at the sittings of this Court in February next, it will be dismissed with costs; liberty being given to the Official assignee in Insolvency to take such steps as he may be advised.

By the Order made thereon, it was directed that the hearing of the appeal should stand over till the sittings of the Judicial Committee after Hilary Term, 1858, in order that notice should be served by the Respondents on the Official assignee of the Court [78] for relief of Insolvent debtors at Calcutta, and, that the Official assignee should be at liberty to take such proceedings as he might be advised herein, in default of which their Lordships would dismiss the appeal.

This order was served on the 8th of August, 1857, upon the Official assignee at Calcutta, but no steps were taken by him to revive and prosecute the appeal.

Mr. R. Palmer, Q.C. (Feb. 5, 1858), Now moved on behalf of the Appellant for an extension of the time for reviving the appeal. The application was supported by an affidavit of the Appellant's agent in London, stating, that there was a prospect of the Appellant arranging with his creditors so as to supersede the adjudication of insolvency.

Mr. Rolt, Q.C., in opposition.—The delay has already been prejudicial to the Respondents. The Official assignee in Insolvency has been served with notice so long back as the 8th of August last, but he does not appear, or ask for time. The Order of the Court made in June was conclusive that the appeal was to be revived by this sitting, or in default to be dismissed.

The Lord Justice Knight Bruce.—It was clearly understood at the last sittings that the Appellant was in no circumstances to be heard. Justice to the Respondents requires that there should be no further delay. The Official assignee in Insolvency has been served with notice so long ago as August last, but has not revived or even appeared here. The appeal must be dismissed, but each party must pay their own costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice, c. Dismissal for want of prosecution*.]

## [79] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

CONSTANTINO PANAGIN CREMIDI.—*Appellant*: WILLIAM PARKER, and FRANCIS HART DYKE. Her Majesty's Procurator-General.—*Respondents* [July 10, 1856,\* and Feb. 23, and Mar. 2, 1857 †].

## THE "ASPASIA" (a).

By the 37th section of the Statute, 17th and 18th Vict., c. 18, the right of appeal from the High Court of Admiralty in England is limited to three months from the date of the sentence, liberty being reserved to the Judicial Committee, to allow, upon sufficient cause being shown, the appeal to be prosecuted after the expiration of that period [11 Moo. P.C. 85].

Motion by a Claimant, the owner of the cargo, upon notice to the Captor, for leave to appeal from a sentence of the Admiralty Court in England, pronounced *in poenam contumaciae*, fifteen months after the capture. The proceedings in England were unknown to the owner of the cargo, and the sentence of condemnation not having been communicated by the Captors to the owner, he had no knowledge thereof until long after the time for appealing had expired. On the motion coming on, it appeared that no petition for leave to appeal had been lodged or referred to the Judicial Committee. Their Lordships refused to entertain the motion, except upon an undertaking to lodge a petition of leave to appeal [11 Moo. P.C. 82].

Appeal allowed, subject to the presentment of such petition of appeal, on payment of costs, upon terms of extracting the inhibition, and prosecuting the appeal within three months, bail being given for payment of the Captor's costs [11 Moo. P.C. 84].

Practice where an appeal is allowed after notice and the Respondent applies to rescind the leave given [11 Moo. P.C. 85].

This vessel under Moldavian colours, laden with a cargo of Moldavian soft wheat, the property of one [80] Cimara, of Constantinople, and a subject of the Ionian Islands, whilst in the prosecution of a voyage from Galatz to Constantinople, Leghorn, or Marseilles, as the owner of the cargo might direct, was, on the 27th day of June, 1854, captured as prize by Her Majesty's steam ship-of-war *Firebrand*, and sent to Constantinople. Some months after the arrival of the brig and cargo at Constantinople, M. La Fontaine, as the agent of the British Fleet at Constantinople, consented to the release of the ship and cargo, on a bond being given to pay over to him the value of the ship and cargo, in the event of their being condemned as prize. Such bond was accordingly given, and the vessel and cargo were released. No proceedings whatsoever to adjudicate upon the vessel and her cargo were taken on behalf of the Captors until the 28th of September, 1855, when a monition was issued at the instance of the Captors from the Admiralty Prize Court of England, which monition was served on the Royal Exchange, in the city of London, and was returned into Court on the 6th of November, 1855, on which day the vessel and her cargo were condemned as lawful prize, by reason of no claim having been given in for either of them. The owner of the cargo, had not any [81] notice, as it appeared, and knew

\* Present—Upon hearing of a motion for leave to appeal: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

† Present—Upon the hearing of the appeal: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson.

(a) Three ships, The *Aspasia*, The *Achilles*, and The *Gerasimo*, were seized for breach of the blockade of the Black Sea, and condemned by the High Court of Admiralty of England as prize. Appeals were interposed from each of these sentences, and separately argued before the Judicial Committee. As these appeals related to the same subject-matter, their Lordships gave but one judgment, which embodied the principal facts common to each, and which are contained in the case of The *Gerasimo*, post, p. 88.



nothing whatever of the proceedings in the High Court of Admiralty in England, and, from the great lapse of time from the capture, believed that no proceedings would be taken for obtaining condemnation either of the ship or her cargo. The first intimation which he had of the proceedings was on the occasion of the party who had given bail for the cargo being called upon, about the end of May, 1856, to pay the sum of £1002 7s. 10d. sterling, the nett proceeds of the sale of cargo. These facts were deposed to in the affidavit of the Claimant, Cremidi, the agent in London of the owner of the cargo, who was authorised, so far as the cargo was concerned, to appeal from the sentence of the Prize Court of Admiralty of England, condemning the cargo as prize.

A motion was now made for leave to appeal from the sentence of the Admiralty Prize Court of England, pronounced on the 6th of November, 1855, so far as it condemned the cargo of *The Aspasia* as prize. Notice of this application was given to the Captors' proctor, but no petition of appeal had been lodged by the Claimant, so as to bring the motion within the general Order referring appeals and petitions to the Judicial Committee of the Privy Council.

Upon the motion coming on, it was opposed on behalf of the Captors by the Queen's Advocate (Sir John Harding), and the Admiralty Advocate (Dr. Phillimore), who submitted that the Court had no jurisdiction to entertain the application, as the matter had not been [82] referred to the Judicial Committee, and relied upon *Cutto v. Gilbert* (9 Moore's P.C. Cases, 131. See also, *How v. Kirchner*, ante, p. 21).

The Right Hon. T. Pemberton Leigh.—Their Lordships are disposed to allow the motion to be heard if the Claimant will undertake to present a proper petition for leave to appeal (for the practice upon this point, see *In re Minchen*, 6 Moore's P.C. Cases, 43; *Morgan v. Leech*, 3 Moore's P.C. 368).

Upon the Claimant so undertaking, the motion proceeded.

Dr. Addams, and Dr. Twiss, in support of the application.—The Claimant is a foreigner and entitled to every indulgence, especially as the sentence was pronounced *in poenam contumaciae*, 2 Wynne's Life of Sir Leoline Jenkins, p. 743, to enable him to purge himself by way of appeal. This Court, in *Harrison v. Harrison* (4 Moore's P.C. Cases, 96), admitted an appeal from a sentence pronounced *in poenam contumaciae*. It is not usual to condemn goods for want of a claim till a year and a day has elapsed after service of process. Rob. Coll. Mar. pp. 88-9. *The Harrison* (1 Wheaton's Amer. Rep. 298); *The Avery and Cargo* (2 Gallison, Amer. Rep. 387); *The Aquila* (1 Rob. 41). Here no steps were taken by the Captors to proceed to adjudication for more than fifteen months after the capture, and such laches entitle the Claimant to restitution, *The Huldah* (3 Rob. 235); the owner of the cargo was induced to suppose that the proceedings were abandoned. Moreover, the Captors did not send out the sentence [83] of condemnation until three months had expired from the sentence, and thus deprived the Claimant of his right of appeal, given by the Prize Act, 17 and 18 Vict., c. 18, sec. 37. An appeal in a prize case was limited by the Statute, 43 Geo. III., c. 160, s. 27, to twelve months after the sentence, but the Lords of Appeal admitted appeals beyond that time, *The Jacob* (1759, cited from Lord Hardwick's MS.). The Claimant in this case was ignorant of the proceedings taken by the Captors, and it is, therefore, a case for the exercise of the discretion vested in the Judicial Committee, by the Prize Act, 17 and 18 Vict., c. 18, sec. 37, to admit an appeal.

The Queen's Advocate [Sir John Harding], and the Admiralty Advocate [Dr. Phillimore], contra. The Prize Act, 17 and 18 Vict., c. 18, sec. 37, limits the time for appealing to three months. The cases referred to relating to appeals against sentences pronounced *in poenam contumaciae*, and extending the time in such cases beyond a year and a day, do not apply; the Prize Act, 17 and 18 Vict., c. 18, sec. 37, having concluded such rule of the Civil law. No merits are disclosed to entitle the applicant to such an indulgence.

The Right Hon. T. Pemberton Leigh.—This is an application for leave to appeal so far as relates to the cargo of *The Aspasia*, against a sentence of the Court of Admiralty in England, which condemned *in poenam contumaciae* the vessel and cargo as lawful prize. By the Prize Act, 17 and 18 Vict., c. 18, sec. 37, the old rule of allowing twelve months to appeal as provided by the Statute, 43 Geo. III., c. 160,

sec. 27, is cut down to three months, if the appeal is [84] from the sentence of the High Court of Admiralty of England; power, however, is reserved in that section, for this Court to admit, upon sufficient cause being shown, an inhibition to be extracted and the appeal to be prosecuted notwithstanding. The affidavit of the Claimant here states that the omission arose from the Captors not taking the proper steps to obtain the condemnation of the vessel, and from the Claimant's ignorance of the proper course to pursue. Now, it is clearly the duty of the owner to employ a proper agent to watch the proceedings, but at the same time it is impossible to believe that he negligently and wantonly abstained from prosecuting this claim; therefore, it must be attributed to his ignorance and not to an abandonment of his claim. We are, therefore, of opinion that we ought not, in such circumstances, to exclude a party who shows merits, from bringing his appeal, but such permission must be subject to stringent conditions. Leave will be given to Cremidi on the usual claim being filed, to extract the inhibition and to prosecute an appeal from the sentence of the Admiralty Court, provided that within three months from this day the usual bail be given to answer the costs of the appeal, and also to pay the costs of this application.

These conditions having been complied with, the appeal was set down for hearing, when the Queen's Advocate, and the Admiralty Advocate, for the Captors, moved to rescind the Order allowing leave to appeal. They relied upon *The Aquilla* (6 Moore's P.C. Cases, 102) in support of this course.

[85] Dr. Addams, and Dr. Twiss, for the Appellant, opposed, citing *The Acery and Cargo* (2 Gallison, Amer. Rep. 387).

The Right Hon. T. Pemberton Leigh.—This application is to discharge an Order of their Lordships, giving leave to prosecute an appeal from the High Court of Admiralty of England in a prize case, notwithstanding three months had elapsed from the date of the sentence complained of. Applications for leave to appeal are generally made *ex parte*, and if it subsequently appears that there has been any *malu fides*, upon a counter petition by the Respondent to dismiss, the Order allowing leave to appeal is discharged. That is the practice of this Court (see *In re Ames*, 3 Moore's P.C. Cases, 413; *Sibnarain Ghose v. Hulladhar Dass*, 9 Moore's P.C. Cases, 354), but that was not the course adopted here, for the Claimant gave notice to the Captors, who had every opportunity of resisting the application, which they did. The facts of the case were then very fully gone into, and nothing now appears to justify us rescinding the Order granting leave to appeal.

The appeal was then proceeded with. The authorities cited are referred to in the case of *The Gerasimo* (post [11 Moo. P.C.], p. 88), where the principal facts of the case relating to the national character of the owners of the cargo, and the seizure and condemnation, are fully set forth.

Judgment was reserved and delivered after the argument in the case of *The Gerasimo* (post [11 Moo. P.C.], pp. 88, 118).

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to Appeal*.

See now Prize Rules, 1898 (O. in C. Oct 20, 1898, Stat. R. and O. 1898, pp. 905 *et seq.*), rr. 229-234; and, as to appeals from Colonial Courts of Admiralty, O. in C. of July 18, 1898, *ib.* pp. 1124-1268, rr. 229-234. As to statutory law of prize generally, see the Prize Rules, 1898, above mentioned, the Naval Prize Act, 1864 (27 and 28 Vict., c. 25), and Holland, *Man. Nav. Prize Law*. By s. 18 of the Judicature Act, 1873 (36 and 37 Vict., c. 66), and s. 4 (3) of the Judicature Act, 1891 (54 and 55 Vict., c. 53), the jurisdiction of the Judicial Committee over any judgment or order of the High Court of Admiralty was, except as to prize, transferred to the Court of Appeal.]



## [86] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

CONSTANTINO PANAGIN CREMIDI.—*Appellant*; WILLIAM PARKER, Esq., and FRANCIS HART DYKE, Her Majesty's Procurator-General,—*Respondents* \* [July 15 and 17, 1856, and March 4, 1857].

## THE "ACHILLES."

Appeal to the Judicial Committee, allowed from a sentence of the Admiralty Court in England, in a prize case, although more than three months (the time limited by the Statute, 17 and 18 Vict., c. 18, sec. 37) had elapsed since the date of the sentence.

Further proof granted to Claimant by the appellate Court as to ownership.

This vessel, under Wallachian colours, laden with a cargo of wheat, the property of Paolo Focco, of the Island of Cephalonia, a subject of the Ionian Islands, on a voyage from Galatz to Leghorn, was captured on the 21st of June, 1854, by Her Majesty's ship *Firebrand*, whereof the Respondent, Parker, was Commander, when coming out of the Sulina mouth of the Danube, for breach of blockade, and sent to Constantinople. The ship and cargo were liberated on bail, and proceeded against fifteen months afterwards in the High Court of Admiralty of England. The owner of the ship and cargo, having no notice of the [87] proceedings in the High Court of Admiralty, did not appear, and no claim being made, the ship and cargo were condemned by a sentence of that Court, dated the 6th of November, 1855, as prize. Application was now made for leave to appeal from that sentence of condemnation. Their Lordships granted the application upon the same terms as in the case of *The Aspasia* (*ante* [11 Moo. P.C.], p. 84), and admitted further proof by the Claimant as to the ownership of the property seized.

The circumstances of the case were nearly identical with *The Gerasimo*, and the principal facts and questions out of which the appeal arose, are contained in the judgment of their Lordships in the case of *The Gerasimo* (*post* [11 Moo. P.C.], p. 88).

The appeal was argued by Dr. Addams, and Dr. Twiss, for the Appellant; and by The Queen's Advocate (Sir John Harding), and the Admiralty Advocate (Dr. Phillimore), for the Respondents.

[See note to last preceding case.]

## [88] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

CONSTANTINO PANAGIN CREMIDI,—*Appellant*; RICHARD ASHMORE POWELL, and FRANCIS HART DYKE, Her Majesty's Procurator-General,—*Respondents* † [March 2, 3, and 4, 1857].

## THE "GERASIMO."

The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country, has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the Power under

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

† Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir John Patteson.

whose dominion he carries it on, and as an enemy of those with whom that Power is at war [11 Moo. P.C. 96].

Nature of the possession which the Russians held of the Principalities of Wallachia and Moldavia, in the years 1853-4 [11 Moo. P.C. 101].

Enquiry into and illustration of the political position of those Principalities [11 Moo. P.C. 101].

Circumstances which convert a friendly or neutral territory into an enemy's country, considered [11 Moo. P.C. 96].

A temporary occupation of a territory by an enemy's force, does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies [11 Moo. P.C. 96 *et seq.*].

A ship under Wallachian colours, with a cargo of corn belonging to owners residing at Galatz in Moldavia, was seized for breach of the Black Sea blockade, when coming out of the Sulina mouth of the Danube, then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia, but such holding was with the expressed intention of not changing the national character, or incorporating that country with Russia. Upon appeal, held (reversing the sentence of the Admiralty Court of England), that the national character of the owner was not changed by the fact of the Russians so occupying the Principalities, and restitution decreed, with costs and damages [11 Moo. P.C. 105, 118].

The purpose of the blockade was declared to be for preventing the import of provisions to the enemy in possession of a neutral's country. *Seemle*. The fact of a neutral ship bringing out a cargo of corn is not a breach of such blockade [11 Moo. P.C. 116].

It is the duty of the Captor, as soon as possible, to send a prize to some convenient port in Her Majesty's dominions for adjudication, and to procure the examination in preparatory of the principal officers of the captured vessel, and to deposit in the Admiralty Court all papers found on board the prize. Penalty for neglect of these rules [11 Moo. P.C. 117].

This was the case of a Wallachian ship, laden with a cargo of Indian corn, the property of Messrs. Epaminonda Pana and Co., merchants at Galatz, subjects of the Ionian Islands. The ship left Galatz in the month of July, 1854, bound to Trieste in Austria, [89] and on the 19th day of July was captured by Her Majesty's steamship-of-war *Vesuvius*, coming out of the Sulina mouth of the Danube, for a breach of the blockade of that river, and sent to Constantinople. The ship was released upon security being given, but the cargo was sold at Constantinople. No tidings having been heard of the proceeds, and the Captors not having taken any proceedings against the proceeds, or to condemn the ship as prize, proceedings were commenced in the High Court of Admiralty of England, by the Claimant, on behalf of the owners of the cargo, to compel the Captors to proceed to adjudication.

The present claim for the restoration of the cargo was made on the 21st of June, 1855. On the 23rd of June, the Claimants' proctor took out a monition against the Captors to proceed to adjudication. The Captors brought in an affidavit of Mr. Young, from which it appeared that Mr. Nicholson (a Commissioner sent out by the Court of Admiralty to Constantinople) [90] had proceeded thither on this case, and also on the cases of *The Aspasia* [11 Moo. P.C. 79], and *The Achilles* [11 Moo. P.C. 86], for the purpose of examining witnesses and a return from him, with papers annexed, was brought into Court.

The ship was condemned on the 2nd of November, 1855, no claim having been made in respect of her.

On the 14th of November, 1855, the claim for the cargo came on for hearing, when it appeared by the claim that the real owners were Epaminonda Pana and Co., described as subjects of the Ionian Islands, the place of their actual residence not being set forth. The Claimant, Cremidi, appeared to be their agent in London. The Claimant prayed for a decree of restitution, with costs and damages. The Crown prayed for a decree of condemnation. The Court admitted the claim for the cargo, and directed further proof to be given by the Claimant as to the cargo being the property of his principals, and allowed both parties to bring in further



proof as to the non-examination of witnesses by the Captors in preparatory, and also whether there was any agreement for the sale of the cargo. The Captors' proctor filed an affidavit of the Respondent, Powell, and of La Fontaine, explaining the reason of the omission to examine the master and crew in preparatory, as they had quitted the vessel, and also as to the sale of the cargo. The Claimant in further proof brought in a bill of lading of the cargo, and a *pro forma* account of the sales of the cargo at the port of destination.

On the 15th of July, and 1st of August, 1856, the cause was fully argued upon further proof. The Judge of the Admiralty Court (The Right Hon. Dr. Lushington), by his interlocutory decree, dated the 8th of August, 1856, pronounced the cargo to have be[91]-longed, at the time of the capture thereof, to enemies of the Crown of Great Britain, and, as such, liable to confiscation, and condemned the same as prize. The present appeal was interposed on behalf of the owners of the cargo against this decree.

Dr. Addams, and Dr. Twiss, for the Appellant; and The Queen's Advocate (Sir John Harding), and Dr. Deane, for the Respondents.

The principal question argued was, whether the owners of the cargo, with regard to this claim, were to be considered as alien enemies; and that question turned upon the nature of the possession which the Russians held of Moldavia and Wallachia, at the time of the shipment of the cargo: and a further question was raised, whether Galatz could be treated as an enemy's port, or had been blockaded at all as against neutrals. The arguments are fully stated and considered in the judgment of their Lordships. The authorities referred to were—

Upon the national character of the owners of the cargo, *The Indian Chief* (3 Rob. 12), *The President* (5 Rob. 277), *The Anna* (5 Rob. 373), *The Boedes Lust* (5 Rob. 233), *The Magnus* (1 Rob. 31). 1 Kent's Comms. p. 82 (8th Edit.). Story, "On Prize Courts" (Pratt's Edit.), p. 3.

Whether the notification of blockade was sufficiently extensive to include blockade by egress as well as ingress, *The Frau Isabe* (4 Rob. 63). Wheaton, "Elements of International Law," p. 575 (6th Edit.).

[92] As to the duty of the Captors to have brought the chief officers of the captured ship to the nearest British port and examined them in preparatory, and to have proceeded at once to adjudication, *The Bothnea and Janstoff* (2 Gallison. Amer. Rep. 78), *The Arabella and the Madeira* (2 Gallison. Amer. Rep. 367), *The Huldah* (3 Rob. 235), *The Washington* (6 Rob. 275), *The Speculation* (2 Rob. 293), *The Madonna del Burso* (4 Rob. 169), *The Peacock* (4 Rob. 185).

Judgment was reserved in this as well as the previous appeals of *The Aspasia* [11 Moo. P.C. 79] and *The Achilles* [11 Moo. P.C. 86], which involved the same question, and was now delivered by

The Right Hon. T. Pemberton Leigh (March 24, 1857).—This was an appeal from a decree of the High Court of Admiralty, dated the 8th of August, 1856, condemning the cargo of the ship *Gerasimo* as lawful prize.

At the time of her capture this ship was bound to Trieste with a cargo of Indian corn, which she had taken on board at Galatz. She was sailing under Wallachian colours, and on the 19th of July, 1854, during the prosecution of her voyage, was captured as she was coming out of the Sulina mouth of the Danube, by Her Majesty's ship *Vesuvius*, under the command of Captain Powell.

It was the duty of the Captors, as soon as possible, to send their prize to some convenient port in Her Majesty's dominions for adjudication, to procure the examination in preparatory of the principal officers [93] of the vessel, and to deposit in the Admiralty Court, upon oath, all papers found on board the vessel, in order that speedy justice might be done, and that the property, if illegally seized, might be restored, with as little delay as possible, to the owners.

None of these steps were taken; the vessel and her cargo were sent to Constantinople, and detained there, together with the crew, till (after a delay, as to the cargo of nearly three months, and as to the ship of nearly eight months) the vessel was released upon security, and the cargo sold at Constantinople.

The Captors appear after this to have taken no steps whatever in the matter until they were stimulated to action by the owners of the cargo.

On the 21st of June, 1855, a claim was brought into the Admiralty Court by Cremidi, in which he claimed the cargo on behalf of Epaminonda Pana and Co., who are merchants at Galatz, and on their behalf demanded restitution, with costs and damages, and at the same time he sued out a monition requiring the Captors to proceed to adjudication.

The Captors proceeded accordingly, and on the 14th of November, 1855, the case was heard upon the claim.

There was an absence of the usual evidence in such cases: there was no examination of the witnesses in preparatory; no affidavit verifying the ship's papers made *recente facto*, but an affidavit sworn by Captain Powell, on the 30th of August, 1855, more than twelve months after the seizure, verifying certain papers as being all the papers which were found on board the vessel, and none of which related to the cargo. The Captors, however, produced an affidavit by a gentleman of the name of Young, who stated that he was the agent [94] in England of the Captors, and that he had received a letter from Captain Powell, dated in the month of May, 1855, informing him that the cargoes of this and other ships sent to Constantinople had been sold at that place, with the consent of the owners thereof, and the proceeds deposited in the hands of an agent. There was also a certificate by Mr. Nicholson, who had been sent out (under what circumstances it does not appear) as a Commissioner appointed by the Court of Admiralty to take evidence on the subject at Constantinople, and Nicholson thereby certified that he had been informed that the master and the whole of the crew of *The Gerasimo* had long since quitted her, and could not anywhere be found.

The only evidence of property on the part of the Claimant, was the affidavit of Cremidi, who stated his belief that Epaminonda Pana and Co., subjects of the Ionian Islands, were the owners, and that no enemy had any interest in it. Neither the affidavit nor the claim stated anything as to the place of residence of Epaminonda Pana and Co.

The learned Judge, therefore, made an Order, dated the 14th of November, 1855, by which he admitted the claim of Cremidi for the cargo, but directed further proof to be given by the Claimant as to the property thereof, and also allowed both parties to bring in further proof as to the non-examination of witnesses in preparatory, and as to whether there was any agreement as to the sale of the cargo, such further proof to be given without prejudice to the question of costs and damages.

The cause was heard on further proof in July and August, 1856, when the learned Judge was of opinion that the owners were to be considered as enemies of [95] the British Crown at the time of the seizure, and that the Claimants had, therefore, no *persona standi* in the Court. The grounds of the decision are thus stated in the report of the judgment printed at the end of the Respondent's case. After referring to two documents brought in by the Claimant upon further proof, the learned Judge expresses himself in these terms:—"It appears, therefore, that the Claimants (the owners of the cargo) were merchants, resident at Galatz at the time of shipment, and that, being so, the next question is, what national character the law impresses upon them. Galatz is in Moldavia; Moldavia was in possession of the Russians; and, so long as any territory is in possession of the enemy, I apprehend that the law declares that all the inhabitants thereof, and all the persons resident therein and carrying on trade, are to be considered as enemies with respect to that trade. The owners of the cargo are erroneously described as Ionian subjects, they being resident at Galatz, and undoubtedly they are not entitled to that character for the purposes of trade. Had the truth been stated in the first instance, I should have disposed of the case at once."

Upon this ground the learned Judge felt himself under the necessity of condemning the cargo, but he added, "that he should have experienced very great difficulty in coming to the conclusion that the Claimants had proved their property in the cargo claimed, even if they were entitled to any *persona standi* in the Court."

Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine care-[96] fully both the principles of law which are to



govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war. Nothing can be more just than this principle: but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any [97] Judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their Lordships are inclined to think that, if the authorities which were cited and so ably commented upon at this Bar had been laid before the Judge of the Court below, he would, perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred.

With respect to the meaning of the term "dominions of the enemy," and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of *The Fama* (5 Rob. 115), he lays it down that in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. "This," he observes, "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly-discovered countries, when a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such Settlements, may be informed under whose dominion and under what laws they are to live."

The importance of this doctrine will appear when the facts with respect to the occupation of the Principalities come to be examined.

That the national character of a place is not changed [98] by the mere circumstance that it is in the possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the *St. Domingo* cases of *The Dart* and *Happy Couple*, when the rule operated with extreme hardship.

In the case of *The Manilla* (1 Edw. 3), Lord Stowell gives the following account of those decisions:—"Several parts of it [the Island of St. Domingo] had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts at least, an independent government of their own. And although this new power had not been directly and formally recognized by any express treaty, the British Government had shown a favourable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been declared or done by the British Government that could authorize a British tribunal to consider this Island generally, or parts of it (notwithstanding a Power hostile to France had established

itself within it, to that degree of force, and with that kind of allowance from some other States), as being other than still a colony, or parts of a colony of the enemy. There can be no doubt that the strict principle of that decision was correct."

[99] On the other hand, when places in a friendly country have been seized by and are in possession of the enemy, the same doctrine has been held.

While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by the French troops, and amongst others, the port of St. Andero. A ship called *The Santa Anna* was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed:—"Under these public declarations of the State, establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."

The same principle has been acted upon in the Courts of Common Law.

In the case of *Donaldson v. Thompson* (1 Campb. 429), the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a Republic was preserved, and it was contended that the Islands must be considered as substantially part of the territory of the Russian Empire, if the Russian power was there dominant, and the supreme authority was in the Russian Commander; or, if not, that the Republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the Islands as if he had [100] seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. Both these propositions, however, were repudiated by Lord Ellenborough; and afterwards on a motion to set aside the verdict by the Court of King's Bench, Lord Ellenborough observed:—"Will any one contend that a Government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing." The same doctrine was afterwards laid down by the Court of King's Bench, in *Hagedorn v. Bell* (1 Mau. and Sel. 450), in the case of a trade carried on with Hamburg, which had been for several years, and at the time was in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognized by Lord Stowell in the case of *The Bolletta* (1 Edw. 171). A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property; that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes, p. 173:—"On the part of the Crown it has been contended, that the possession taken by the French was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the [101] treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia." On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this was a cession by treaty, and not an hostile occupation by force of arms, liable to be lost again the next day.

These authorities, with the other cases cited at the Bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

It is necessary now to inquire what was the nature of the possession of Moldavia by the Russians, at the time when the shipment in question was made.

The political position of the Provinces of Moldavia and Wallachia is very anomalous.



lous. They are classed by Wheaton, in his "Elements of International Law," p. 48 (6th Ed.), amongst semi-sovereign States. By the Convention of Ackermann in 1826, between Russia and Turkey, it was provided that the government of those Provinces should be administered by Hospodars chosen from amongst the native Boyars, and they were to enjoy their authority for the term of seven years. By the Treaty of Adrianople, between the same Powers in 1829, and by a separate Act annexed to that Treaty with respect to the Provinces of Moldavia and Wallachia, it was provided that the Hospodars, instead of being elected for a term of seven years only, should in future hold their dignities for life, and that they should freely administer the internal affairs of those Provinces in concert with their respective Divans. It was further provided that they should pay a fixed [102] tribute to the Porte in lieu of certain charges to which they were previously subject, and be free from all other exactions. The inhabitants were to enjoy full liberty of commerce for the productions of their soil and their industry, without any restriction, except such as the Hospodars, in concert with their respective Divans, should establish. They were to be at liberty freely to navigate the Danube with their own vessels, furnished with passports by their Government: and it was provided that the Pruth, which bounds one side of Moldavia, should continue to be the limit of the two Empires of Russia and Turkey.

This independent administration was enjoyed by the two Provinces at the time when the differences arose between Russia and Turkey in the year 1853. Their government was administered by the Hospodar of each Province, with the assistance of a Council; they had a national flag, and a *Chargé d'Affaires* resident at Constantinople.

The Sultan having refused compliance with demands made upon him by Russia, the Emperor gave orders that his troops should enter the Danubian Principalities, and on the 26th of June, 1853, he issued a manifesto, declaring, in the following terms, the grounds upon which, and the purposes for which, this step was taken:—"Having exhausted all the means of persuasion, and all the means of obtaining in a friendly manner the satisfaction due to our just reclamations, we have deemed it indispensable to order our troops to enter the Danubian Principalities, to show the Porte how far its obstinacy may lead it. Nevertheless, even now it is not our intention to commence war. By the occupation of the Principalities we wish to have in our hands a pledge which will [103] guarantee to us in every respect the re-establishment of our rights. We do not seek conquests. Russia does not need them. We demand satisfaction for a legitimate right openly infringed."

On the 2nd and 3rd days of July, 1853, the Russian troops, under Prince Gortchakoff, crossed the Pruth and entered Moldavia: and upon that occasion the Prince issued a proclamation to the inhabitants of Moldavia and Wallachia, in which he declared:—"We come amongst you neither with projects of conquest, nor with the intention of modifying the institutions under which you live, or the political position which solemn Treaties have guaranteed to you."

The proclamation then stated that the occupation was only provisional, and that on the day on which the Emperor should obtain the reparation due to him, and guarantees for the future, the Russian troops should return within the frontiers of Russia; and it concluded with exhorting the inhabitants to engage with security in their agricultural labours and commercial speculations, and to be obedient to the laws under which they lived, and to the established authorities.

The Russian Government informed the Hospodars that their relations with the Porte must be broken off, and that all action on the part of the Sovereign power must for a time cease; that the fixed tribute which they were accustomed to pay to the Porte must be stopped. But the Hospodars were not removed from office; they continued, with the assistance of the Administrative Council, to conduct the affairs of the Government, and the Wallachian flag continued to be used. When war afterwards was declared between Russia and Turkey, the two Hospodars were recalled by the Porte, and directed to leave the government in the hands of a provisional Council of Boyars. A [104] Russian Commissary was appointed to conduct the Government in their stead, but nothing was said or done by the Russian Government to change the nature of the occupation, or to indicate any intention of converting into a conquest what had been originally announced as a provisional and temporary

measure. On the contrary, when General Budberg was appointed Commissary, the Russian Government avoided giving him the title of Governor, as being one which was calculated to give rise to misapprehension as to the Emperor's intentions, which secured those of not incorporating the Provinces.—(Sir George Hamilton Seymour's despatch to Lord Clarendon, dated Nov. 5th, 1853.)

The occupation, however, such as it was, led to a declaration of war by the Porte, in October, 1853, and in that war England and France engaged as allies of the Sultan in the following spring. Austria and Prussia, though not actively engaged as belligerents, were not less opposed to the occupation of the Principalities, and negotiations were entered into by both those Powers with Russia, for the purpose of securing the immediate evacuation of the Provinces by the Russian troops.

The Russian Minister, in his answer to the demands of Austria on the 17/29th of June, 1854, stated that, from the moment when the Porte declared war against Russia, the occupation of the Principalities, whatever might have been its original character, had been for Russia only a military position, the maintenance or abandonment of which was entirely a matter connected with strategical considerations. The answer then contained the following passage:—"Our august Master still wishes, as he has always wished, peace. He has no desire—we have repeated it, and we repeat [105] it once more—either to prolong indefinitely the occupation of the Principalities, or to establish himself there in a permanent manner, or to incorporate them with his dominions, still less to overthrow the Ottoman Government."

On the 8th of August, 1854, Prince Gortchakoff announced that the Emperor of Russia had ordered the complete evacuation of the two Principalities, and soon afterwards the Russian troops retired across the Pruth.

It seems impossible to hold that by means of an occupation so taken, so continued, and so terminated, Moldavia ever became part of the dominions of Russia, and its inhabitants subjects of Russia, and, therefore, enemies of those with whom Russia was at war. The utmost to which the occupation could be held to amount was a temporary suspension of the *Suzeraineté* of the Porte, and a temporary assumption of that *Suzeraineté* by Russia; but the national character of the country remained unaltered, and any intention to alter it was disclaimed by Russia. At what period, then, could foreigners dwelling there be said to have that notice of a change in the dominion and in the laws under which they were to live, to which Lord Stowell refers, in the case of *The Fama* [5 Rob. 115]? "At what period were they under the obligation of changing their domicile in it, under the penalty, if they omitted to do so, of being treated as enemies of Great Britain?"

Moldavia and Wallachia were not treated by the Porte as enemies, and it would be singular if these countries, though not held to be enemies by Turkey, should be held to be enemies of the allies of Turkey. That the Wallachian flag was recognized both by the Russian and Turkish authorities, sufficiently appears from the documents before the Court; [106] and their Lordships have ascertained, by communication with the Foreign Office, the other facts above stated; and further, that no act was ever done by the British Government to change the national character of the Provinces in relation to Great Britain; and without some such act, the occupation by the Russians, under the circumstances stated, could not produce such an effect.

Being of opinion, therefore, that the Claimants have a *persona standi* in the Court, we have now to consider the effect of the evidence upon further proof.

The only evidence offered on further proof, by the Claimants (if, indeed, it is to be treated as evidence), consisted of the production of two documents; a bill of lading, and an account, to both of which the learned Judge of the Court below refers in his judgment, as showing that the Claimants of the property are to be considered as Moldavians, for the purposes of this case. The bill of lading is not verified by any affidavit; it purports to bear date at Galatz, on the 30th of June, 1854, and to be signed by Caralumbo S. Pana, the master of the Wallachian brig *Gerasimo*, and to acknowledge the shipment at Galatz, by Messrs. Epaminonda Pana and Co., for account and risk of whomsoever it may concern, of 838 chilos of maize of Moldavia, of good quality, dry, sifted, and in good condition, consigned, at Trieste or Venice, to the order of Signor Antonio de Ralli. The account is what is termed a *pro forma* account, and purports to be signed by Ralli, at Trieste. His signature is attested by two witnesses, and the signatures both of Ralli and the witnesses is attested by



a Notary Public, whose official character of a Notary, and whose signature, are attested by the British Vice-Consul at [107] Trieste. This document is headed:—"Messrs. Pana and Co., Galatz. *Pro forma* account of cargo of Indian corn, on board the Wallachian brig *Gerasimo*, Pana. It purports to state, in the first place, what would have been the gross proceeds of the cargo at Trieste on the 20th of November, 1854; and it then contains an account of the charges which would have attended the sale, including commission. It seems, therefore, that this account was made out as between Pana and Co. as the shippers, and Ralli as consignee and agent for the sale.

Though these documents were produced only on the further proof, the account of Ralli had been made out long before, with a view, probably, to the proceedings then in contemplation; for it appears to have been made on the 17th of April, 1855, and signed and witnessed before the Notary on the 19th of that month. This was before any question of property had been raised, and it, therefore, does not, except incidentally, show the right of property.

On the part of the Captors, evidence was produced as to the other two points, namely, the omission to examine witnesses in preparatory, and the sale.

The material evidence upon both these points is given in the affidavit of La Fontaine, made at Constantinople on the 16th of February, 1856, in which he says that, since the 20th of August, he has acted as Prize-Agent for the British squadron in the Black Sea; that *The Gerasimo* was brought to Constantinople on the day of August (not naming the day); that at such time the exigencies of the service totally precluded the possibility of sending the ship down to Malta for adjudication; that later in the year, when it was proposed to send her down to [108] Malta for adjudication, she, owing to the unseaworthy state of the said ship, and the difficulty at that time of sending a sufficient prize-crew to navigate her to Malta, was detained at Constantinople by the Admiral Superintendent there. He then proceeds to state matters relating to the sale, and concludes thus:—And the deponent further made oath, that as there was no Vice-Admiralty Court, and no standing Commissioner at Constantinople, it was impossible to get any of the said crew examined there; and that after they had been detained for a considerable time on board her, they were allowed to leave her without being examined; and the vessel was delivered up, and her cargo sold, in pursuance of the above-mentioned arrangements. This is the only evidence by which it is attempted to justify the non-examination of witnesses in preparatory.

With respect to the sale of the cargo, he says, that as both the ship and her cargo were deteriorating in value, deponent, in his quality of agent and representative of the British squadron, by virtue of the authority given him as aforesaid, entered into an arrangement with Captain C. Pana for himself, and as lawful representative of the vessel and her cargo, respecting them. That the conditions of the arrangement so entered into were reduced into writing, and duly executed by the deponent and by C. Pana; and he then states that certain documents, which he numbers, are the papers so executed, and are all the documents relating to the said arrangement.

Now, their Lordships regret to observe that, on reference to these documents, it appears that the account given of the transaction by La Fontaine's affidavit, is entirely inaccurate in the most important particulars.

This gentleman swears that the arrangement which [109] he made with C. Pana was made with him as lawful representative of the cargo, as well as of the ship; and that under that arrangement, the cargo, as well as the ship, was sold. If that statement had been true, it would have been of the utmost importance; for not only would it have materially affected the evidence of the Claimants' right of property, but it would have amounted to a waiver of their demand for costs and damages. But on reference to the agreement itself, it appears that it has no reference whatever to the cargo. It is made by C. Pana, not as representing the cargo, nor as having any right whatever over it, but solely as the lawful attorney of the owner of the ship. The agreement is confined to the ship and freight. At the time when it was made, namely, on the 31st of March, 1855, the cargo had been actually sold by La Fontaine himself, under the circumstances to be now stated.

There is great confusion in the dates assigned to the documents, partly, perhaps, from misprints, and partly from the difference between the new style and the old not

always being observed ; as far as we have been able to collect the order of proceedings, it was as follows. With respect to the material facts there is no doubt.

Signor Paspali was the owner of the vessel. Spiridione Pana was the agent of E. Pana and Co., the shippers of the cargo. Hanson, a banker at Constantinople, at first acted as agent for the Captors, and soon afterwards La Fontaine succeeded to that office. At one period both seem to have been acting.

Paspali and the Captors claimed freight for the cargo, and called upon Pana and Co., or Spiridione Pana, as the agent, to pay it. This he refused to do. [110] or to consent to terms which Hanson, on behalf of the Captors, desired to impose as the conditions of an arrangement. Under these circumstances, Paspali and the Captors' agent were desirous that the cargo should be sold, being first valued, and, in the month of September, 1854, Paspali presented a petition to the *Chargé d'Affaires* of the Wallachian Principality at Constantinople, praying that, in accord with the British Chancery, surveyors might be appointed to verify the condition of the cargo. The petition states that La Fontaine assents to this application. This petition was communicated by the directors of the Wallachian Chancery to what is termed the Royal British Chancery, which seems to mean the Consulate-General of Her Majesty, with a request that it would be pleased to name a surveyor for the purpose of deciding, amongst other things, whether the Indian corn on board *The Gerasimo* ought to be discharged. Hereupon, Spiridione Pana, on the 6th of October, 1854, addressed to the British Consul-General a statement in which, after alluding to an earlier petition of Paspali, and an answer which he had put in to it, he observes that Paspali had presented a second petition, in which he continued to hold him (Spiridione Pana), in the capacity in which he acts, responsible for the payment of the freight claimed, because he had not consented to take out the cargo existing on board under the conditions imposed on him by Hanson. The statement concludes in these words:—"In reply to the above adverse petition it is sufficient for the undersigned to refer Signor D. Paspali to the reply given to him by the Act of the 15th of September last. And, in order that Signor D. Paspali may no longer have reason to consider the un-[111]-dersigned as being an impediment to the delivery and sale of the cargo, he declares that he is not opposed to the appointment of the survey demanded, nor to the sale of the cargo ; but he does not take any trouble in the matter, nor does he assume any responsibility towards any person whomsoever, still less towards Signor D. Paspali, for the freight claimed ; and provided from the survey it should appear that the cargo ought to be sold, the undersigned will not refuse to be present at the sale in the same manner as the other consignees will be present who are in the same position as the undersigned ; his preceding protestations, however, remaining still, in all and singular their items, in full vigour, and without any prejudice to the rights and actions of the shippers against whomsoever it may concern, or any responsibility of the undersigned in the capacity in which he acts towards Signor Paspali for the freight claimed in the event that the proceeds of the cargo should not be sufficient to cover it ;" and he prays that a copy of this paper may be communicated to Paspali and to Hanson, in the capacity in which he acts.

Neither the first petition of Paspali, nor the answer to it by Spiridione Pana, are amongst the papers in the appeal.

In consequence of these proceedings, the Wallachian and British authorities appointed surveyors, who, on the 17th of October, 1854, made a report, in which they stated that they had betaken themselves to the vessel in the company of La Fontaine, assisted by the public broker, Lazzaro de Nicolini, and there, in the presence of the Captain, had examined the cargo, which they found in a state of serious heat ; that the odour it sent forth, and the commencement of rot, [112] induced them unanimously to advise the sale of the cargo, for account of whom it may concern, in order to prevent the total deterioration thereof. On the same day the cargo was sold by La Fontaine, as the Royal British Navy Agent, to Messrs. Charnaud, exactly as it may be found on board *The Gerasimo*, that is to say, rotten, wetted, damaged, or with any other defect, at the price of 15½ piastres for every chilo.

This sale seems to have been made without the knowledge of E. Pana and Co., or S. Pana, their agent, for, on the 6th of November, 1854, he presented a petition to the British Consulate, stating that he was authorized by E. Pana and Co., the proprietors of the cargo, to sell it, and receive the proceeds, and praying that he might be at



liberty to do so, depositing the proceeds in the hands of the Royal Britannic Chancery until it should be definitively settled as to the fate of the cargo, he being ready to tender valid security for the due deposit of the price obtained.

Nothing further appears upon the evidence or documents, but it is obvious that some further arrangement was made, for it was agreed between the Counsel at the Bar that the proceeds of the cargo had been paid over to Pana and Co., or their agent, on security being given to answer the amount in case of condemnation.

The question for their Lordships to decide is, what is the effect of this evidence with reference to the three points: the property, the sale, and the omission to examine witnesses; and upon none of these points are they able to find any serious doubt.

At Constantinople, where the facts were probably known, and, at all events, were capable of easy proof, no doubt was ever suggested as to the fact of Pana and [113] Co. being owners of the cargo through the whole of the long proceedings which led to the sale. They were dealt with, both by the Captors and the shipowner, as the proprietors: they were called upon in that character to pay the freight; they were called upon in that character to consent to the sale; they were called upon in that character to be responsible for the amount in case of condemnation; and can it be argued that they are only to be treated as owners in case of condemnation, and not in case of restitution? At the hearing of the claim, none of these facts appeared. At the hearing on further proof, the view taken of the case by the learned Judge made it unnecessary to investigate them. The affidavit of La Fontaine was calculated to mislead anybody who had not carefully examined the documents to which it refers; the inaccuracies in it were not pointed out at this Bar, and were probably, therefore, not brought to the notice of the learned Judge of the Court below. When the documents are examined, it appears to their Lordships that no fair doubt as to the property can be raised by the Captors. Indeed, the Respondent's own case on their Lordships' table states that the cargo was sold with the consent of Spiridione Pana, the agent of the proprietor of the cargo. Can a doubt be suggested whether the principals for whom Spiridione Pana was agent were Epaminonda Pana and Co., of Galatz? As to the sale, the evidence clearly shows that it took place under circumstances which cannot in the least prejudice the right of the owners to relief.

Then as to the excuse for the non-examination of the witnesses. There is literally none whatever. What is the value of a statement by La Fontaine of what the exigencies of the public service would or [114] would not permit? What knowledge has he upon the subject? even if what appears in this case was calculated to induce the Court to place entire confidence on his accuracy. But, if the exigencies of the public service did not permit the sending these vessels either to England or to Malta, are the Claimants to suffer? Is it their fault that there was no Commissioner for the examination of witnesses at Constantinople: or that crews could not be spared to send the vessel to Malta? Is it consistent with justice that the crews should be kept prisoners, and the ship and cargo detained, without the least authority, at Constantinople; that the Captors should take no steps whatever for more than twelve months to proceed to adjudication; that the Claimants should lose all the advantage of having the examination of their own witnesses; and that for all these wrongs they should be entitled to no remedy?

It was strongly insisted by the Appellant that the penalty on the Captors for omitting to comply with the rules of the Prize Court, if unaccounted for, or not sufficiently explained, was a forfeiture of all their rights, and restitution to the Claimants, with costs and damages; and authorities were cited which were supposed to warrant that proposition.

It is not, in their Lordships' view, necessary to adopt in this case so severe a rule, and they think it will be more satisfactory to examine the grounds on which it is attempted to justify the seizure and on which condemnation is required.

The ground now suggested is, that *The Gerasimo* was guilty of a breach of blockade in coming out of the Danube when the mouths of that river were in a state of notified blockade. It is singular that if this [115] were the ground of capture, no notice whatever of the blockade should have been contained in the affidavit originally prepared for Captain Powell to swear when the seizure was made, and the facts recent; that notice of it should be introduced for the first time in the affidavit made by him

on the 30th of August, 1855: and that even in that late affidavit it is not stated that breach of blockade was the cause of seizure.

There is no doubt, however, that breach of blockade, whether it was the cause of seizure or not, may be used as ground of condemnation, if the circumstances of the case bring it within the law.

What, then, were the circumstances? In the summer of 1854, the Russian forces in the Turkish territories were straitened for provisions. The allied fleets desired to prevent the importation of provisions up the Danube, and with that view the two Admirals in command of the English and French fleets issued a proclamation, dated the 2nd of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the Danube, in order to stop all transport of provisions to the Russian armies; they declared that this blockade included all those mouths of the Danube which communicated with the Black Sea, and they apprized all vessels of every nation that they will not be able to enter the river till further orders—(*"qu'ils, ne pourront entrer dans ce fleuve jusqu'à nouvel ordre"*).

On the 26th of June, the Russians forbade all export of cereals after the 2nd of July. Any exportation of cereals, therefore, was in furtherance of the objects of the allies, and to the prejudice of the Russians. Could a Moldavian merchant imagine, if he had heard of this [116] blockade, that he was to be liable to capture by the allies for exporting provisions, when the whole purpose of the blockade was declared to be to prevent their import?

But, by the rules of law, a ship which has entered a blockaded port before the blockade, is entitled to come out again; and if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out. The blockade of a port is *prima facie* notice of the existence of the blockade to all who are within it, because the inhabitants who see the blockading ships off their coast cannot be well ignorant of the blockade. But this was no blockade of the port of "Galatz," but a blockade of the mouths of the Danube; Galatz lying on its banks up the river, at a distance of 150 miles from its mouth.

In this case the ship had entered the river before the blockade; the cargo was taken on board on the 30th of June; and the ship must have sailed on or before the 2nd of July; otherwise she would have been detained by the Russians. If she had no notice of the blockade, she was, on that general ground, entitled to bring out her cargo; if she had notice, she never could suppose that, according to the notification, she could be liable to capture; but if the case had been open to any suspicion, though, in fact, there is none, no weight could be given to such suspicion, when the Claimant has been deprived, by the wrongful act of the Captors, of the opportunity of affording the explanations which the rules of law were intended to secure to him.

Of the law applicable to the case, as it appears to their Lordships, they cannot express their opinion [117] better than in the language used by the learned Judge of the Court below, in the beginning of his judgment on the hearing before him. He says:—"On the part of the Claimants, a very long argument was addressed to the Court, impugning the conduct of the Captors, and charging them with having improperly brought the vessel to Constantinople. It has been further stated that there being no means of examining witnesses at Constantinople, great unnecessary delay had occurred, and that the Captors were responsible for such delay and all the consequences. The Court is not disposed to deny the truth and justice of the principle contended for; on the contrary, I am clearly of opinion, that if a delay in bringing to adjudication, and the non-examination of witnesses, arose, though it may be almost impossible for the Government of the belligerent nation to prevent such occurrence, still that neutrals ought to be indemnified if injustice has been done them. The Captors in the first instance, though they may be perfectly blameless, are responsible to the neutrals, and they must look to their own Government for redress, if they have been compelled to make good any injury sustained by neutrals, in consequence of their fulfilling the commands which they dare not disobey. In many cases the Captains of some of Her Majesty's cruisers may have a discretion to release at once, but this may not be so in case of a blockade, when special orders may have been given to capture and detain."

In this statement of the principles of law, their Lordships cordially concur. What claim the Captor, Captain Powell, may have upon Her Majesty's Government,



it is not their duty to judge, nor have they any means of forming an opinion. But as regards [118] the Claimants, his conduct appears to be without any excuse, and their Lordships have no hesitation in advising restitution of the cargo, with costs and damages against the Captors.

His Lordship then proceeded to deliver judgment in the case of *The Aspasia* [11 Moo. P.C. 79] as follows:—

As regards the Claimant, this case differs in no material particular from that which has just been decided, and the same decree must be pronounced. As between the Captors and the Crown there may be a very material distinction, as the death of Captain Parker, in the service of his country, within a few days after the capture, relieves him from personal blame, in respect of the gross irregularities which have since taken place.

His Lordship also delivered the following judgment in *The Achilles* [11 Moo. P.C. 86]:—

This case differs from the two which have just been disposed of, in this circumstance, that the Claimants' right of property is not sufficiently established. The claim is made on behalf of Paolo Focca, as the sole owner; the ship's papers, however, do not establish the title, but, on the contrary, throw some doubt upon it, and the agreement made with the Captain on behalf of the owner does not show who the owner was.

Considering, however, the hardships imposed on the Claimant by the course pursued by the Captors, their Lordships will admit the Claimant to further proof as to the property. The other facts are sufficiently clear, and they will not order further proof as to them.

[Mews' Dig. tit. CONTRACT, C. 5. ILLEGAL CONTRACTS; e. *Contrary to International Law*; tit. WAR, 1. *In General*, 3. *Prize of War*, a. *Rights as to*, S.C. 5 W.R. 450; 8 St. Tr. (N.S.) 787. See note to *The Aspasia*, 1857, 11 Moo. P.C. 79.]

# [119] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

HERMANN ALEXANDER SORENSEN,—*Appellant*; Our Sovereign Lady the QUEEN, and WILLIAM TOWNSEND, Procurator-General in Her office of Admiralty,—*Respondents* \* [Feb. 19, 20, 1857].

## THE "ARIEL."

The sale of a ship absolutely and *bona fide* by an enemy to a neutral, *imminente bello*, or even *flagrante bello*, is not illegal [11 Moo. P.C. 129].

A Russian subject immediately before the war between Russia and England sold, absolutely and *bona fide*, a ship to a subject of a neutral State. Part only of the purchase-money was paid at the time of the purchase, the remainder being agreed to be paid out of the earnings of the ship. Before all the stipulated price was paid, the ship was seized in a British port as prize, and condemned by the High Court of Admiralty of England, on the ground that the enemy's interest in the ship was not divested, as the residue of the purchase-money was to be paid out of the earnings. Such condemnation reversed upon appeal, as the non-payment of part of the purchase-money did not create a lien on the freight and ship in favour of the seller, so as render the ship in possession of a neutral owner liable to seizure by a belligerent [11 Moo. P.C. 139, 140].

Liens, whether in favour of a neutral on an enemy's ship, or in favour of an

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.

enemy on a neutral ship, are equally to be disregarded in a Court of Prize [11 Moo. P.C. pp. 134, *et seq.*].

This vessel, under Danish colours, was seized by the Custom House officers at Belfast, shortly after her arrival at that port from Miramichi, in New Brunswick, laden with a cargo of deals and fire-wood, consigned to that port. The vessel was proceeded against in the High Court of Admiralty of England, [120] and, by an interlocutory decree, was condemned as prize and droits of Her Majesty in Her office of Admiralty.

Proceedings having been commenced by the seizers in the High Court of Admiralty, a claim was given in for the ship and the freight due for the transportation of the cargo on the part of the Appellant. Upon the case coming on for hearing upon the depositions and ship's papers, the Court, at the instance of the Appellant, allowed further proof.

It appeared that The *Ariel* was built at Libau, in Courland, in the year 1852, and had been owned by one Hagedorn, a merchant and shipowner, resident at Libau, and also the Netherlands Consul at that port. At the commencement of the year 1854, the political differences between Russia and the Western Powers began to assume so threatening an aspect that several of the shipowners resident at Libau determined to dispose of their shipping property. Accordingly, on the 2nd of February, 1854, Eckhoff, as the administrator of the estate of Hagedorn, then deceased, signed a power of attorney authorizing Heinrich Sorensen, the Danish Consul at Libau, to sell The *Ariel* to his son, Hermann Alexander Sorensen, the Appellant, for a sum not less than 10,000 roubles; and on condition that in case the full payment could not be effected at once, one-third of the purchase-money should be paid at the time of transfer, another one-third after six months, and the remaining third within nine months. In the latter part of February, Sorensen, senior, left Libau for Hamburg, where he met his son, and, in virtue of the power so executed by Eckhoff, agreed with his son, that he should purchase The *Ariel*, upon the conditions expressed in such power. Ac-[121]cordingly, on the 6th of March, 1854, old style, corresponding with the 18th of March, new style, a bill of sale and transfer of The *Ariel* to Sorensen, junior, was executed by Eckhoff, whereupon 3333 silver roubles, 33 copecks, being one-third of the purchase-money, was paid over to him by Sorensen, senior, on behalf of his son. On the 5th of May, 1854, Sorensen, senior, died, and as Eckhoff had no personal knowledge of Sorensen, junior, he became desirous of effecting some arrangement with him in respect of the balance of the purchase-money of The *Ariel*, so as to secure the estate of Hagedorn from loss. In the month of June following, one Stelling, as the agent, and on behalf of Eckhoff, called upon Sorensen, who thereupon handed over to him two acceptances, one, at six months' date, for 3333 silver roubles, 33 copecks, and the other, at nine months' date, for a like sum, being the balance of the purchase-money. At the time of the sale and transfer of The *Ariel*, on the 18th of March, 1854, she was lying in the port of Libau, and on the 15th of April following, she left that port for Memel, where she arrived on the following day. Having taken in a cargo of timber, she left Memel on the 18th of May, and arrived in Dublin on the 12th of June following, where she discharged her cargo. She left that port in ballast on the 25th of June, and arrived at Liverpool on the 27th, where she discharged her ballast, and, having taken in a cargo of salt, left that port on the 11th of July, following. On the 22nd of August, she arrived in Halifax, where she discharged her cargo, and on the 12th of September left that place in ballast. On the 24th of September she arrived in the Bay of Miramichi, where she took in a [122] cargo of deals and firewood, and having left on the 18th of October following, arrived in Belfast on the 20th of November, where she discharged her cargo, and on the 2nd of December she was seized by the officers of Her Majesty's Customs.

The national character of the Claimant appeared from the evidence on further proof, to be this: Sorensen, the father of the Claimant, was by birth a Dane, having been born at Flensburg, in the Grand Duchy of Sleswig. In the year 1826, he went to reside at Libau, in the gulf of Courland, having been appointed Danish Consul at that place, which office he held up to the time of his death, which took place on the



5th of May, 1854. He engaged in business there as a merchant and shipowner, but always considered himself a Dane, and so called himself, and often mentioned his intention of returning to Copenhagen, and there end his days. The Claimant was one of the children of Sorensen, senior, and was born at Libau, where he remained until about the age of four years, when he went to Copenhagen on a visit to his uncle, who was a merchant there. He remained at Copenhagen for some time, and then returned to his father at Libau, but at the age of eight years he again returned to Copenhagen to visit his relatives and learn the Danish language. After having remained at Copenhagen for some considerable time, he returned to Libau, where he remained until the year 1851, when he again left that place and returned to Copenhagen, and in the same year went to Leith, in Scotland, where he remained for twelve months, and thence to London, where he resided two years, and had established himself as agent for several Russian and Danish mercantile firms. On the 22nd of February, 1854, the [123] Claimant left London for Hamburg, in pursuance of a telegraphic message from his father to that effect, and upon his arrival there his father advised him to give up his London business of agent, in consequence of the threatening aspect of affairs to Baltic commerce, and to establish himself as a Danish merchant and shipowner at Altona. Acting upon this advice, the Claimant established himself at Altona, when, pursuant to the resolution of the Town College of that City, of the 8th of March, 1854, he was duly admitted a citizen and burgher, having previously sworn allegiance to the King of Denmark, being the only Sovereign to whom he has ever taken the oath of allegiance. He had a counting-house at Altona, and a lodging at Hamburg. All the relatives of the Claimant, on his father's side, were Danes by birth, and all those on his mother's side, except one, had become Danish citizens.

On the 6th of August, 1856, the Judge of the Admiralty Court (The Right Hon. Dr. Lushington), by an interlocutory decree (see judgment reported, *nom.* The *Baltica*, 1 Spink's Prize Cases, pp. 264, 274), held that the national character of the Claimant was Danish, but as the seller retained an interest in the ship, pronounced the ship and freight to have belonged, at the time of the seizure, to an enemy of Great Britain, and condemned the same as prize, and as droits and perquisites of Her Majesty in Her office of Admiralty.

The present appeal was from this decree. The Appellant insisted that the same was erroneous, by reasons, first, because the purchase of The *Ariel*, and her transfer to him, was *bona fide* and complete, and the enemy at the time of seizure had no lien, direct or indirect, upon her; and further, that at the [124] time of the purchase and transfer of The *Ariel* and of the claim, the nationality of the Appellant, was Danish.

The argument, on both sides, is fully stated in the judgment of their Lordships.

The appeal was argued by Dr. Addams, and Dr. Twiss, for the Appellant; and The Queen's Advocate (Sir John Harding), The Admiralty Advocate (Dr. Phillimore), and Mr. Atherton, Q.C., for the Crown.

The authorities referred to were—

As to the national character of the Claimant, The *Conferenzerath* (6 Rob. 362), The *President* (5 Rob. 277), The *Baltica* (1 Spink's Prize Cases, 264), The *Benedict* (1 Spink's Prize Cases, 314), The *Anna Catharina* (4 Rob. 107), The *Jonge Josias* (1 Edw. 128), The *Johann Christoph* (1 Spink's Prize Cases, 63), The *Ernst* (1 Spink's Prize Cases, 103), The *Soglasie* (1 Spink's Prize Cases, 104).

That the sale and transfer of the ship to the Claimant, was collusive and fraudulent, and that the sale by an enemy to a neutral could not change its character, The *Hoffnung* (6 Rob. 232), The *Jan Frederick* (5 Rob. 132), The *Danckebaar Africaan* (1 Rob. 107, 112), The *Olio* (6 Rob. 67), The *Two Brothers* (1 Rob. 131), The *Abby* (5 Rob. 251), The *Najade* (4 Rob. 251), The *Frow Margaretha* (1 Rob. 333), The [125] *Rendsborg* (4 Rob. 121), The *Rapid* (1 Spink's Prize Cases, 80), The *Baltica* (1 Spink's Prize Cases, 264). S.C. post, p. 141), *De Lovio v. Boit* (2 Gallison's Amer. Rep. 448). Story "On Prize Courts" (Pratt's Edit.), p. 63.

Upon the necessity of the sale of the ship being absolute without leaving any interest in the seller, The *Tobago* (5 Rob. 218), The *Sechs Geschwistern* (4 Rob. 100).

The *Sans José Indiano* (2 Gallison's Amer. Rep. 267, 283), The *Frances* (8 Cranch's Amer. Rep. 335).

And, that there was no lien on freight to found a claim in a Prize Court, The *Marianna* (6 Rob. 24, 29), The *Christine* (1 Spink's Prize Cases, 82).

Judgment was delivered by

The Right Hon. Sir John Patteson (21st March, 1857).—The first question in this case relates to the national character of the Claimant, Sorensen, junior. It was strongly contended on the part of the Captors that he could not be properly considered to be a Dane. The circumstances under which he took a counting-house at Altona, with a lodging at Hamburg, are undoubtedly peculiar; and the precise time he went thither, and of consequence the exact length of time that he had continued there when the war between this country and Russia broke out, are not fully ascertained. Their Lordships, however, looking at the general law on this subject, and particularly adverting to the case of The *Conferenzrath* (6 Rob. 362), entirely agree with the learned Judge of the Admiralty, that Sorensen, junior, has succeeded in establishing his claim to a Danish national character.

[126] The next and important question is, whether Sorensen, junior, was the owner, and sole owner, of The *Ariel* at the time of the capture. Now this question turns upon two points—

First, was there a real *bona fide* sale, absolutely to Sorensen, junior, of The *Ariel*, without collusion or fraud?

Secondly, did any interest in the ship remain in the seller at the time of the capture?

The ship *Ariel* is one of several vessels alleged to belong to the Claimant, which were seized in British ports some time after the breaking out of the war, The *Ariel* being seized at Belfast on her return from America with a cargo, on the 2nd of December, 1854. This case is distinguishable from the others, as to which there is not any appeal at present before their Lordships, but which have been so alluded to in the argument that it is impossible wholly to exclude the mention of them. The distinction between them is in regard to the precise terms of the original sale to Sorensen, junior, and is such that their Lordships might perhaps determine this case on that distinction, without coming to any positive decision as to the general question which applies to them all. But, upon consideration, their Lordships have thought it right to state their opinion upon that general question.

The facts appear to be, that The *Ariel* was a Russian ship, and before the breaking out of the war belonged to a Russian subject, Eckhoff, as administrator of one Hagedorn, who had been for some time Consul of the Netherlands at Libau, and also a merchant and shipowner there, who died in April, 1853. Some stress was laid on this in the argument, it being contended that Eckhoff was bound to sell The *Ariel* for the benefit of the estate of Hagedorn, who was [127] not a native of Russia, but had only a mercantile domicile in Russia during his life and residence there, and, having died before any contemplation of war, never was, or could be by any possible construction, an enemy of this country, nor could his property, after his death, be considered as Russian property. The doctrine of *utile tempus* for a foreigner residing in a country between which country and another a war breaks out, to remove himself and his property from that country to his own, was supposed to apply. But that doctrine applies only to cases where there is a *bona fide* intention to remove. There is no evidence whatever of any intention on the part of Eckhoff, the administrator, to remove Hagedorn's property to the Netherlands, and the doctrine of *utile tempus* appears to be wholly inapplicable. The most that can be made of the representative character of Eckhoff, is to place him in the same position as Hagedorn himself would have been had he been still alive. Now, Hagedorn had unquestionably a mercantile domicile at Libau, in Russia, and, had he been living, and become the seller of The *Ariel*, instead of Eckhoff, he and his ship must, according to all authorities, have been considered Russian. Another of the ships seized, namely, The *John*, belonged to another Russian subject, named Gamper; and another, The *Industrie*, to one Rode; and the rest of the ships belonged to Sorensen, senior (the father of the Claimant), who had for many years



been the Danish Consul at Libau, and was also a merchant and shipowner there, and, therefore, clearly a Russian subject, so far as relates to these ships.

The Russian Ambassador left England on the 8th of February, 1854.

[128] At that time the Claimant was carrying, and had for about two years, carried on the business of an agent in England. On the 22nd of February, 1854, he was summoned to Hamburg by his father by a telegraphic message. They met at Hamburg, and it was then arranged that the Claimant should leave England and establish himself at Altona, and become a Danish subject, with a view to purchase his father's ships, and some others, and trade with them on his own account. He had not sufficient means of his own to pay for such ships, but he was told that the speculation would, probably, be very advantageous, even to the extent of 100 per cent., and arrangements were made between him and his father to enable him to carry it out, and he accordingly returned to England and disposed of his concerns there, and came to Altona to become a Danish subject. He purchased his father's vessels, and also *The John*, and *The Industrie*, and *The Ariel* (the ship in question). The *Ariel* was sold to him by his father under a power of attorney given by Eckhoff to the father for that purpose, he (Eckhoff) being personally unacquainted with the Claimant, on the 18th of March, 1854.

The British declaration of war issued on the 29th of March.

These dates seem of themselves to show that the sale was made in contemplation of war, and *imminente bello*, in a popular sense; but the evidence in the case goes further, and shows conclusively that the Russian shipowners at Libau, feeling that war was at hand, and that they could not employ their ships under the Russian flag, determined, on consultation, to sell their vessels, even at considerably reduced [129] prices, to neutrals, rather than keep them unemployed in Russian ports. It is argued that war cannot be said to be imminent unless there be an embargo, or some similar act of the country about to be belligerent, and cases are cited in which such circumstances have occurred, but none of those cases go the length of laying down any positive rule as to the necessity of such circumstances. Their Lordships are of opinion, that there is abundant proof that the sale was made *imminente bello*, and in contemplation of it. Still, if the sale was absolute and *bona fide*, there is no rule of international law, as laid down by the Courts of this country, which makes it illegal. Such a *bona fide* sale made even *flagrante bello* would be legal, much more *imminente bello*. The *Ariel* was in port at the time of the sale; therefore, the cases as to the illegality of sales *in transitu*, do not apply.

Was then the sale of this ship absolute and *bona fide*? Assuredly the time of the sale, the circumstances of the Claimant making himself a neutral for the express purpose of buying this and the other ships, and his inability to pay the whole price, all tend to throw suspicion upon the sale, and to make it incumbent on the Court to look closely into the history of the transaction, it being obviously the intention of all parties to place the ship, by such sale, out of the reach of capture by the belligerent. If there had been facts leading to a well-founded conclusion that a secret understanding existed between the seller and the Claimant, that the ship should be restored to the seller in the event of no war breaking out, or in the event of a speedy peace, or that the ship should be employed by the Claimant under the direction and for the benefit of the seller, the Court would be bound to [130] hold the sale to be collusive and void, and to condemn the ship as Russian property. But no such facts are even surmised in this case.

It appears by the evidence of Eckhoff himself, that Sorensen (the father) informed him that he should advise his son to purchase *The Ariel*, if Eckhoff did not require all the purchase-money at the time of the sale and transfer, inasmuch as his son would not have sufficient money to pay for all the vessels he intended offering him for sale, and that he, therefore, intended to sell his ships to his son; to accept a portion of the purchase-money at the time of sale, and to allow his son to pay him the remainder of the purchase-money out of the earnings of the vessels. Eckhoff goes on to say, that by reason of what Sorensen (the father) had so communicated to him, he agreed to sell *The Ariel* to the Claimant, under the following stipulation, or condition, namely, that the amount of the purchase-money should be 10,000 silver roubles, that 3333 silver roubles and 33 copecks, or say one-third of the purchase-money, should be paid in cash at the time of effecting the sale

and transfer of *The Ariel*; that a similar sum or instalment of one-third of the purchase-money should be paid in six months after the sale and transfer, and the remaining one-third in nine months. He adds, that had it not been for the very high character and well-known honour and integrity of Sorensen (the father), he would not have agreed to sell *The Ariel* to the son, except for ready cash, inasmuch as he was then, and still was, personally unknown to the son.

It is argued that Eckhoff does not in terms deny that he agreed to be paid the remaining two-thirds of the purchase-money out of the earnings of *The* [131] *Ariel*, and, therefore, it must be inferred that he did so agree, and accepted the same terms as the father did on the sale of his vessels. Their Lordships are of opinion, that the drawing of such an inference would be putting an unfair construction on Eckhoff's affidavit, especially as it is plain that he looked to Sorensen (the father) to carry him through the transaction, and, being personally unknown to the son (the Claimant), would be very unlikely to enter into any engagement with him as to the earnings of the ship. Afterwards, indeed, when upon the death of Sorensen (the father), in May, 1854, Eckhoff became somewhat anxious about the price of the ship, he did by his agent procure the Claimant's acceptances falling due at six and nine months from the sale and transfer of *The Ariel*, and a promise from the Claimant that the earnings of *The Ariel* should be applied to the liquidation of those acceptances, being the best security he could get. It appears that they were so applied, and that a small sum, only about £90, remained due when *The Ariel* was seized in December, 1854. This subsequent arrangement is the circumstance above alluded to, in which this case is perhaps distinguishable from the cases of the other ships, as to which the appropriation of the earnings formed part of the original contract.

It was urged further, that the bill of sale of *The Ariel* is untrue, because it states the whole purchase-money to be paid. Their Lordships are of opinion, that there is no weight in this objection. In all conveyances of freehold or leasehold estates, the purchase-money is always mentioned to have been fully paid, and yet there may be a collateral instrument, showing that nothing has been paid, or the [132] whole or part of the money left upon mortgage of the estate. A bill of sale of a ship is a conveyance of a similar nature, and open to the same considerations: the object being to enable the purchaser to become the absolute owner.

After the sale and transfer of *The Ariel*, it appears to have been employed under the sole control of the Claimant, without any interference on the part of the seller (Eckhoff), in voyages to England and Ireland and America, with a crew composed indeed of Russians, except the master and mate, who were Danes, but not with Russian cargoes. Under these circumstances, the learned Judge in the Court below says:—"I am inclined to hold the present sale" (speaking of that of *The Baltica*, one of the father's ships) "was *bona fide*." By which their Lordships understand him to mean that the sale was real, intended to pass the property in the ship to the Claimant, without any engagement to restore it under any circumstances, and without fraud or collusion. In this opinion their Lordships fully concur.

But then the second point above stated remains. Did any interest in the ship remain in the seller at the time of capture? And this is a point more difficult of solution. The decision of the learned Judge that some interest did remain in the seller rests almost entirely on the language used by Lord Stowell in the case of *The Sechs Geschwistern* (4 Rob. 100), for with the exception of that case all the other cases proceed on the ground of *mala fides* and collusion. Lord Stowell there says:—"The rule which this country has been content to apply is, that property so transferred" (that is, by purchase from an enemy) "must be *bona fide* and absolutely transferred; [133] that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest, vitiates a contract of this description altogether."

Applying that rule to the case then before him, Lord Stowell condemned the ship, and rightly so; because there were covenants in that case which preserved and retained the interest of the enemy seller, and for restitution at the end of the war. It was a conditional, not an absolute sale. Lord Stowell concludes his judgment in these words: "Is there in this any sign of a *bona fide* transfer? Is not the hand of the French vendor still on the vessel? Looking to the control which the French Government and the vendor still retain over this property, it is impossible for me



to hold that all the interest of the enemy is completely divested." In the present case there is a total absence of any such covenant or condition. The utmost that can be said is, that there is an engagement on the part of the buyer to apply the earnings of the ship to the payment of part of the price.

The mere non-payment of a part of the price cannot of itself be sufficient to leave an interest in the ship in the seller. That is distinctly stated by Lord Stowell in *The Marianna* (6 Rob. 26). He says "That objection can have little weight, since it is a matter solely for the consideration of the person who sells, to judge what mode of payment he will accept. He may consent to take a bill of exchange, or he may rely on the promissory note of the purchaser, which may not come in payment for a considerable time, or may never be paid. The Court will not look to such contingencies. It will be sufficient that a legal trans-[134]-fer has been made, and that the mode of payment, whatever it is, has been accepted."

Here, however, there is more than mere non-payment of part of the price; there is an engagement to pay it out of the earnings, and that is contended to create an interest in and lien on the freight, and, through the freight, on the ship.

We must observe here, that even supposing that the facts of this case were sufficient to show that the vendor had a lien on the freight for the purchase-money unpaid, it by no means follows that he had a lien on the ship. The ship and the freight are quite distinct—the ship may belong to one person and the freight to another; and that not only for a single voyage, but, as a security for a debt, for future voyages, provided that the contract and assignment be not such as to separate the freight and earnings of the ship for ever from the ship itself, so that they could not be re-united, but only to separate them for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid. The law on this subject was distinctly laid down, as stated above, by Lord Eldon, in the case of the ship *Warre*, which is to be found in the note to 8 Price's Rep. 269. The same doctrine was held in *Stephenson v. Dowson* (3 Beav. 342); in *Langton v. Horton* (1 Hare, 549); in *Leslie v. Guthrie* (1 Bingham, N.C. 697); and in other cases.

There are no means by which, according to the contract with respect to the earnings stated in this case, the ship could in any manner be affected, either in the Admiralty, the Courts of Common Law, or the Court of Chancery. It may be doubtful, considering the loose terms of the contract, and as it was made [135] between foreigners, whether the Court of Chancery would interfere by appointing a receiver of the freight, if the ship arrived in England and the owner had not applied the earnings towards payment of the purchase-money. But, as between English subjects, if the Court interfered, it would not be in pursuance of the contract, but by reason of breach of contract. It was said in argument, that by the law, either of Russia or Denmark, some lien might be created on the ship, but that is a matter of foreign law, and, therefore, a fact to be proved by those who rely upon it, and no proof was offered. The difficulty, or rather the impossibility, of obtaining a satisfactory result by such inquiries appears to have been one of the reasons why Lord Stowell, in the case of *The Tobago* [5 Rob. C. 218], to which we are about to allude more at length, refused to enter into them at all.

Supposing, however, that a lien on the freight or even on the ship, in favour of the vendor, who is to be considered as an enemy, did exist, would that lien render the ship in the possession of the neutral owner liable to be captured? That such a lien on an enemy's ship would not be sufficient to found a claim by a neutral in a Court of Prize is clear. It was so held by Lord Stowell in the case of *The Tobago* (5 Rob. 218), which was the case of a British subject claiming in respect of a bottomry bond on a French enemy's ship which had been captured; and again in the case of *The Marianna* (6 Rob. 24). That was the case of a lien on the freight and cargo of a ship, which ship was sold by an American neutral to a Spanish enemy, and the lien was in respect of part of the purchase-money remaining unpaid. It is true that in *The Christine* (1 Spink's Prize Cases, 84), [136] the Court said that the doctrine in *The Marianna* did not apply to cases when the *bona fides* of the sale was disputed, in which proof of actual payment is always essential; and no doubt that upon a question of *bona fides* such proof would be most important, and even essential. But the question of *bona fides*, in this case, has been already disposed of. Their Lordships are now considering the only point as to an interest

remaining in the *bona fide* seller. The same doctrine as determined in *The Tobago* and *The Marianna* is laid down by the Supreme Court of the United States of America; in *The Frances* (Irvin's claim): (8 Cranch's Rep. 418): and in *The San Jose Indiano* (2 Gallison's Rep. 283), and other cases.

Indeed, it was not disputed at the Bar that such is the law of prize as regards a Claimant in respect of a lien. But the converse of the proposition was contended not to be true, and that, although the lien of a neutral on an enemy's ship, or its freight, is not sufficient to found a claim, yet the lien of an enemy on a neutral ship, or its freight, is sufficient to show an interest in the enemy, of which the belligerent Captor is entitled to avail himself, and to defeat the neutral's claim: that a lien on an enemy's ship which would not be recognized in favour of a neutral, would be recognized against a neutral for the purpose of condemnation, if the lien be in favour of an enemy. Their Lordships asked, and asked in vain, for some authority which went to establish that distinction. No such authority was produced, but their Lordships were referred again to the language of Lord Stowell, in the case of *The Secks Geschwistern* [4 Rob. C. 100], which, as has been already observed, was a question as to the [137] right of property, not of lien. Their Lordships have been unable to find any authority for the alleged distinction, and, on the contrary, they are of opinion that the cases of *The Tobago* [5 Rob. C. 218], and of *The Frances* (Irvin's claim) [8 Cranch 418], already cited, are plainly against the distinction. In *The Tobago*, the Counsel for the Captors argued: "Suppose a bond of this nature given upon a neutral ship, and to a person now become an enemy, could a proceeding of prize be instituted against the neutral ship, or any part of it, as the property of the enemy? Certainly not." The Counsel for the Claimant argued, "With regard to the case put, of an enemy's interest of this description, on a neutral ship, the distinction is obvious, that this interest is a thing accessorial only to the ship; and that it might well consist with the principles of justice, that the accessory might be restored though the ship was condemned: at the same time that it would not be reasonable or just to seize the ship itself, on account of such an accessorial interest, which an enemy might possess in it." Lord Stowell, in giving judgment, says: "Can the Court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a Court of Prize? The total silence of those who had argued for the Claimant, as to any precedents for this demand, strongly shows that it has not been the practice of the Court to consider such bonds as property, entitled to its protection; and I think I may venture to say that there has been no such instance. The person advancing money on bonds of this nature acquires by that act no property in the vessel; he acquires the *jus ad rem*, but not the *jus in re*, until it has been converted and appropriated [138] by the final process of a Court of Justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more. If there is no change of property, there can be no change of national character." And further, he says, "The Captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. In like manner his rights operate on no such liens where the property itself is protected from capture. Indeed, it would be almost impossible for the Captor to discover such liens in the possession of the enemy, upon property belonging to a neutral; the consequence, therefore, of allowing generally the privilege here claimed would be, that the Captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage, from hostile liens upon neutral property." It is difficult to conceive stronger language than this to show that the distinction now attempted to be set up is wholly without foundation. The observations of the same learned Judge in *The Marianna* [6 Rob. C. 21] are substantially to the same effect. Both these cases, it is to be observed, were decided subsequently to that of *The Secks Geschwistern* [4 Rob. C. 100]. The language of the Court in *The Frances* (Irvin's claim), (8 Cranch's Rep. 419), is equally strong: "In cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination



of such claims would impose upon the Captors, and even [139] upon the Prize Courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property, and neutral Claimants, have excluded such cases from the consideration of those Courts." Then, after referring to the cases of *The Tobago* [5 Rob. C. 218] and *The Marianna* [6 Rob. C. 24], it is added: "From this it appears that the doctrine of the Prize Courts upon this subject, works against, as well as in favour of Captors." Their Lordships have come to the conclusion that the supposed distinction does not exist, and that liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize.

One other argument was pressed, arising from the number of vessels bought by the Claimant, and the magnitude of the transaction was insisted on; and the case of *The Rendsborg* (4 Rob. 121) was particularly adverted to. That case was such, that Lord Stowell held it to amount to an adhering to and assisting the enemy, and it was of a very peculiar character. Their Lordships are unable to see why, if the transfer of one ship was legal, under the circumstances which have here occurred, if it had stood alone, such transfer should be rendered illegal because six other ships were purchased, under similar circumstances, at the same time; unless, indeed, as affording ground to believe that all the purchases were fraudulent and collusive.

In effect, the whole case resolves itself into a question of *bona fides*; and that being once established, their Lordships feel obliged to come to the conclusion that *The Ariel* was the *bona fide* property of the Claimant alone, and that no interest remained in the [140] seller (Eckhoff). They must, therefore, humbly advise Her Majesty that the decision of the Court below ought to be reversed, and the proceeds of the ship restored to the Claimant; however, without costs and damages, not only because further proof was ordered and gone into, but also on account of the particular circumstances of the case (a).

[Mews' Dig. tit. CONTRACT; C. 5 ILLEGAL CONTRACTS; e. *Contrary to International Law*; tit. SHIPPING, A. VIII. SALE AND TRANSFER, 1. *Contract for Sale*. Cited in *The Teutonia*, 1871, L.R. 3 Ad. and E. 411; cf. *Driefontein Consolidated Mines Lim. v. Janson*, 1901, 70 L.J. K.B. 881.]

## [141] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

HERMANN ALEXANDER SORENSEN,—*Appellant*; OUR SOVEREIGN LADY THE QUEEN, and WILLIAM TOWNSEND, Her Majesty's Procurator-General, in Her office of Admiralty,—*Respondents* [June 23,\* and Dec. 11,† 1857].

(a) There were six other vessels seized, all of them belonging to Sorensen, junior, and purchased by him, *imminente bello*, namely, *The Baltica*, *Æolus*, *Amelie*, *John*, *Ceres*, and *Industrie*, and it was arranged between the parties, to save expense, that as the cases were in *eadem conditione* and so treated by the Court below, no proceedings by way of appeal should be taken in those cases till *The Ariel* was disposed of. After the delivery of the above judgment, the Crown Officers restored all these vessels, with the exception of *The Baltica*, which they declined to restore, as they contended, that the facts were distinguishable, the sale of that ship having taken place while she was *in transitu*. See *The Baltica*, *post* [11 Moo. P.C.], p. 141.

\* Present—At the first hearing: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Dodson, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

† Present—At the re-hearing: The Lord President (Earl Granville), the Right

## THE "BALTICA."

- A neutral residing in an enemy's country, as Consul of a neutral State, and who also traded there as a merchant, is to be regarded as an enemy [11 Moo. P.C. 143].
- A Russian vessel was sold, *bona fide* and absolutely, by an enemy to a neutral when the war between Russia and Great Britain was imminent. The vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. Held (reversing the sentence of the Admiralty Court of England), that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into possession of the purchaser, which took place before the seizure [11 Moo. P.C. 150].
- A neutral while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subject of it be lying in a neutral or an enemy's port [11 Moo. P.C. 145].

This ship, under Danish colours, was seized by the Custom House officers, at the port of Leith, on suspicion of being a Russian ship.

The vessel, under the Russian flag, formerly belonged to Sorensen, senior, and was sold by him on the 17th of March, 1854, immediately antecedent to the declaration of war between Great Britain and Russia, [142] to the Appellant, his son, a Danish subject, resident at Altona, and transferred by a regular bill of sale. Part only of the purchase-money was paid, the remainder being agreed to be paid by the earnings of the vessel. Sorensen, senior, was a Dane by birth, but had long resided at Libau, as Danish Consul, where he traded as a merchant. The only distinguishing feature in this case from *The Ariel* (*Ante* [11 Moo. P.C.], p. 119) was, that at the time of the purchase, *The Baltica* was prosecuting a voyage from Libau to Copenhagen. It appeared that on her arrival in the port of Copenhagen, in the middle of March, she was delivered over to the agent of the Appellant, and was admeasured by the Danish Custom House officers there, and branded as Danish property. Her flag was also there changed for the Danish flag, and a Danish master and crew engaged to navigate her. She sailed from Copenhagen with a cargo of linseed on the 21st of May, 1854, and arrived at Leith, in Scotland, her port of destination, on the 29th of that month, and was seized on the 31st, by the Custom House authorities as prize.

Proceedings consequent upon her seizure were commenced against the vessel in the High Court of Admiralty of England, when the Appellant put in a claim as owner of the ship and freight.

The Judge of the Court of Admiralty (The Right Hon. Dr. Lushington), by his interlocutory [143] decree, dated the 6th of August, 1855 (see case reported, *nom.* *The Baltica*, 1 Spink's Prize Cases, p. 264), condemned the ship, upon the ground that from the fact of the seller being Consul of a neutral State and also a merchant trading in the enemy's country, he was to be regarded as an enemy; moreover, that the transfer was fraudulent and collusive, and intended to defeat the just belligerent rights of Great Britain, and also that the vendor had retained an interest in the ship, part of the purchase-money having been agreed to be paid by the earnings of the vessel. The appeal was from this decree.

The Appellant insisted upon the *bona fides* of the purchase and the national character of the purchaser, which had already been established in *The Ariel*, and submitted that that case was not distinguishable, in principle, from the present appeal.

On behalf of the Crown it was submitted that the sale was invalid, having been made when the vessel was *in transitu*.

Their Lordships called upon the Crown to distinguish this case from *The Ariel*.

Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Lord Chief Baron of the Exchequer (the Right Hon. Sir Frederick Pollock), the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.



The Queen's Advocate (Sir John Harding), The Admiralty Advocate (Dr. Phillimore), and Mr. Atherton, Q.C., for the Crown, cited *The Danckebaar Africaan* (1 Rob. 107), *The Vrouw Margaretha* (1 Rob. 336), *The Jan Frederick* (5 Rob. 128).

Dr. Addams and Dr. Twiss, for the Appellant.

Their Lordships afterwards directed the case to be re-argued (Dec. 11, 1857).

[144] The Admiralty Advocate argued the case for the Crown, and Dr. Addams, for the Appellant.

The arguments are fully noticed in the judgment, which was delivered by

The Right Hon. T. Pemberton Leigh (Feb. 2, 1858).—*The Baltica* was one of several Russian ships which, in the month of March, 1854, shortly before the breaking out of the war between Russia and Great Britain, were sold by Sorensen, senior, a merchant domiciled in Russia, to his son, Sorensen, junior, a merchant domiciled in Denmark. These vessels having been condemned in the Court of Admiralty in England, appeals were brought against those sentences; and in the case of *The Ariel* (*ante* [11 Moo. P.C.], p. 119), which was selected for the purpose of deciding the general question, it was held by their Lordships that the sale was *bona fide*; that the property was entirely divested from the vendor, and vested in the vendee, before the seizure; that the transfer was complete, and was not a fraud upon any just right of the belligerents, and they, therefore, ordered restitution of the vessel.

In conformity with this decision, the Crown Officers very properly restored such of the vessels as appeared to them to stand in the same situation with *The Ariel*, but they declined to restore *The Baltica*, considering the case of that vessel to be distinguishable from the rest, on the ground, that the sale of the ship had taken place while she was engaged in the prosecution of a voyage, or, as it is technically termed, while she was *in transitu*.

[145] In order to determine the validity of this distinction in the circumstances of this case, the present appeal has been brought.

The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and the vendee, is good also against a Captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against Captors, as long as the ship or goods remain *in transitu*.

With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his "Notes on the Principles and Practice of Prize Courts," a work which has been selected by the British Government for the use of its naval officers, as the best code of instruction in the Prize Law. The passages referred to, are to be found in pp. 63, 64, of that work.

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu*, is ineffectual to change the property, as long as the state of *transitus* lasts; but how long that [146] state continues, and when, and by what means, it is terminated.

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests.

Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding Captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the Captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. That the *transitus* ceases, when the property has come into the actual possession of the transferee, is a [147] doctrine perfectly consistent with the decisions in *The Danckbaar African* (1 Rob. 107), and in *The Negotie en Zeevaart* [Lords, July 18, 1782], on the authority of which the former case was decided.

*The Danckbaar African* [1 Rob. C. 107] had sailed on a voyage from Batavia to Holland, which country, when the voyage commenced, was at war with Great Britain, and continued so till after the capture and adjudication. The ship and goods were seized on their voyage by British cruisers, and brought to the Cape of Good Hope. They were there claimed by merchants resident at the Cape, who represented themselves to be the owners, and who insisted, as the fact was, that before the capture, the Cape (previously a Dutch possession) had capitulated to the British forces under a treaty which secured to the capitulants their rights of property. It was contended, therefore, that they were entitled to restitution, on the ground that, at the time of the capture, their character of enemies had ceased, and been changed into that of friends.

Lord Stowell held, that he was bound by the authority of *The Negotie en Zeevaart* [Lords, July 18, 1782], to condemn the ship and goods which had been seized before they had reached the hands of the owners; relying on a dictum of Lord Camden, "that the ship, as Dutch, could not change her character *in transitu*," but he intimated that his opinion might have been different if the ship had come, before capture, into the actual possession of the owners. His language is, "If the vessel had arrived at the Cape, I will not say that, coming actually into the hands of the capitulants, she might not have been protected as property in possession, but being taken possession of before she arrived [148] there as Dutch property, I am bound by the decisions of the Lords, and I think myself obliged to say that her character could not be changed *in transitu*, and that she must be condemned as Dutch property."

It will be observed that in this case, if the ship had reached the Cape before capture, and come into the possession of the owners, such possession would have been taken before the termination of her regular voyage; for her destination was to Holland; and this circumstance is adverted to by Lord Stowell, who in answer to the argument that the ship was coming to the Cape, and into the possession of the true owners, observes, "There is no decided proof that this ship was coming to the Cape, and if so she is still to be considered as taken merely *in transitu* towards Holland, where the voyage was clearly to have ended; and in what character? As a Dutch ship in a Dutch port."

Yet, even under these circumstances, he was not prepared to condemn the ship if she had actually come into the hands of the owners.

In the case of *The Vrouw Margaretha* (1 Rob. 338), it is distinctly stated by Lord Stowell that the *transitus* ceases by the actual delivery of the property. After stating that, by the usage of merchants, a transfer of property *in transitu* may be made by the execution of proper documents, he proceeds:—"When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He then [149] assigns the reason for the rule, namely, that if it were otherwise, "all goods shipped in an enemy's country would be protected by transfers which it would be impossible to detect;" and adds, "It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*, and in that sense I recognize it as the rule of this Court."



In the manual already referred to [*Notes on the Principles and Practice of Prize Courts*], Mr. Justice Story, at p. 64, lays down the rule to the same effect in these words:—"The same distinction is applied to purchases made by neutrals of property *in transitu*; if purchased during a state of war, existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery."

Applying these rules to the facts of this case, their Lordships can have no doubt as to the result.

*The Baltica* sailed from Libau, on some day before the 17th of March, 1854 (N.S.), with a cargo of linseed, bound for Leith. On the 17th of March, she was transferred by bill of sale (as far as, under the circumstances, such transfer could be effectual) to Sorensen, junior. She was described as then on a voyage from Libau to Copenhagen. Probably she was intended to call at Copenhagen in the prosecution of her voyage to Leith. There does not seem to have been any motive for misrepresenting her voyage, for her ultimate destination was an English port. She arrived at Copenhagen before the end of March, and possession of her was then taken by Sorensen, junior, the purchaser. He had her registered as a Danish ship, and she was marked as such by the proper Danish authorities. He detained the ship at Copen-[150]-hagen till the middle of May. He changed the captain and the crew and the flag, and transferred the command to a Danish master; and under a Danish commander and with a Danish crew, and under the Danish flag, the vessel sailed from Copenhagen for Leith, on the 21st of May.

There can be no manner of doubt, therefore, that at this time the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the *transitus*, in the sense in which for this purpose the word is used, had ceased.

But, if it could be held that the *transitus* continued till the arrival of the ship at Leith, the result in this case would be the same, for the ship actually arrived in Leith Roads on the 29th of May. On the 31st of May, she was towed into Morison's Haven in that port, where her cargo was discharged, which, it seems, has since been given up to the consignee with the consent of the Custom House officers.

A seizure, however, was made of the ship, on what particular day does not very distinctly appear; but clearly after she had arrived at her port of destination.

No distinction, therefore, can be made between *The Baltica* and the other ships which have already been restored. Their Lordships will report to Her Majesty their opinion, that the same order should be made in this case as was made in *The Ariel*; an order for restitution, but without damages, or costs either in the Court below or in the Court of appeal.

[Mews' Dig. tit. CONTRACT, c. 5, ILLEGAL CONTRACTS, c. *Contrary to International Law*; tit. INTERNATIONAL LAW, IV. PERSONS, a. *Alienage*, 1. *General Principles*. Cf. *The Venus*, 1814, 8 Cranch, 280.]

# [151] ON APPEAL FROM THE SUPREME COURT AT CALCUTTA.

PETER CLARKSON REED,—*Appellant*; SREEMUTTY GOURMONEY DABEE,—*Respondent* \* [May 9, 1857].

Recognizance entered into to abide the determination of an appeal vacated upon petition of the Appellant, upon the abandonment of the appeal.

In this case, leave to appeal had been granted by the Judicial Committee upon terms of lodging in the Council Office a certificate of recognizance, under a penalty of £500, before one of the Barons of the Exchequer, conditioned upon the deter-

\* Present: The Right Hon. Lord Wensleydale, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson.

mination of the appeal. These terms were complied with; but the parties having compromised, the appeal was not further prosecuted. The Appellant now presented a petition, praying that the Order granting leave to appeal be dismissed, and the recognizance vacated.

Mr. Elderton, in support of the petition.—Their Lordships rescinded the Order granting leave to appeal, and discharged the recognizance entered into on behalf of the Appellant. The Appellant to apply upon a certificate from the Council Office to the Court of Exchequer to vacate the recognizance.

[152] ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT, BENGAL.

RANEE HURROSOONDREE DEBIAH.—*Appellant*; RAJAH PRAN KISHEN SING,—*Respondent* \* [May 9, 1857].

In circumstances showing conflicting and opposite decisions by the Sudder Court upon the same question at issue, between the same parties, an appeal treated under the Statute, 8th and 9th Vict., c. 30, sec. 2, as abandoned for non-prosecution, was restored upon terms of paying costs and undertaking to lodge cases forthwith, and to lodge security or a Bond in England, to the amount of £500.

Where an appeal has been treated as abandoned by Statute, 8th and 9th Vict., c. 30, sec. 2, their Lordships have no power to grant leave to institute a new appeal: only a discretion to allow the original appeal to be restored.

This was a petition to restore, or, in the alternative, to admit a fresh appeal, which had been treated as abandoned, under Statute, 8th and 9th Vict., c. 30, sec. 2, for non-prosecution within two years. The petition stated that leave to appeal to England had been granted by the Sudder Court on the 18th of January, 1848, and that the transcript of the proceedings arrived and was registered at the Council Office on the 7th of November, 1850. That an agent had been appointed in England in the month of May, 1852, and that the agent attended at the Council Office on the 24th of that month, with a view of proceeding with the appeal, and was informed that the Respondent had appointed agents in this country on his behalf, and that he immediately put himself in communication with them to join with him in paying half the expense of printing, when the Respondent's [153] agents informed him that they had no remittances from India to enable them to do so, but promised to join when they received sufficient remittances. That the Appellant's agent in consequence delayed taking a copy of the transcript proceedings till the 3rd of February, 1853. That the Sudder Dewanny Adawlut of Bengal, on the 12th of May, 1856, in another suit in which the same question was raised between the same parties, had held, regarding the family usage as to the division of the Raj in dispute, directly in opposition to their decree made in the suit now appealed. That on learning the result of this decision, the Appellant's agent prepared the transcript for printing in the month of January, 1857, when he became aware for the first time, that on the 24th of December previously, the appeal had been treated as abandoned under the provisions of the Statute, 8th and 9th Vict., c. 30, sec. 2. That the Appellant was desirous of prosecuting the appeal and bringing the same to a hearing, and that the delay was caused by no wilful intention; and the Petitioner prayed that the appeal might be restored, or that special leave to appeal against the judgment of the Sudder Dewanny Adawlut might be allowed to the Appellant.

Mr. Wigram, Q.C., in support of the petition, asked for an order for special leave to appeal.—[The Right Hon. Dr. Lushington: I very much doubt if the appeal is not lost, under the Statute, 8th and 9th Vict., c. 30, sec. 2, or that it can have been intended that their Lordships should have power to grant leave to institute a new

\* Present: The Right Hon. Lord Wensleydale, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Dodson.



appeal. It is a question of great difficulty. The real question is one of restoration, not of granting leave to appeal.]—The object of that [154] Statute was to remedy the mischief which existed of allowing appeals to stand over for an indefinite time. It is an inherent right in the Crown to permit appeals at any time.—[The Right Hon. Lord Wensleydale: The Statute meant that the appeal should be finally put an end to, not that there should be a fresh power to appeal.]

Mr. Leith opposed, submitting that conditions ought to be imposed, if the application was granted, for the due prosecution of the appeal.

The Right Hon. Dr. Lushington.—Their Lordships, under the very peculiar circumstances of this case, are inclined to allow leave to be given for the purpose of prosecuting this appeal. But their Lordships wish it to be distinctly understood, that it is the very peculiar facts attending this case which induce their Lordships to come to this conclusion. It appears upon the petition of the Appellant, that there have been two opposite decisions in India, upon what it seems must be considered substantially the same question; and it might be productive of very great inconvenience, and would certainly not be very creditable to the law as administered in India, if such two conflicting decisions were allowed to stand. Their Lordships greatly lament the delay which has taken place upon the present occasion, and certainly, in many respects, it appears to be utterly unjustifiable; but, for the reasons I have stated, their Lordships are inclined to adopt the course of allowing the appeal to be restored. It must, however, be understood that the costs of this application must [155] be paid by the Appellant, and security given here to the amount of £500, or a Bond in such terms as their Lordships shall think fit to prescribe, and the Appellant must also print and lodge his case without delay.

Mr. Wigram.—Will the Court allow a re-deposit in India, or if it should be found that the deposit remains in Court in India, will fresh security be required here?

Dr. Lushington.—Security must be entered into here for £500, or a Bond to secure that amount.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; d. *Restoring*. See now O. in C. of 26th June, 1873 (Stat. R. and O. Rev. iv. 318). As to special leave to appeal in civil cases generally, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

# ON APPEAL FROM THE VICE-ADMIRALTY COURT AT ST. HELENA.

CHARLES PHILLIPPE HOCQUARD,—*Appellant*; MESSRS. PINTO, PEREZ and CO., and JOSE MARIA PEREZ, for FRANCISCO ANTONIO FLORES,—*Interveners*; Our Sovereign Lady the QUEEN, and JOHN MACDOWALL SKENE,—*Respondents* \* [Dec. 1, 2, 3, and 8, 1857].

## THE "NEWPORT."

It is necessary, to justify a condemnation, imposing forfeiture and penalties for a breach of the Slave Trade Act, 5 Geo. IV., c. 113, that it be shown, as regards the ship, that she was employed in contravention of the object of that Act of Parliament, and that she was so employed with the knowledge of the owner, and, as to the shippers, that the goods had been shipped by them wilfully and knowingly for the purpose of being employed in the Slave trade [11 Moo. P.C. 165].

A ship, belonging to owners in Jersey, was chartered by P. and Co., merchants

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Knight Bruce, and the Right Hon. The Lord Justice Turner.

of London, to carry a cargo of goods on account of F., a Brazilian subject, for a voyage to the West Coast of Africa, out and home. The vessel was passed and cleared by the Custom House officers at London, but was seized near Ambriz, her outward port of destination, for being illegally engaged in the Slave trade, and condemned by the Vice-Admiralty Court at St. Helena, by reason of having on board packs and other articles used in carrying on the Slave trade, without having a certificate from the Custom House authorities that such articles were to be used only in lawful commerce: as well, also, that F., on whose account the goods were shipped, was, as it was alleged, a notorious Slave dealer. The Court also condemned P. and Co., the shippers, in penalties, amounting to double the value of the goods.

Such sentence reversed upon appeal, on the ground, that there was no sufficient proof of any guilty knowledge on the part of the owners of the ship, or shippers of the cargo, and restitution decreed with, as to the owners of the ship, costs and damages: and, as to the shippers of the cargo, costs [11 Moo. P.C. 186, 187].

The Regulations contained in the Order in Council of the 25th of June, 1851, issued pursuant to the Act, 2nd Will. IV., c. 51, provide that if the owners and others liable to penalties under the Act, 5th Geo. IV., c. 113, are known, they should be cited by name in the monition, and be personally served. If it appears that the parties are *bona fide* ignorant of the proceedings taken, it is the duty of the Judge, upon that fact being known, to suspend judgment [11 Moo. P.C. 175, 176].

If the monition cites all persons in general, without describing any person in particular, no penalties under the Act, 5th Geo. IV., c. 113, can be pronounced for [11 Moo. P.C. 176].

The shippers of the cargo and a party claiming the cargo not cited in the monition admitted by the appellate Court to intervene in the appeal promoted by the owners of the vessel against the sentence of condemnation [11 Moo. P.C. 160].

A special libel of appeal and an allegation by the Appellants and responsive allegation by the Crown, pleading new matters, admitted by the Court of appeal, and fresh evidence taken thereon [11 Moo. P.C. 159, 160].

This was an appeal from a sentence of the Vice-Admiralty Court of St. Helena, by which the British [156] Brigantine *Newport*, of Jersey, was condemned for having been, at the time of seizure, engaged in the Slave trade, contrary to the provisions of the Act 5th Geo. IV., c. 113, and by which decree, also, Messrs. Pinto, Perez and Co., merchants of London, the shippers of the cargo on board *The Newport* at the time of seizure, were condemned in the penalties to the amount of £12,915 17s. 6d., being double the value of the cargo.

The appeal was originally promoted by Charles [157] Phillippe Hocquard of Jersey (the Claimant in the Court below), the Master of the ship *Newport*, on behalf of the owners of the vessel against Her Majesty the Queen, and John Macdowall Skene, the Commander, and the officers and crew of Her Majesty's ship *Philomet*, the seizers of *The Newport* and her cargo.

*The Newport*, owned by Messrs. Le Sueur, of Jersey, was cleared out and sailed from the port of London on the 8th of June, 1854, bound for Ambriz, on the West Coast of Africa, and thence if required to Loanda, on the same coast, laden with a general cargo; and consigned to Francisco Antonio Flores, a Brazilian subject, who resided at Loanda, a Portuguese settlement about sixty miles from Ambriz. Previous to her being despatched on her voyage, and some time in April, 1854, Messrs. Pinto, Perez and Co., by the instructions of Garrido, the attorney of Flores, through the agency of Messrs. Banner, shipbrokers, chartered *The Newport* to carry a cargo of lawful goods to Ambriz or Loanda, and to re-load, at either or both of such places, a homeward cargo of African produce, with which she was to return to London direct. A Bond (see Statutes, 6th and 7th Will. IV., c. 6, s. 11: and 16th and 17th Vict., c. 107) was given as required by the Custom House regulations, for certain arms, and the manifest of the cargo duly authenticated by the Portuguese Consul in London.



On the 21st of September, 1854, The *Newport*, in the prosecution of her outward voyage, arrived within about twelve miles of Ambriz, and, before any communication had taken place between the vessel and Flores, or his agent, was seized by Her Majesty's [158] ship *Philomel*, for being engaged in the Slave trade, and after touching at Loanda was carried with her cargo into St. Helena, in the Vice-Admiralty Court of which Island a cause of forfeiture against ship and cargo was instituted by the Captors.

On the 16th of October, 1854, an affidavit was filed in that Court by the Second Lieutenant, De Robeck, of The *Philomel*, setting forth that the articles found on board were for the purpose of the Slave trade: and on the 19th of the same month, a monition issued against Charles Phillippe Hocquard, the master, and Francis Le Sueur and Philip Le Sueur, the owners of the ship in special, and all persons in general, having an interest in the ship, or her cargo, which was served upon the master. On the 26th of October, 1854, the master appeared and put in a claim for ship and cargo, and also claimed costs and damages by reason of their detention, on behalf of himself and of Messrs. Le Sueur, of Jersey, the owners of the ship, and of Messrs. Pinto, Perez and Co., of London, whom he then erroneously supposed and described to be the legal owners, as well as the shippers, of the cargo. This error on the part of the master, it appeared, arose from ignorance of the circumstances, and from the fact that from the time of the seizure until after this claim was given, the ship's papers were exclusively in the hands of the Captors.

No subsequent monition issued against Messrs. Pinto, Perez and Co., nor against Flores. Another affidavit was filed by Lieutenant De Robeck, alleging the notoriety of Flores, the owner of the cargo, being a Slave dealer. On the 20th of November, before tidings of the seizure of the vessel had reached this country, the vessel was by a sentence of the Vice-[159]-Admiralty Judge declared forfeited, for being engaged in the Slave trade, and Messrs. Pinto, Perez and Co., as the shippers of the cargo, were condemned in penalties to the amount of £12,915 17s. 6d., and the cargo was decreed to be held in deposit until the penalty and costs should be paid. The grounds of this sentence as stated by the Judge were, that the vessel had on board packs of staves, and other articles usually selected for barter in carrying on the Slave trade, and that the cargo was consigned to Flores, who, it was alleged, was a notorious Slave dealer, and that there was a guilty knowledge in the shippers of the purpose to which the goods were to be applied by Flores, within the meaning of the Act, 5th Geo. IV., c. 113.

An appeal was at once asserted by Hocquard, the master, on behalf of the owners.

In January, 1855, a petition was presented, and an inhibition and monition for process extracted, and despatched forthwith to St. Helena; but the process was not returned in obedience to that monition until the middle of the month of October in that year.

On the 26th of October, 1855, the process was brought into the Registry, and a special libel of appeal, upon the authority of The *Lerin Lank* (10 Moore's P.C. Cases, 201) was given in on behalf of the Appellant, Hocquard; but an objection to a special libel having been taken on the part of the Respondents, their Lordships,\* on the 8th of February, 1856, without entering into the [160] merits, determined that any special matter, if admissible, ought to be introduced in a separate allegation, and not in the libel of appeal, and, therefore, directed the libel to be reformed accordingly.

As soon as the reformed libel was admitted, an appearance was given for Messrs. Pinto, Perez and Co., the shippers, as interveners for their own interest, and at the same time Perez intervened for Flores, the sole owner of the cargo.

Application was then made for leave to bring in an allegation on their behalf, pleading the same facts and exhibits which had originally been pleaded in the libel of appeal. This application was opposed by the Respondents, but was granted by their Lordships,† on the 12th of April, 1856. *Jones v. Godrich* (5 Moore's P.C. Cases,

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir William H. Maule.

† Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Lawrence Peel.

47). and 2 Browne's Civil Law, 357, was relied on by these Appellants in support of this motion.

Evidence was taken upon this allegation, and publication was prayed on the 13th of June, 1856, when an allegation was asserted on behalf of the Crown. This allegation, however, was not brought in until the end of January, 1857. The object of it was to establish that Messrs. Pinto, Perez and Co. had knowingly and wilfully shipped the cargo by *The Newport*, in order to accomplish some or one of the objects declared to be unlawful by the Act, 5th Geo. IV., c. 113. Evidence was then taken on this allegation, and also on a responsive allegation admitted on the part of Messrs. Pinto, Perez and Co. The substance and effect of the evidence of the witnesses taken on [161] these several allegations is so fully stated and commented on in the judgment, as to render its repetition here unnecessary.

Sir Frederic Thesiger, Q.C., and Mr. Forsyth, Q.C., for the Appellant, Hocquard, and Pinto, Perez and Co. intervening.

Dr. Twiss, for Perez, claiming for Flores, also intervening.

The Queen's Advocate (Sir John Harding), the Attorney-General (Sir Richard Bethell), and Dr. Jenner, for the Crown and the Captors.

The questions argued depended chiefly on the evidence, and were:—

First. That the sentence condemning the vessel and imposing penalties upon the shippers of the cargo was erroneous, as the evidence either before the Vice-Admiralty Court at St. Helena, or upon the additional evidence taken in the appellate Court, did not show guilty knowledge on the part of the owner of the ship, or that the goods had been shipped wilfully and knowingly, in contravention of the Act, 5th Geo. IV., c. 113, as required by decided cases, *Sherwill v. The Queen* (2 Moore's P.C. Cases, 1), *Del Campo v. The Queen* (2 Moore's P.C. Cases, 15); and that the *onus* of such proof was on the Crown, *Barton v. The Queen* (2 Moore's P.C. Cases, 19). That there was no probable ground for forfeiture, *The Apollon* (9 Wheaton, Amer. Rep. 372); and therefore, that the vessel and cargo ought to be restored with costs and damages, *The Woodbridge* (1 Hagg. Adm. Rep. 75). [162] It was further argued upon this point, that there was no power in the Vice-Admiralty Court to impose penalties at all; that the Act, 5th Geo. IV., c. 113, gave no such power; neither did the Act, 8th and 9th Viet., c. 91, and that the Court below had violated the regulations made pursuant to the Statute, 2nd Will. IV., c. 51.

Second. That the sentence was altogether irregular, and in violation of the rules and regulations for proceedings in the Vice-Admiralty Courts, established by the Order in Council of the 25th of June, 1851, under the Act, 2nd Will. IV., c. 51 (printed in note to *Guernardens v. Preston*, 4 Moore's P.C. Cases, 169); as neither the shippers or owner of the cargo, whose names and residences were known to the Captors, were cited in, or served with the monition taken out of, the Vice-Admiralty Court at St. Helena, as they ought to have been in order to be able then to defend themselves; and, lastly, on the part of Flores, it was insisted, that it was not competent to the Court to impose penalties on him as consignee of the cargo, as he was a foreigner. *Lopes v. Burslem* (4 Moore's P.C. Cases, 300).

Their Lordships' judgment was pronounced by

The Right Hon. T. Pemberton Leigh (3rd Feb. 1858).—This case comes before the Court by appeal from a sentence of the Vice-Admiralty Court of St. Helena, dated the 20th of November, 1854, by which the Judge of that Court pronounced the British Brigantine or vessel, called *The Newport*, whereof Hocquard was master, to have been engaged, at the time of her seizure, in the Slave trade, contrary to the provisions of the Statute, 5th Geo. IV., c. 113, and as such, or [163] otherwise, subject to forfeiture to the Queen, and condemned the same accordingly. The Judge, moreover, pronounced for the penalties due under the provisions of that Act; that is to say, that the sum of £12,915 17s. 6d. is due by Pinto, Perez and Co., the shippers and owners of the goods, wares, and merchandize laden on board the vessel, to wit, double the value of the goods, etc., and condemned Pinto, Perez and Co. in such penalties accordingly, and in costs, and ordered that the said goods, wares, and merchandize should be held in deposit until the penalty and costs should be paid.

The sentence is founded on an alleged breach of the provisions of the Act, 5th



Geo. IV., c. 113, and it is material, therefore, to state what are the provisions of that Act, and what construction has been put upon it by judicial authority.

The Act provides, by the 2nd section, that all dealings in slaves (except in certain special cases provided for by the Act) shall be unlawful, and that it shall be unlawful for any person to let to hire, use, or employ any vessel for the purpose of such trade, or to ship or contract for the shipping of any goods on board of any vessel for the purpose of being employed in such trade. By the 4th section, any ship so employed is subjected to condemnation, together with all property found on board the ship belonging to any owner or part owner of the ship. By the 7th section it is provided that if any person shall wilfully and knowingly ship any goods on board of any ship to be employed in contravention of the objects of the Act, such person shall be subject to a penalty of double the value of the goods. By the 10th section, persons guilty of the acts forbidden in the previous sections are declared to [164] be guilty of felony; and, by the 11th section, seamen serving on board any ships with a knowledge that they are to be employed contrary to the Act, are declared guilty of a misdemeanor. By the 51st section, it is provided that the penalties may be sued for, either in any Court of Record in Great Britain, or in any Court of Record or Vice-Admiralty Court where the offence was committed, or where the offender may be found after the commission of such offence.

Although the penalties thus inflicted on shippers of goods are imposed, by the 7th section, only on such persons as shall wilfully and knowingly ship them for the purpose of contravening the Act, the words "knowingly and wilfully" are omitted in the 4th section; which applies to the letting to hire the ship to be employed for this purpose, and subjects the ship so employed to forfeiture.

A question, therefore, was naturally raised, whether such words were to be implied from the whole context of the Act with respect to the owner of the ship, and whether a ship employed in carrying such goods, though without the knowledge of the owner, was not subject to forfeiture, on the principle which is often found to prevail in cases of breach of the Revenue Laws.

This question came before the Judicial Committee in the case of *Barton v. The Queen* (2 Moore's P.C. Cases, 19), and it was then decided, after long deliberation, that in order to subject the ship to forfeiture, it was necessary to prove guilty knowledge on the part of the owner, and that the *onus* of proving such knowledge, both as to the owner of the ship, and as to the shipper of the goods, lay upon the seizers. In the case of *Del Campo v. The Queen* [165] (2 Moore's P.C. Cases, 15), it was held that the cargo on board a ship employed in contravention of the Act, though shipped with a guilty knowledge, is not subject to forfeiture unless the goods belong to the owner of the ship.

In order, therefore, to sustain the sentence in the Court below, it must be shown, as to the ship, that she was employed in contravention of the object of the Act, and that she was so employed with the knowledge of the owner; and as to the shippers, that the goods had been shipped by them wilfully and knowingly, for the purpose of being so employed. Such being the law, what are the facts?

*The Newport* belonged to Le Sueur and Co., merchants in Jersey. Messrs. Banner, Brothers and Co., of the City of London, shipbrokers, were employed by the owners to make engagements for the ship. On the 21st of April, 1854, Banner, Brothers and Co. agreed to charter her for a voyage to the west coast of Africa, out and home, to Messrs. Pinto, Perez and Co., who are merchants of character in the City of London.

This charter-party is made between John Le Sueur of the one part, and Pinto, Perez and Co. of the other part, and it is thereby agreed that the ship shall receive on board, in the river Thames, such lawful goods as the charterers shall send alongside, and shall proceed therewith to Ambriz, on the west coast of Africa, and thence, if required, to Loanda, and afterwards reload, at either or both places, a cargo of lawful merchandize, and proceed therewith to London direct. The freight to be paid for the voyage out and home is £900, of which £400 are to be paid on the ship sailing from London, and the remainder on the delivery of the return cargo.

The ship was thus chartered by Pinto, Perez and Co. [166] on behalf of Francisco Antonio Flores, a Brazilian subject, resident at the Portuguese port of Loanda, on whose account they had received orders, through Garrido, his clerk and agent, to purchase and ship a cargo, to be consigned to him at Ambriz or Loanda. Accord-

ingly, between the date of this charter-party and the 8th of June following, they purchased and shipped a cargo on board *The Newport* for the account of Flores, the invoice value of which was £6457 18s. 9d., being one-half of £12,915 17s. 6d., the amount of penalties in which they have been condemned.

The cargo consisted of Manchester goods, to the amount of above £1000, earthenware, hardware, muskets and various miscellaneous articles, amongst which are the following: Forty-five casks for palm oil, £38 1s.; 120 bundles new iron hoops, £12; 100 packs (which we understand to be bundles of staves, to be made into casks), and which are described in the invoice as "*pipas abatidas*," for palm oil, capable of containing 12,645 gallons. These packs are set at £80; 1000 demijohns, £72 18s. 1d.

This cargo was shipped in the port of London, under the inspection of the Custom House authorities; the particulars of the cargo, to which we have adverted, were all specified in the ship's manifest, signed by the master. The ship was regularly cleared at the Custom House, on the 9th of June, 1854, as appears by the certificate of the Custom House officer. The invoice, which specified the different goods, was entitled, "Invoice of sundry merchandize, shipped from London to Ambriz and Loanda (Angola) by the ship *Newport*, Captain Hocquard, by order of A. Garrido, to consignment, and for account and risk, of F. A. Flores, of Loanda." The manifest de-[167]-scribed the vessel as bound for Ambriz, and the cargo as shipped by Pinto, Perez and Co., and consigned to Flores. There was not the slightest attempt at concealment of any kind, and no irregularity whatever is suggested by the Respondents to have been committed, unless the omission to give a bond with respect to the packs, to which we shall presently advert, can be considered to fall under this description.

Loanda is a Portuguese settlement, and Ambriz, at present, is also in the hands of the Portuguese Government. What was its condition, at the time of this shipment, does not appear very distinctly: some of the witnesses describe it as at that time in the possession of the Portuguese; others speak of it as in the occupation of an African Chief. However this may be, it was apparently considered, by the Portuguese authorities, to be within their territory; for, on the 9th of June, 1854, Vanzeller, the Consul-General of Portugal in London, signed and delivered to Hocquard a certificate, to be presented at the Custom House at Ambriz, of a declaration made by Hocquard in compliance with the regulations of the laws of Portugal; and a letter was addressed by Vanzeller to a gentleman described as the Administrator of the Custom House at Ambriz. Although, therefore, it turns out that at that time there was no Custom House at Ambriz, the shippers (if they had no other knowledge of the matter) might well suppose that Ambriz was in the possession of the Portuguese, and that there was a Custom House there.

The ship, furnished with all these documents, set sail on her voyage under the command of Captain Hocquard, on the 9th or 10th of June, 1854, and arrived off the port of Ambriz on the 21st of Sep-[168]-tember following, where she was boarded by an officer of Her Majesty's ship *Philomel*—a gentleman named Dalison. This officer examined the cargo and papers of the vessel, and was furnished by the master with every information relative to the ship, the cargo, and the voyage which she was then prosecuting. Mr. Dalison then left the ship, and she was soon afterwards seized by Captain Skene, the Commander of *The Philomel*, for being, as he alleged, engaged in the Slave trade. Captain Skene informed the master that the only ground on which he suspected that the vessel was so engaged, was that there was a number of packs on board, for which he had no certificate, from the Custom House of the port from which he had cleared outwards, stating that sufficient security had been given that the packs should be used only for the purpose of lawful commerce.

*The Newport* being a British vessel, seized by a British cruiser, a Court of Vice-Admiralty was the proper tribunal to adjudicate upon her; and Captain Skene, having removed to his own ship a certain number of her crew, and put on board three of his own men under the command of Lieutenant De Robeck, ordered the ship to be taken to St. Helena, as the nearest and most convenient port where there was a Court of Vice-Admiralty.

Lieutenant De Robeck sailed with her accordingly, and on the passage kept her for twenty-four hours off the port of Loanda, where Flores was residing. The master requested permission to communicate with his consignee; but this was refused, and no notice of the seizure was given to Flores by the Captors. The ship



arrived at St. Helena on the 8th of October, and on the 16th of that month, at the [169] instance and on the affidavit of Lieutenant De Robeck, a monition was issued out of the Vice-Admiralty Court of St. Helena, the terms of which are material.

The monition is issued against Hocquard, the master of the vessel, Francis Le Sueur and Philip Le Sueur, the owners thereof, and all persons in general who had or pretended to have any right, title, or interest in the said brigantine or vessel, her tackle, apparel, and furniture, and the cargo laden therein, and the parties so monished are to show cause why the ship and cargo was not liable to forfeiture and condemnation, and why the penalties due by law should not be pronounced for. Le Sueur and Co., as the owners, are expressly named in the monition; but there is no mention of the name either of Pinto, Perez and Co., or of Flores.

Lieutenant De Robeck's affidavit, after verifying various papers found on board the ship, including the several documents already alluded to, stated that Dalison, the officer originally sent on board the vessel, had reported that no certificate was found on board from the Custom House of the port from which she had sailed, with respect to the water casks, packs, or shooks, part of the cargo; and he stated that he knew Flores, the consignee of the cargo; that Flores was a notorious Slave dealer, and that he had no other occupation, calling, or profession, but that of a dealer in slaves, and of bartering with goods imported for slaves for exportation. Though Lieutenant De Robeck swore thus positively to these facts, he did not state how he had acquired a knowledge of them, and from his subsequent examination it appears that he did not know them at all, that he never saw nor was acquainted with either Garrido or Flores, nor ever saw [170] anything of any slave establishments of theirs, and that he knew nothing of them except from the information of others.

There is no mention of Pinto, Perez and Co. in this affidavit any more than in the monition, nor any statement that the Deponent believed, or had the least reason to believe, that either Le Sueur and Co., or Pinto, Perez and Co., were in any manner privy to the illegal employment of the vessel. Hocquard, the master, had been deprived of all his papers, and had been refused all opportunity of communicating with Flores, his consignee; and, in this difficulty, he applied to Fowler, a proctor at St. Helena, to claim the ship for Le Sueur and Co., whom he knew to be the owners of the ship, and the cargo for Pinto, Perez and Co., whom he knew to be the shippers, and supposed to be the owners of the cargo.

On the 26th of October, accordingly, a claim was carried in by Fowler, which is styled the claim of Hocquard, the master, on behalf of himself and Le Sueur and Co., the owners of *The Newport*, and on behalf of Pinto, Perez and Co., of London, merchants, as the shippers and sole owners of the cargo.

In support of this claim he, on the same day, made an affidavit, in which he went very fully into all the circumstances of the chartering of the vessel and the shipment of the cargo by Messrs. Pinto, Perez and Co.: he said, "that the cargo was shipped in London, under the eye and surveillance of the Customs authorities at the port." "That the Deponent had every reason to believe, and did at the time of making his affidavit believe, that the cargo was truly and solely for the purposes of lawful commerce, and that it was never contemplated not intended by any parties or party [171] whatever engaged, either in the fitting and chartering or freighting the brigantine or vessel, or in the shipping or consigning the cargo, or in the navigation or management of the brigantine or vessel in the voyage, that the brigantine or vessel, or the said cargo, or any part or parcel thereof, should be engaged in, or used or devoted to, any other than the purpose of lawful traffic:" and he goes on to say, "That previous to his clearing from London, he made certain declarations, and signed certain documents, at the Custom House of that port, relative to the voyage and cargo of the vessel, as is usual in such cases; that he relied entirely on the brokers to do whatever was necessary to procure all requisite documents from the Custom House authorities, and that he had every reason to believe, and did believe, that every necessary declaration, bond, or document requisite and usual to be made, signed, or given to the Customs of the port from which a vessel clears outward with a cargo, had been made, signed, and given in the case of the vessel, and that every necessary document or certificate or ship's paper of any description, required to enable the vessel to proceed securely on her voyage, and to prove the nature of the traffic in which the vessel was engaged, was furnished to him, as master,

on his clearing out as aforesaid, and was amongst the papers and documents delivered by him to Captain Skene, at the time of the seizure and detention of the vessel."

With respect to the packs, he stated that he was not aware of the particular purpose to which they were intended to be applied, but that they were put on board as part of the cargo, and not for the use of the vessel; and that he, the Deponent, had no means within his knowledge, of converting the said packs [172] into water-casks, or casks of any description, even had he so desired. He said that the demijohns were not shipped for nor intended to be used on board the said vessel for the purpose of containing water, or for any other purpose whatever than that of being delivered with the remainder of the cargo, according to the terms of the charter-party and bill of lading; and that he was informed by Captain Skene himself that the demijohns were articles of legal traffic, and that he did not rest anything on their being on board the vessel. He said that all the articles objected to were entered on the ship's manifest, and were, to the best of his belief, solely for the purpose of lawful trade; and were, as he was credibly informed, continually imported into Africa for the purpose of lawful trade.

With respect to the allegations in De Robeck's affidavit against Flores, the Deponent stated that he knew not Flores, and that he was unable, therefore, either to admit or deny the allegations respecting him; that he had no further knowledge of the person to whom the vessel and cargo were consigned than the name of the party, gathered from his instructions and ship's papers. He stated that he had made a former voyage, as master of the vessel, to the coast of Africa; had taken out a cargo of coals, and had brought back a cargo of palm oil; and that he believed that the vessel had always been employed in making voyages to and from London and the said coast, and had never been engaged in the Slave trade; that he had been long acquainted with the owners of the brig; that they were shipowners and merchants of high reputation and unblemished character, both at Jersey and wherever their name is known, and that [173] the Deponent truly believed that they never had been, nor would they or any of them be, engaged in carrying on, or aiding, abetting, or encouraging the African or any other Slave trade, under any pretence or for any reward or remuneration whatever; that he also knew, and was well acquainted with, the house of Baumer, Brothers and Co., and that they are brokers of long-established and wide-spread reputation, and that he had never heard of, nor had the slightest reason to suspect, their being connected in any transactions with, or which might in any way further, the Slave trade; that he also knew the house of Pinto, Perez and Co., the charterers of the vessel, and that they have large transactions with the coast of Africa, and are continually receiving into England from thence cargoes of the various productions of the country, and that the Deponent had never, either directly or indirectly, heard that they were, or ever had been, concerned in the Slave trade in any way whatever, and that the Deponent verily believed they never had been nor were so concerned.

It would be difficult to frame an affidavit, going more fully and distinctly into every part of the case than this, or more completely negating as far as the knowledge and belief of the Deponent extend, all privacy on the part either of Le Sueur and Co., or of Pinto, Perez, and Co., to any unlawful use of the ship or cargo.

The affidavit of Hocquard was confirmed by the papers and letters found on board the ship, as far as any inference could be derived from them, and by the affidavit of De la Mare, the chief officer of the vessel, under the master, who stated that he was employed to receive on board the vessel the different packages [174] then on board of, and forming part of the cargo of, the vessel, and that the whole of the cargo, and every part and parcel thereof, were regularly and duly shipped in London, and brought on board the said vessel in the ordinary manner; and that with every separate shipment thereof, he, the Deponent, to the best of his recollection and belief, received a boat or shipping-note, bearing the Custom House stamp, and that he had several of the said shipping-notes in his possession at the time of the seizure of the vessel, and had since delivered the same to the master of the vessel.

There was, further, an affidavit by Pritchard, a Custom House officer at St. Helena, by which, on behalf of the Claimant, he deposed that it appeared to him from the papers and documents found on board the ship, and brought in by the Captors, that the provisions of the Act, 16th and 17th Vict., c. 107, intituled, "An Act to



consolidate and amend the Laws relating to the Customs of the United Kingdom, etc.," had been complied with, and that the vessel was duly cleared out from the port of London on the 9th of June last, for Ambriz, on the west coast of Africa, with a cargo consisting, among various other articles, of 100 packs of staves, 1000 demi-johns, and 25 casks of muskets, all of which are entered on the manifest of the vessel.

Lieutenant De Robeck made a second affidavit, verifying copies of certain letters and documents relating to Flores, which the Judge admitted; though, from a subsequent explanation of the grounds of his judgment, he does not appear to have given them much weight.

On the 20th of November, 1854, the cause came on [175] for hearing, and on the same day the sentence complained of, was pronounced by the Court.

It is contended by the Appellants that this sentence is not only entirely unwarranted by the evidence before the Court, but that it was pronounced in direct violation of the regulations contained in an Order in Council, issued under the authority of the Statute, 2nd Will. IV., c. 51, by which Order the proceedings of Vice-Admiralty Courts in cases of this description are, or ought to be, governed (see foot note to *Guimaraens v. Preston*, 4 Moore's P.C. Cases, 170).

One of these regulations provides, that if the owners or parties implicated are known, they shall be cited by name in the monition. Pinto, Perez and Co. were known to be the shippers of the cargo. Flores was known to be the consignee and owner (this appears by De Robeck's examination); yet neither Pinto, Perez and Co., nor Flores, are cited.

If the monition contain the names of the owners or others from whom penalties are sought to be recovered (in other words, if such persons are known), the Regulations provide that the monition shall be personally served on the parties; the object being obviously to secure due notice and opportunity of defending themselves, to the individuals liable to be affected by the judgment.

Here the names and residences, both of Pinto, Perez and Co., and Flores, were perfectly well known, yet there was no service upon them, and no notice of any sort given to them.

It is provided by the Regulations, that if it shall appear to the Judge by affidavit, that personal service cannot be effected on the parties, if any, named in [176] the monition, by reason that they have personally absented themselves to avoid service, the Judge is to pronounce his decree; but if he has reason to believe that the parties are *bona fide* ignorant thereof, he ought to reserve his judgment, so far as relates to the penalties sued for, and also as to the slaves and vessel if any doubt shall arise upon the evidence.

Here, there had been no attempt to serve either Pinto, Perez and Co., or Flores, personally; there was doubt, as to Flores, whether the transaction was illegal; there was more than doubt as to Le Sueur and Co., and Pinto, Perez and Co.: yet the Judge, instead of suspending his sentence, pronounces, on the same day on which the case is brought on, a decree of condemnation.

Finally, in the case of a monition citing all persons in general, and not describing any persons by name, no penalties against individuals can be pronounced for. Here, Pinto, Perez and Co., are not cited by name, yet the Judge pronounces for penalties against them to the amount of nearly £13,000.

It is no excuse for these irregularities that the master (who had no authority at all to appear for Pinto, Perez and Co.), in the state of ignorance in which he was, instructed a Proctor to give in a claim for Pinto, Perez and Co., as sole owners of the goods. It was perfectly well known to the Captors that Pinto, Perez and Co. were not the owners at all, and that the goods belonged to Flores, from whom all knowledge of the proceedings, as far as the Captors were concerned, had been kept.

It is said that, although Flores had no official notice of these proceedings, he was acquainted with them, and might have attended to protect his interests. [177] It by no means appears that he had any opportunity of doing so. There is evidence, indeed, that by the 14th of October he had heard of the seizure of *The Newport*, and that by the 10th of November he had heard, indirectly, that she had been taken to St. Helena; but there is no communication between Loanda and St. Helena, except by cruisers; and on the 20th of November the sentence was pronounced. Flores had a right to rely on the observance by the Court, of rules in themselves

positive and essential to the due administration of justice, and the Captors, who had kept him in ignorance of their proceedings, cannot very reasonably object that he did not appear to them.

It is contended, however, by the Respondents, that the case has now assumed an entirely different aspect; that any irregularities in the original proceedings are immaterial; that it comes before their Lordships on new pleadings and new evidence; and that there is now sufficient ground, both to affirm the original sentence, and to pronounce an original sentence of condemnation of the cargo, and of infliction of penalties upon Flores.

The case certainly comes before their Lordships in a very singular shape. In addition to the ordinary petition of appeal, and transcript of the original proceedings and evidence, we find, amongst the papers before us, a libel of appeal, supported by affidavits, on the part of Hocquard, as representing *Le Sueur and Co.*, and *Pinto, Perez and Co.*; an allegation on the part of *Pinto, Perez and Co.*, as interveners; a claim for the cargo by *J. M. Perez*, as attorney for Flores, praying restitution, with costs and damages; a responsive allegation on the part of the Crown; and a further al-[178]-legation on the part of *Pinto, Perez and Co.* Upon these further pleadings, a vast mass of additional evidence, both oral and documentary, has been produced by both sides. Witnesses have been brought over by the Crown, at a great expense, from the Brazils, from Portugal, and from Africa; every matter bearing upon the transaction has been the subject of investigation, besides many bearing upon it not at all, or but very remotely. The costs of these proceedings, therefore, form a subject of consideration, not less important, perhaps, in a pecuniary point of view, than the matter itself in dispute.

The points to be determined remain, however, as against the original parties, the same as they were at first. As regards *Le Sueur and Co.*, is it made out that the ship was employed with their knowledge in any manner in contravention of the Act, 5th Geo. IV., c. 113? As against *Pinto, Perez and Co.*, is it made out that they shipped the goods in question, wilfully and knowingly, for the purpose of being so employed?

The case attempted to be made by the Respondents is this:—That Flores was, at the period of the transactions in question, and had been long previously, engaged in the Slave trade; that Garrido, his agent, had also been long engaged in the same traffic, first, on his own account, and afterwards on account of Flores; that the employments of Flores and Garrido were notorious to everybody who had any trade with the west coast of Africa; that Flores had, in truth, no other real trade; that Ambriz was a port which had no trade except in slaves; and it is argued, that under these circumstances it must be presumed that the goods in question were intended to be employed in the Slave trade, and that *Pinto, Perez and Co.*, and [179] *Le Sueur and Co.*, had notice of that fact. It is insisted further, that the cargo was of a character to excite suspicion, and that, although the Act under which a bond with respect to casks (or, as it is contended, packs, to be made into casks) is required, may not apply to this case, still that it was the practice of the Custom House in London to require a bond in such cases, and of merchants to give it; and that the absence of such bond adds to the suspicion which the cargo itself is calculated to create.

It is useless to go in detail through the mass of the documents and depositions, in which there is much matter contained which cannot be regarded as evidence, and some evidence to which little credit can be given, except in so far as it is corroborated by other testimony or by circumstances. This observation applies more especially to Monteiro, who has been brought over from Africa by the Crown, in order to be a witness, and who states that he is to receive £1200, in addition to his expenses, for coming. On this witness, as well from the account which he gives of himself, and from the letter which he admits having written to Garrido, as from the contradiction given to his evidence in several particulars, their Lordships are of opinion that they cannot place much reliance. A careful examination of the papers, after the long and very able discussion which the case underwent at the Bar, has brought their Lordships to the following conclusions:—

It is clear that, at a period antecedent to the date of the present transactions, both Flores and Garrido were largely engaged in the Slave trade, and that for several



years before 1851 they were employed in the regular purchase and transmission of slaves from the [180] west coast of Africa to a company of merchants at Rio de Janeiro. In 1851, however, strenuous efforts were made by the Brazilian Government to put down the traffic; and, as far as regards the Brazils, these efforts appear to have been attended with great success. British and Portuguese Commissioners were resident at Loanda for the purpose of enforcing the execution of the Treaties relating to this subject. One of the gentlemen, who was the British Commissioner there for several years, Sir George Jackson, has been examined as a witness for the Crown in this case, and it appears from his evidence that, in 1851, he reported to his Government that the Slave trade was most sensibly diminished, and that any occasional shipments of slaves had been principally from the south of Loanda (Ambriz is to the north of Loanda). In January, 1853, the British Commissioners reported that the slave traffic was so far extinct, that nothing but a change of policy on the part of Brazil could effect its revival to any considerable extent; and this opinion was shared by the Portuguese Commissioner.

In the year 1853, there seems to have been some increase of the Slave trade both north and south of Loanda, mentioned in the Commissioners' Report of 1854; but in February, 1855 (speaking, therefore, it is presumed, of what happened in the year 1854), they reported that such increase had been only momentary, and had entirely ceased.

It is said, however, and there is reason to believe, that, although the trade with Rio de Janeiro was stopped, Flores, and Garrido as his agent, were, at different times after 1851, engaged in adventures of sending slaves to Cuba. So strong a suspicion, at all [181] events, was entertained on that subject by the British authorities, that urgent remonstrances were addressed to the Portuguese Government against permitting Flores to remain in their territory in Africa, and in consequence, in the beginning of 1854, an order for his removal, within five months, was issued, which was served upon him in June, 1854. He obtained a little delay in the execution of the order; but in February, 1855, he quitted Africa, and their Lordships are not aware of any evidence to show that he has since been engaged in such transactions. In 1854, he obtained from the Portuguese Government a concession of large copper mines in Africa, which he began to work in 1855, and Sir George Jackson states that he has no reason to suppose that Garrido (the agent of Flores, who remains in Africa) has, since those mines began to be worked, been at all concerned in the traffic of slaves. Unless the evidence of Monteiro be considered sufficient to establish the fact, there seems no distinct proof that, in or after the year 1854, Flores embarked in any adventure in slaves.

In order, however, to establish a case against this shipment, it is not sufficient to show that Flores had been engaged in the Slave trade, and had not altogether abandoned it in 1854. It must be proved either that at that time he had no lawful trade, or that, from the port to which the cargo was addressed, or from the nature of the cargo itself, or from other circumstances, there is a presumption that this adventure was intended, not for his lawful traffic, but for his unlawful traffic. Now, not only are the propositions as to Flores' trade, and as to the port of consignment, and the nature of the cargo, not established, but the direct contrary is distinctly proved [182] by the evidence; and so far from there being proof of any other circumstances to raise the presumption, the evidence tends directly to rebut it.

It is proved that Flores was engaged in lawful traffic to a large extent; his dealings of this kind increasing, as it seems, in proportion as the Slave trade was suppressed. He had much correspondence with Pinto, Perez and Co., and received several consignments from them in the years 1854 and 1855. This correspondence is produced, and it all appears to bear reference only to lawful trade. Some of the articles ordered by him are such as could hardly be employed for any but lawful trade: one is a brick-making machine; another is an oil press, which he proposes to establish for crushing ground-nuts, an article which seems to have acquired considerable importance in commerce since the great check given to the Slave trade upon this coast.

With respect to the port of Ambriz, the witnesses on both sides agree that, at the date of the transactions in question, it was a port at which considerable lawful traffic was carried on; at which there were respectable European houses

established for the purpose of carrying on such traffic; at which a cargo like that of *The Newport* might find a sale for the purposes of lawful traffic, and at which a legitimate cargo might be procured in return; and it is shown that for several years Flores himself had been in the habit of importing palm oil, elephants' teeth, and other African produce, from Ambriz into Loanda.

If, therefore, the real employment of Flores had been notorious in London, and known to these parties, how could it have affected their case? It never can be contended that, because a man has been en-[183]-gaged in the Slave trade, he must not engage in lawful trade, or that all persons dealing with him must be presumed to be engaged in illegal traffic. The policy of the British Government appears to have been directed, on the contrary, to supplanting the Slave trade by lawful commerce, and to inducing those who had been engaged in it, whether buyers or sellers of slaves, whether natives of Africa or foreigners, to abandon their old pursuits, and employ themselves and their capital in promoting the lawful commerce, and with it the civilization of the country.

But, so far from the characters of Flores and Garrido being notorious in London, and known to all merchants there engaged in the African trade, not a single merchant, or other person, resident in England, is produced as a witness on the part of the Crown to prove the fact, and there is much evidence the other way. Mr. Swanzy, who has been engaged in the African trade for twelve years, swears that he had never heard either of Garrido or Flores. Mr. Williams, who was formerly a partner in the firm of Pinto, Perez and Co., who knows all their transactions as well, he says, as they know them themselves, and is still in some measure connected with the firm, swears that he never heard of Garrido, and never heard of Flores being engaged in the Slave trade, or even that he was suspected of being so, till after the seizure of *The Newport*. Mr. Banner, who has been engaged, for about fourteen years, as a shipbroker, in trade with the west coast of Africa, states that he had never heard, nor had the least suspicion, till after the seizure of *The Newport*, that Flores was engaged in the Slave trade. Slader, a clerk of Banner, deposes [184] to the same effect, and so do Pargana and Boyd, who are clerks of Pinto, Perez and Co.

One of the firm of Le Sueur and Co. has been examined, and he states that he had never heard of either Flores or Garrido; and he denies in the most positive terms, that he, or any of his firm, or his ship, since she belonged to them, has been ever engaged, directly or indirectly, in the Slave trade, and he says that the whole transaction of chartering the ship on her last voyage was conducted by Messrs. Banner and Co.

This statement is confirmed by Banner, who states that he had chartered *The Newport* twelve times between 1845 and 1854, upon African voyages, sometimes on account of the British Government, and sometimes to private persons. He states that on the late occasion, the ship was chartered and the cargo shipped solely for the purposes of lawful commerce. The partners in the firm of Pinto, Perez and Co. have sworn to the same effect; and have also sworn that, until after the seizure of *The Newport*, they had no notice, knowledge, or suspicion that Flores was or had been engaged in the Slave trade.

If we look at the *evidentia rei* in the particular transaction, not the least circumstance of suspicion is discovered. It is clear, from the depositions of the Crown witnesses, as well as of those of the Appellants, that the cargo was of a character quite as well suited for lawful as for unlawful traffic. The staves are proved to have been second-hand staves, furnished by breaking up casks which had brought home palm oil, and to have been bought for the purpose of being [185] so employed again, and not to be fit for carrying water. So little interest was felt about them by the shippers, that the master was told, if he was pressed for room in his ship, to leave them out. No blame is to be imputed to either the owners of the ship or the shippers of the cargo for giving no bond in respect of them. It is, at least, very doubtful whether any bond could have been demanded; but, at all events, it was not demanded. The Custom House officer who passed the goods says he should not have required a bond if he had observed them; "indeed, he has no doubt that he did observe them, but required no bond; not, according to his then judgment, considering such bond to be requisite."



From the evidence of all the Custom House officers examined, it appears that the practice amongst them varied with respect to requiring such bonds, and, if there was any mistake in the matter, the allegation on the part of the Crown attributes it “to the error or neglect of the Custom House officers on the spot.”

With respect to the demijohns, it is proved that they are common articles of commerce in the African trade; that they are not used for the purposes of carrying water in slave-ships, for which purpose they occupy too much room, but are used for carrying spirits into the interior of Africa: indeed, the evidence shows that it had been intended to fill these vessels with spirits on the voyage in question, but that on applying to the Custom House it was found to be illegal to do so. When it is admitted that this ship was never intended to be employed in carrying slaves, and that the whole cargo was to be sold, and that these articles were part of the cargo, and not of the equipment of the vessel, no suspicion can attach, [186] after the evidence is examined, to any of these articles.

The *bona fides* of the transaction is strongly confirmed by the other circumstances which appear in the case. The letters of Flores and Garrido show incidentally that Flores was employed in 1854, in procuring return cargoes in Africa for the ships which he was expecting from England. Insurances upon such ships and cargoes were effected to the amount of £20,000; and amongst all the letters which have been produced, not one is pointed out as containing any expression from which an inference of illegal traffic can be drawn.

The result is, in their Lordships’ opinion, that the Respondents have entirely failed, by the additional evidence, to bring home any charge either against Le Sueur and Co., or Pinto, Perez and Co., with respect to the shipment in question, and that, on the contrary, the effect of such evidence is to exonerate these gentlemen entirely from any guilty knowledge of an illegal purpose, even if there were reason to believe that, on the part of Flores, such purpose existed. Indeed, as against Le Sueur and Co., the allegation on the part of the Crown does not impute to them any such knowledge.

The sentence complained of must be reversed. Le Sueur and Co. have been subjected to serious loss; their ship has been sold, they have lost their return freight, the seizure was made without any sufficient cause, and they are clearly entitled to restitution, with costs and damages. If the Captors have acted under the instructions of their Government, it is to the Government that they must look for their indemnity.

Pinto, Perez and Co. have been condemned in very [187] heavy penalties, on the ground of having committed an offence which might have subjected them in this country to a prosecution for felony. Whatever injury, however, they have sustained (and it may probably be, as they represent, very serious), it is not of a character for which damages can be awarded in a Court of Admiralty; but to the costs of all the proceedings, both in St. Helena and in this country, they are fully entitled.

Their Lordships desire to guard themselves against being supposed to imply, by this judgment, any censure of the course which it has been thought proper on the part of the Crown to adopt in this case. When the attitude assumed by this country towards Foreign States, on the subject of the Slave trade, is considered, it may justly have been thought the duty of the British Government, when their own subjects were alleged to be implicated in such a traffic, to have the matter sifted to the very bottom, and not to spare, as they appear not to have spared, any trouble or expense, in order to discover the guilt, if guilt existed, and to bring the offenders, if offenders there were, to justice. This course may have been necessary, as it was strongly urged by the Attorney-General that it was necessary, for the vindication of the national honour in the eyes of the world; but their Lordships think that the national honour must be vindicated at the national expense, and that merchants who, having engaged only in a lawful adventure, have been subjected to an unjust and illegal sentence, are entitled to be indemnified against its consequences, and against the costs which they have incurred in obtaining its reversal, in relieving themselves from the heavy pecu-[188]-niary loss which it inflicted, and from the deep stain which it cast upon their characters.

The only remaining question, is with respect to the cargo. The penalties, for which alone it was held in deposit, being no longer due, in consequence of the reversal

of the sentence against Pinto, Perez and Co., it is of course that the cargo should be restored to Flores, the owner, unless a case for penalties, or condemnation, can be established against him. Their Lordships have already expressed their opinion that the Respondents have failed to establish any such case, even if, on the present proceedings, it was competent to them so to do. The cargo, therefore, with the proceeds of such part as has been sold, must be restored to him; but, considering that he has not availed himself of the opportunity which he had of exculpating himself, by his own affidavit or examination (as J. M. Perez, his attorney, has attempted to do on his behalf) from all guilty intention in this transaction, and that his course of trade previously exposes this particular adventure, as regards him, to some suspicion, their Lordships think that justice will be done to him by simple restitution of the cargo, and of the proceeds of such part as has been sold, without costs or damages; and they will make a report to Her Majesty in conformity with the opinion which they have expressed.

[Mews' Dig. tit. SHIPPING, A. XI. CHARTERPARTY, 3. *Exemption from liability*; XIII. FREIGHT, 2. *When payable*, c. *Pro rata itineris*; XXVI. ADMIRALTY LAW AND PRACTICE, 22. *Practice*, w. *Reference to Registrar*, 23. *Appeals*, b. *To Privy Council*; tit. SLAVERY AND SLAVE TRADE. S.C. Swab. 317; 6 W.R. 310. As to The Slave Trade Act, see note to *The Amedie*, 1810, 1 Acton 251. As to Colonial Courts of Admiralty, see Pulling's *Index to the Statutory Rules and Orders*, 3rd. ed., 1899, p. 106.]

[189] ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

HENRY BUNNY,—*Appellant*; ROBERT HART,—*Respondent* \* [June 16, 1857].

The English "Bankruptcy Consolidation Act," 12th and 13th Vict., c. 106, does not extend to the Colony of New Zealand.

Under a warrant issuing out of the Court of Bankruptcy in England, lands and personal property belonging to A. in New Zealand (who had been adjudicated a Bankrupt in England) were seized. In an action by A. in the Supreme Court of New Zealand for trespass, the Defendant pleaded the bankruptcy of A., and that he had committed the trespass under the authority of the warrant of the Court of Bankruptcy. In that action A. disputed the validity of the adjudication of bankruptcy, which question the Supreme Court refused to entertain. Upon appeal, the Judicial Committee, by consent, directed the appeal to stand over, to enable A., the Appellant, to petition the Lords Justices sitting in Bankruptcy to annul the adjudication [11 Moo. P.C. 196].

An English trader having gone abroad, and remained there with the intent to defeat or delay his creditors, is, under the 167th section of the "Bankruptcy Consolidation Act, 1849," guilty of a continuing act of Bankruptcy [11 Moo. P.C. 197].

In consequence of the poverty of the Plaintiff, the Supreme Court of New Zealand allowed an appeal to the Queen in Council, without requiring the usual security for costs [11 Moo. P.C. 193].

This was an appeal from a judgment of the Supreme Court of New Zealand, for the Southern Dis-[190]-trict, in an action of trespass brought by the Appellant against the Respondent.

The facts out of which the appeal arose were these:—

The Appellant, previous to the year 1853, resided in England, at Newbury, in the county of Berks, where he carried on business as a brickmaker, cattle dealer, and

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir William H. Maule.



money scrivener. In November, 1853, having become largely indebted to various creditors, and being wholly insolvent, he left this country, and went with his family to New Zealand, where he settled. On the 12th of March, 1855, a petition for adjudication of bankruptcy against the Appellant, was presented to the Court of Bankruptcy for the London District by one Wilson, a creditor of the Appellant. Proof having been given of the petitioning creditor's debt, and of the trading and act of bankruptcy of the Appellant, he was on that day adjudicated a Bankrupt, and official and trade assignees of the estate and effects of the Appellant were appointed under the bankruptcy. Notice of this adjudication was served at the last place of abode of the Appellant, and published in the Gazette, the Appellant being required to surrender on the 4th of May, 1855.

The Appellant did not, however, surrender himself, nor take any steps to annul the petition for adjudication of bankruptcy. A power of attorney, dated the [191] 24th of April, 1855, was executed by the assignees, authorizing the Respondent, a resident in New Zealand, to collect and get in all and singular the estate and effects of the Appellant, in New Zealand or elsewhere out of Great Britain and Ireland, and on the 27th of April, 1855, Mr. Commissioner Fane, acting in the matter of the bankruptcy, issued a warrant addressed to the Respondent, authorizing and empowering him to enter into and upon the house of the Appellant, and to seize all things whatsoever belonging to him. In pursuance of this warrant, the Respondent, on the 6th of October, 1855, entered into and seized the dwelling-house and furniture, etc., of the Appellant, in the Colony of New Zealand, and also the cattle and certain closes and parcels of land belonging to him in that Colony, on behalf of the assignees.

In consequence of such seizure, the Appellant brought an action of trespass against the Respondent in the Supreme Court for the Southern District of New Zealand, to recover damages for the trespass and conversion. To this action the Respondent demurred, and pleaded the bankruptcy of the Appellant, and justified the acts complained of, as being done under and in execution of the warrant of the Court of Bankruptcy. To this plea the Appellant gave notice that he disputed the petitioning creditor's debt and the trading and act of bankruptcy, and by way of replication, he denied the bankruptcy, and alleged that the Respondent of his own wrong, committed the trespasses and conversions. The Respondent made profert of the official copies of the several proceedings in the bankruptcy of the Appellant referred to in the plea, and submitted, that the same were conclu-[192]-sive evidence of the bankruptcy, and that in the absence of any proceedings taken in England to dispute or annul the fiat or the petition for adjudication, the same must be taken and held by the Supreme Court of New Zealand to be valid and subsisting, the Supreme Court having no jurisdiction in matters of bankruptcy or other proceedings had or taken in the Court of Bankruptcy in England, or under the laws then in force relative to Bankrupts.

This demurrer was allowed by Mr. Justice Wakefield on the 6th of March, 1856, on the ground that to permit the Appellant to dispute the petitioning creditors' debt, and the trading and act of bankruptcy, would be tantamount to creating in New Zealand a Court of appeal from England.

A rule was afterwards granted by the Court, at the instance of the Appellant, to show cause why this judgment should not be set aside; but, after argument, the rule was discharged. The judgment of Mr. Justice Wakefield, in discharging the rule, was as follows:—"The further discussion of this case has strengthened my belief that I decided correctly on the first hearing of it, on the 6th of March last. The 233rd section of 'The Bankrupt Law Consolidation Act, 1849,' gives the right to a person in similar circumstances to the Plaintiff to commence an action, suit, or other proceeding, to annul the adjudication within twelve months after the advertisement of the bankruptcy in the London Gazette. These proceedings must be commenced at home. The case of *Clark v. Mullick* (3 Moore's P.C. Cases 252) has been cited as an authority for this Court having jurisdiction to try the issue of bankruptcy, or no bankruptcy. No doubt it favours such a view, but there [193] is a difference between that case and the present one. *Clark v. Mullick* was an action by a person alleging himself to be the assignee of a Bankrupt against a debtor to the estate of the Bankrupt, whereas this is an action by the Bankrupt against the

assignees' representative, Hart. Assuming that the latter action could, like the former, be tried in the Colony, there is nothing to show that a Colonial Court is bound to examine the proceedings of the Court of Bankruptcy in the Colony at the instance of the Bankrupt. On the other hand, 'The Bankruptcy Law Consolidation Act' contains various provisions for trying the question at home, and in the present case the reasons for resorting to the tribunals there instead of the tribunal here greatly preponderate. One I have already alluded to, namely, the great trouble and expense of procuring evidence here, as it could not be obtained without sending a commission home, a costly proceeding, and proverbially not so satisfactory as examining witnesses, *viva voce*. On the other hand, every sort of information that might be required would be found at once at the place whence the adjudication issued, and a great saving of both time and money would be secured by resorting thither. When the Plaintiff has succeeded in setting aside the adjudication of the Court of Bankruptcy against him in an English Court, he may be in a position to maintain his action against the Defendant."

The Appellant applied to the Supreme Court of New Zealand, for leave to appeal from this judgment to England, and, by reason of his poverty, that he might be allowed to prosecute the same without giving security for costs of the appeal. The Court granted leave without giving the usual security.

[194] In support of the appeal the Appellant submitted that the judgment was erroneous, for the following reasons:—

First. That as the Court of Bankruptcy was limited in its jurisdiction to England and Wales, and did not extend to the Colonies, therefore the warrant of such Court pleaded by the Respondent as his authority for the trespasses and conversions complained of, was of no legal force in New Zealand, and was no legal defence to the action brought by the Appellant against the Respondent.

Second. That supposing such warrant was of legal force in New Zealand, still as such warrant merely directed the Respondent to take possession of the Appellant's personal estate, it was no justification to the Respondent for seizing the Appellant's real estate, or for selling his personal estate.

Third. That (as the Respondent in his plea to the action, alleged the bankruptcy of the Appellant, and that he, the Respondent, had committed the trespasses and conversions complained of, for and on behalf of the assignees of the estate and effects of the Appellant, and by virtue of the warrant of the Court of Bankruptcy) the Appellant was entitled in such action to try the validity of the adjudication of bankruptcy.

Fourth. That where persons (acting under the authority of a Court confined in its jurisdiction to England, as the Court of Bankruptcy is) seize property in another country, the Courts of such country, within whose jurisdiction such property is situated, are bound, if called upon, to ascertain that the proceedings, under which such property has been seized, are legal.

[195] And, as to the adjudication of bankruptcy, he further submitted that the same was invalid, for the following reasons:—

First. That he was not indebted to the petitioning creditor.

Second. That the petition for the adjudication of bankruptcy was not in the form required by the 89th section of "The Bankruptcy Law Consolidation Act, 1849," nor had it been filed and prosecuted as required by the 90th section of that Act.

Third. That the Appellant was not a trader liable to become Bankrupt under the provisions of "The Bankrupt Law Consolidation Act, 1849."

Fourth. That, even if the Appellant was a trader, the act of bankruptcy on which such adjudication was obtained, was his departing the realm on the 9th of November, 1853, and, as the petition for adjudication of bankruptcy was not filed until the 12th of March, 1855 (being more than sixteen months after the act of bankruptcy was committed), such adjudication of bankruptcy was invalid under the 88th section of "The Bankrupt Law Consolidation Act, 1849."

In support of the judgment appealed from, the Respondent contended that there was no ground in law for setting it aside, and relied upon the following reasons:

First. That it appeared upon the proceedings in bankruptcy, that the Appellant was duly adjudicated a Bankrupt.



Second. That as no action, suit, or other proceeding, within the meaning of the 233rd section of "The Bankrupt Law Consolidation Act, 1849," had at any time been taken by the Appellant to dispute or annul the petition for adjudication, the Gazette containing [196] the advertisement of the adjudication was conclusive evidence against the Appellant, that he had become a Bankrupt before the date and filing of the petition for adjudication.

The Appellant appeared in person in support of the appeal.

He submitted, that the "Bankrupt Law Consolidation Act, 1849," did not apply to New Zealand; and that the Court below ought to have entertained the objections urged to the validity of the adjudication of bankruptcy. Upon this point he relied upon *Clark v. Mullick (a)*, and he disputed the validity of the adjudication, relying upon the same grounds stated in his reasons of appeal upon this point.

The Lord Justice Knight Bruce.—As the validity of the adjudication is disputed by the Appellant, it seems the proper course to allow him to present a petition to the Lords Justices sitting in Bankruptcy to annul the adjudication, and in the meantime for the appeal to stand over.

Mr. Hannen, for the Respondent, admitted that the judgment could not be sustained, and consented to this course.

The Appellant accordingly presented a petition to the Lords Justices, to annul the adjudication on the grounds set forth in the reasons relied upon by him [197] in the appeal to Her Majesty in Council (see case upon this point reported *nom. Ex parte Bunny*, 1 De Gex and Jones, 309). The Lords Justices expressed their opinion that the Appellant had resided abroad with the intent to defeat or delay his creditors, and that there was a continuing act of bankruptcy while he so continued to remain abroad with that intent.

The Appellant wishing to try the validity of the adjudication by an action, the petition was ordered to stand over with liberty to him to bring such action. The Appellant ultimately declined to bring an action and the petition was dismissed.

By an Order in Council made upon the appeal, leave was granted to the Appellant to withdraw the appeal, by consent.

[Mews' Dig. tit. BANKRUPTCY, H., IV. COLONIAL BANKRUPTCY; tit. COLONY, I. GENERAL PRINCIPLES, 1. *English Law—Introduction and Applicability*, III. APPEALS TO PRIVY COUNCIL, 6 *Practice*, 1. *In forma pauperis*. S.C. *sub nom. Ex parte Bunny*, 1 De G. and J. 309. As to application of English statute law to the Colonies, etc., see note to *Lyons (Mayor of) v. East India Co.* (1836), 1 Moo. P.C. at p. 299. Cf. also *Cooke v. Charles A. Vogeler Co.* (1901), A.C. 102; *Dulaney v. Merry*, 1901, 70 L.J. K.B. 376. As to special leave to appeal in civil cases, see note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. at p. 125.]

## [198] ON APPEAL FROM THE COURT OF CHANCERY IN THE ISLE OF MAN.

HENRY LABOUCHERE and Others,—*Appellants*; EMILY TUPPER and Others,—*Respondents* \* [June 17, 1857].

An executor of a trader carrying on the trade after his death, though not avowedly in the character of executor, is nevertheless personally liable for all the

(a) 3 Moore's P.C. Cases, 252. See also *Edwards v. Ronald* (1 Knapp's P.C. Cases, 259); *British Linen Company v. Drummond* (10 Barn. and Cr. 903); *Davison v. Farmer* (6 Exch. Rep. 242); *Leroux v. Brown* (12 Com. Ben. Rep. 801); *Mostyn v. Fabrigas* (Cowp. 161), and see notes to that case in 1 Smith's L.C., 363 (2nd edit.).

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir Edward Ryan.

debts contracted in the trade after the Testator's death, whether he is entitled or not, to be wholly, or to any extent, indemnified by the Testator's personal estate, and whether the Testator's estate is sufficient or insufficient for that purpose [11 Moo. P.C. 221].

Neither does the propriety of the executor's conduct, as between himself and those beneficially interested in the Testator's personal estate, give the creditors of the trade, becoming so after the death of the Testator, the rights of creditors of the Testator; it being immaterial, as far as they are concerned, whether the Testator, if he had a partner, was bound by a covenant with him that the Testator's executor should continue the trade in partnership with the surviving partners [11 Moo. P.C. 221].

The executor of a deceased shareholder in a Joint-stock Banking Company held not liable to make good out of his Testator's assets, debts contracted by the Company subsequently to the Testator's death, though the shares were registered in the executor's name, and he received the dividends in his character of executor, the debts due at his death having been subsequently discharged by the Company [11 Moo. P.C. 221].

There is no difference between the Manx law and the law of England in respect to the principles applicable to the law of partnership [11 Moo. P.C. 216].

The Appellants were the partners in a firm, which, since 1836, had carried on the business of banking in London, under the style of "Williams, Deacon, Labouchere, Thornton, and Co.," and one of the Respondents, Carre Cook Tupper, was the executor of one John Colton Tupper; the other Respondents, Emily Tupper and her children, were the persons beneficially interested under the Will of John Colton Tupper.

The appeal was brought against two decrees of the [199] Court of Chancery in the Isle of Man, made in two causes instituted there. The first suit related to a debt due from the "Isle of Man Joint-stock Banking Company" to the firm of Williams, Deacon, and Co. The second cause was a cross suit to the original bill brought by the Appellants and John Deacon, deceased.

The principal questions raised by the pleadings and the subject of the appeal, were—First, whether the real and personal estate of John Colton Tupper, who was, at the time of his decease, a shareholder in "The Isle of Man Joint-stock Banking Company," was liable to the Appellants for the debts due to their firm when that Company stopped payment on the 14th of August, 1843; and, secondly, if the real and personal estate was not so liable, whether such estate was liable to the Appellants for the debts owing to their firm from that Company at the time of the decease of John Colton Tupper. By the decree made in the first cause, the Court of Chancery in the Island declared that the Respondent, Carre Cook Tupper, as executor of John Colton Tupper, had no power to pledge the estate of his Testator beyond the amount invested in the shares, and, therefore, that the estate was not liable to the debts incurred by the Company after the death of John Colton Tupper, beyond the amount invested in such shares, and, that the debts owing by the Company to the Appellant's firm, at the time of the death of John Colton Tupper, were discharged by payments made subsequent to his decease. By the decree in the cross-suit, the bill was dismissed.

The facts of the case out of which the appeal arose were as follow:—

[200] In the year 1836, a Joint-stock Banking Company, called the "Isle of Man Joint-stock Banking Company," was formed for the purpose of carrying on a banking business at Douglas, in the Isle of Man. This partnership was constituted by a deed, dated the 2nd of July, 1836, and a memorandum annexed thereto, dated the 22nd of August, 1837, which was made between two persons, named Wulff and Forbes, of the town of Douglas, Bankers, and John Colton Tupper and upwards of 130 other persons, as shareholders in the co-partnership. By section eight of the deed of co-partnership it was provided, that the name and place of abode of each proprietor for the time being, in the Company, together with the number of shares held by him, from time to time, should be entered and written in a book, to be kept for that purpose, to be called "The Shareholders' Register," and every proprietor who should at any time change his name or place of abode, or, being a female,



should marry, and the assignees of any proprietor who should become Bankrupt or Insolvent, and the personal representatives of any proprietor who should die, should, immediately upon and after the events, leave a notice at the Banking-house or office of the Company, in the town of Douglas, stating his name, or new name and place of abode; and when a female proprietor should have been married, then the name and place of abode of her husband. Section nine provided, that no benefit of survivorship should take place between the proprietors, and that all the property of the Company should, as between the several proprietors and their real and personal representatives, be deemed personal estate. Section fifty-nine provided, that in case any person in whom any shares [201] in the capital of the Company should, by original subscription, purchase, marriage, bequest, representation, or other mode of acquisition, become vested, and who should not have executed or otherwise acceded to the deed, should, for three calendar months, after notice, neglect or refuse to execute the deed of accession as therein mentioned, then it should be lawful for the Directors for the time being to declare the shares so vested in such person neglecting or refusing as aforesaid, and all benefit and advantage whatsoever incident thereto, to be forfeited to the remaining members of the Company, and the same should be forfeited accordingly. Section sixty provided, that whenever, by any means whatsoever, any shares in the capital of the Company should become forfeited, or should be duly and effectually transferred to a new proprietor, then and in such case, and not before, the responsibility of the previous owner as a proprietor in the Company in respect of such share or shares should cease and determine, and such previous owner should be exonerated and released from all subsequent claims, demands, and obligations, in respect of the same share or shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements of the deed in respect of the same share or shares. Section sixty-one provided, that before any assignee of a Bankrupt or Insolvent proprietor should sell or assign any share or shares in the capital of the Company vested in him in that capacity, and before any executor, administrator, or legatee of a deceased proprietor, or any husband of a female proprietor, should sell, transfer, or assign any share or shares vested in him in such capacity or should become a proprietor in respect of such share [202] or shares, or receive any dividends in respect of the same, he or they should produce to the Directors for the time being of the Company, satisfactory evidence of his or their titles to the same. By section sixty-six it was provided, that if ever the losses of the Company should have absorbed not only the whole of the fund called the reserve surplus fund, but also one-fourth part of the paid-up capital of the Company, the Directors for the time being should call a special general meeting of the proprietors, and lay a statement of the affairs of the Company before such meeting, when it should be lawful for any three or more of the proprietors at such meeting to require the dissolution of the Company, unless two-thirds in number and value of the proprietors then and there present should be desirous of continuing the Company, which they should be at liberty to do upon purchasing the shares of the party or parties desirous of withdrawing, and indemnifying such retiring proprietors from the debts and engagements of the Company, and releasing them as therein mentioned.

The Respondent, Carre Cook Tupper, was a shareholder, and one of the Directors of the Company from its commencement until the Bank stopped payment. The Testator, John Colton Tupper, was, at the time of making his Will and at his death, also a shareholder in the Company, and by his Will, dated the 23rd of March, 1838, he gave, devised, and bequeathed unto the Respondent, Emily Tupper, certain chattels for her benefit during her life, and he also gave and bequeathed unto Carre Cook Tupper and Edward Forbes, all other his real and personal estate whatsoever, in trust to collect and receive the rents, issues, profits, and dividends arising from the same, and all profits [203] and advantages arising from any shares to which he might be entitled in any mines of lead or copper, and from and out of the yearly income thereof to pay an annuity to the Respondent, Emily Tupper; and upon other trusts therein mentioned. The Will did not empower the trustees and executors to sell any portion of the Testator's estate until the eldest son became of age, nor did the Will contain any directions relative to the interest of the Testator in the Banking Company, or in anywise authorize the executors to employ any part

of the Testator's estate in carrying on or continuing the business of the co-partnership.

The Testator died on the 22nd of January, 1840, leaving the Respondent, Emily Tupper, his widow, and the other Respondents, his children, him surviving, who claimed under his Will to be interested in his residuary, real and personal estate. Forbes having renounced, Carre Cook Tupper alone acted as executor thereof. Carre Cook Tupper did not sell the Testator's shares in the Bank, but, being himself a partner and Director, he caused the shares to be entered in the Shareholders' Register as held by "The representatives of J. C. Tupper." This entry was signed by Carre Cook Tupper, as one of the Directors of the Company. In August, 1840, a dividend of £8 per cent was paid upon the Bank shares; and in 1841, a dividend of £6 per cent was paid; and in 1842, a dividend of £5 per cent; which several dividends were received by Carre Cook Tupper, as executor, and paid by him to the credit of the account of the estate of the Testator with the Bank.

The Company stopped payment on the 14th of August, 1843, and a bill and action was filed by the Appellants' firm in the Court of Chancery in the Isle [204] of Man, on the next day, against all the shareholders in the Company, including Carre Cook Tupper in his own right and also as executor of John Colton Tupper, and against the legal representatives of many others who had been shareholders in the Company, claiming the sum of £60,000 due to the Appellants' firm upon eight promissory notes of the manager of the Company, as a specialty debt; and in December, 1843, a supplemental bill was filed by the Appellants' firm, claiming the sum of £99,941 18s. 1d. In this suit the estate of the Testator was arrested.

The Respondents, the wife and children of John Colton Tupper, and Carre John Tupper, since deceased, on the 20th of March, 1844, filed a bill in the Court of Chancery in the Island against Carre Cook Tupper, and the Appellants, and Williams the elder, and John Deacon, by which bill, among other things, they charged that the Company was dissolved by the death of John Colton Tupper, and that thereafter, Carre Cook Tupper carried on the trade or business of a Banker on his own account and responsibility in respect of the shares therein so belonging to the Testator at the time of his death; and that the debt, if any, which was up to and at the time of the death of the Testator due to the Appellants' firm, consisted of a small balance due by the partnership, and which balance, the Plaintiffs charged, was entirely discharged by payments subsequently made to the Appellants' firm by the survivors of the partnership; and that since the death of the Testator, Carre Cook Tupper had continued to trade with the Testator's share of the capital of the Bank which existed at the time of the death of the Testator, and with his other assets in conjunction with the surviving partners as [205] aforesaid, under the firm of the "Isle of Man Joint-stock Banking Company," or some other style or firm as a new partnership, and debts to a very large amount had been contracted by such new partnership with divers persons, but particularly as the Respondents alleged with the Appellants' firm; and that such new banking partnership carried on by Carre Cook Tupper, and the other surviving partners as aforesaid, stopped payment on the 14th of August, then last past, and that the Appellants' firm had by virtue of the process of the Court of Chancery in the Isle of Man, granted upon the bill filed by the Appellants' firm in the year 1843, attached and arrested property and effects, part of the estate of the Testator in the hands of Carre Cook Tupper, as well as Carre Cook Tupper's own property, to be amenable to such decree as might be made on the bill; and the Bill further charged that the Defendant, Carre Cook Tupper, and also Williams, Deacon, and Co., pretended that the estate and effects of the Testator were liable to debts contracted with them by Carre Cook Tupper subsequently to the decease of the Testator, which liability the Respondents denied; and the Bill prayed that the Will of the Testator might be established and the trusts thereof performed, and for an account of his personal and real estates, and that the Appellants' firm might be restrained by injunction from attaching or arresting the estate or effects of the Testator, in the possession of the Defendant, Carre Cook Tupper, or elsewhere.

The Appellants and John Deacon, by their answer, submitted, that according to the true construction of the deed constituting the partnership of the Banking Company, the same was not dissolved by the death of [206] John Colton Tupper, but that



the executors of the Will of John Colton Tupper were by the deed bound to the other partners in the Bank to continue the partnership on the behalf and at the risk of the estate of John Colton Tupper, until either the executors became themselves individually shareholders and partners in the Banking Company, or induced some other person or persons to become shareholder and partner, shareholders and partners therein, and until such new shareholder and partner, shareholders and partners, whether the executors themselves or such other person or persons had been duly admitted and recognised as such shareholder and partner, shareholders and partners, and that Carre Cook Tupper did not after the decease of the Testator carry on the trade or business of a banker on his own account or responsibility in respect of the shares belonging to the Testator at the time of his decease. And the answer further alleged, that Carre Cook Tupper did not for his own benefit, but as executor of the Will of the Testator and for the benefit of the estate of the Testator, receive the dividends which were from time to time declared and became due after the decease of the Testator in respect of the shares of the Testator up to the stopping payment of the partnership, of which the Testator was a partner at the time of his decease.

Upon this bill the Court of Chancery in the Island, in April, 1844, granted an injunction, prohibiting Carre Cook Tupper from further intermeddling with the estate and effects of John Colton Tupper, and appointed a receiver of the rents and profits of such estate.

In 1849, a decree was made in the original suit of the Appellants, commenced in August, 1843. [207] By this decree the suit was dismissed as against some of the Defendants, and it was declared that Carre John Tupper, in his own right and as executor of John Colton Tupper, and other original proprietors of shares, ought to pay the Appellants' firm the sum of £96,793 4s. 6d. with interest.

The Appellants and Deacon, in consequence of the injunction and appointment of a receiver, were unable to enforce their decree against the estate and effects of John Colton Tupper; they, therefore, on the 30th of May, 1851, filed a cross bill against Emily Tupper, and the children of the Testator, and against Carre Cook Tupper, stating, among other things, the decree against Carre Cook Tupper, and that at the decease of Testator the Company stood indebted to the Appellants in the sum of £60,000 and upwards, to the payment of which the Testator's estate was bound to contribute; and that Carre Cook Tupper, in pursuance of his duty as trustee and executor and in strict compliance with the terms of the Will, to which Emily Tupper had given her consent, continued to carry on the partnership with the assets of the deceased until the debt of £60,000 had increased to the sum of £99,943 18s. 1d.; and praying for an account of all the estate and effects of the Testator, whether specifically bequeathed or otherwise: and that the personal estate might be reduced into money, and all moneys, the proceeds of the estates, might be paid over to the Clerk of the Rolls for distribution amongst the creditors of the estate of the Testator; and that in case the personal estate should be found insufficient, that the real estate of the Testator might also be disposed of, and the proceeds in like manner be paid over for distribution, and that the Plaintiffs by virtue of [208] the execution under the decree of January and February, 1849, might be declared entitled to rank as creditors upon the estates, real and personal, for the sum of £60,000, or such balance of the execution as might appear to be due and owing to them upon the same, and further praying that the bill might be considered and taken as a cross bill to the original bill of Emily Tupper.

The Respondent, Emily Tupper, by her answer to this bill, charged the fact to be that the assets of the Company, at the time of the decease of the Testator, were more than sufficient to discharge every debt and liability of the Company to the Appellants, and that the Company did, shortly after the decease of the Testator and long previous to the Company stopping payment, actually pay off and discharge to the Appellants' firm the full amount of every debt and liability which the Company owed to the Appellants' firm at the time of the Testator's decease, or were in any respect liable to them for; but that the Company subsequent to the decease of the Testator had contracted a new debt with the Appellants' firm for a very large amount, and which remained due and owing to the Appellants' firm at the time the Banking Company stopped payment.

A cross bill was also filed by Carre Cook Tupper against the Respondents, the widow

and children of the Testator, the Appellant and others, praying that he might be declared free and discharged from all liability in respect of the Appellants' demands.

On the 22nd and 23rd of May, 1856, the decrees the subject of the present appeal, were made by his Excellency the Lieutenant-Governor and Chancellor of the Isle of Man. The material part of the judgment [209] in the first of the suits declared, that the Defendant, Carre Cook Tupper, as executor of John Colton Tupper, had made himself personally liable as a partner in the "Isle of Man Joint-stock Banking Company," in respect of the shares previously held by John Colton Tupper, deceased, in the Company, and that he had no power to pledge the estate of John Colton Tupper beyond the amount invested in the shares, and, therefore, that the estate was not liable to the debts incurred by the Company after the death of the Testator, beyond the amount invested in such shares. And the Court was also of opinion, that the debts owing by the Company to the Appellants' firm at the time of the death of the Testator were discharged, and that, therefore, the arrests laid on the property and effects which belonged to John Colton Tupper under the decree at the suit of the Appellants' firm ought to be rescinded and set aside, and the same was ordered and decreed accordingly. Decrees were also made in the cross suit instituted by the Appellants and Deason, and in the cross suit instituted by Carre Cook Tupper, whereby the bill in each of those suits was dismissed.

The Appellants appealed against the decree made in the suit of the Respondents, Emily Tupper and others, and in the cross suit brought by them, to Her Majesty in Council, which appeal now came on for hearing.

The Attorney-General (Sir Richard Bethell), and Mr. Simpson, for the Appellants. —The principal decree of the Court below cannot be sustained: it is in itself contradictory, unfounded, and inconsistent with the rules of law. Three points are raised by such decree. First, the personal liability of [210] the executor himself for the debts incurred subsequent to the death of his Testator. Second, the consequent non-liability of the Testator's estate for debts due to the Appellants' firm: and thirdly, the extinction of the debts due to them by subsequent payments since the Testator's death, according to the rule laid down in *Clayton's case* (in *Deacones v. Noble*, 1 Mer. 576). Now, we submit, that the partnership in the Isle of Man Joint-stock Banking Company, which existed at the decease of John Colton Tupper, the Testator in the cause, was not dissolved by his decease. The ninth section of the deed of the 2nd of July, 1836, provides, "that no benefit of survivorship shall take place between the proprietors." By the covenants in this deed, the Testator bound his real and personal estate to carry on the business of the Banking Company as a continuing partnership until his executor should sell his shares, or he or his legatees should personally become proprietors, neither of which events took place. The effect, therefore, was, that until there was such a transfer and registration, his liability continued, and the debts of the Company, as provided by section sixty, became a charge on his estate. According to the true construction of the Testator's Will, Carre Cook Tupper, as executor, had power to pledge or render liable the whole of the Testator's estate, personal as well as real, in carrying on the business of the Banking Company after the decease of the Testator: and this he did. The Appellants had a right, therefore, to treat the executor as standing in the place of the Testator: since, by virtue of the deed and Will together, he had power to pledge the estate. That estate, in fact, stood in relation to the liabilities of the Company in the place of the Testator's [211] person, and was bound by the same covenants and dealings as his person would have been. Such a covenant in the deed of partnership is valid by the law in force in the Isle of Man, though it may be doubtful whether by the law of England there could be such a thing as a continuous chain formed of a series of persons liable to the debts of the concern.—[The Lord Justice Turner: What kind of debts form a charge upon real estate by the law of the Island?]—Descended land is not applicable, but purchased land after the personal estate is exhausted is liable to the payment of debts. The English authorities do not strictly apply, but they illustrate the principles involved in this case. In *Exp. Garland* (10 Ves. 110), and *Exp. Richardson* (3 Madd. 138), the powers and liabilities of an executor in regard to questions of partnership is fully discussed. Where by a deed of a Company it was to continue for forty years, and it was provided that the shareholders should not be discharged except by the substitution of other shareholders, the



executors of a deceased shareholder were held liable to the debts of the partnership, notwithstanding that the formalities required by the deed had not been observed in the substitution of the executors, so as to entitle them to participate in the profits, *Exp. Blakeley's Executors' case* (3 Mac. and Gor. 726), *Straffon's Executors' case* (1 De Gex, Mac. and Gor. 576), *Exp. Mayhew* (1 Jurist, N. S. 566). It is impossible for the Respondents successfully to contend that the Testator's estate was not bound by the covenants during the continuance of the partnership and by the dealings of the Company, whether in his lifetime or after his death. The sixtieth section of the deed provided [212] that he should continue so bound until the shares were transferred to another, capable of undertaking and fulfilling his engagements; and until some other person was bound *in solido* to the same extent of responsibility as the released shareholder had been, his estate is liable.—[The Lord Justice Knight Bruce: Is there any case in which a partner has engaged for the liabilities of the other partners for all time?—Yes. *Warner v. Cunningham* (3 Dow. 76). It is true that is a Scotch case, but Lord Redesdale treats it on the same footing as an English case. Then as to the remaining point, the extinction of the debt existing at the time of the death of the Testator by subsequent payments. That part of the decree cannot be sustained with regard to an account in which a distinct rest was made at the time and a balance struck. The rule in *Clayton's case* does not apply. According to that case, an appropriation of payments was made first, *ad modum solventis*, and if not, then secondly, *ad modum accipientis*, but if both omitted to make any appropriation, then the law applied it to the oldest debt. But here the stopping of the account and the intervention of new parties left no room for that rule. The case on the other side is, that all that happened subsequent to the Testator's death was *res inter alios acta*; but, if so, how could anything subsequently annihilate the balance struck at the time of the death? The rule of law upon this point is clear, *Pemberton v. Oakes* (4 Russ. 154), *Simson v. Ingham* (2 Bar. and Cr. 65), *Bodenham v. Purchas* (2 Bar. and Ald. 39). The decree is contradictory and unfounded, as the estate of the Testator was liable for the debts due to the Appellants' firm as well at the time of his death as also for the moneys the Appellants afterwards made [213] themselves liable and paid for the Company. The decree of the Court below in 1849, established our right, and entitles the Appellants to succeed in this appeal. Lastly, the suit of the Respondents was not according to the mode of proceeding in the Island.

Mr. R. Palmer, Q.C., and Mr. Cotton, for the Respondents.—The principles of the law of partnership, recognized by the Manx law, are the same as the law of England. The case was argued in the Court below upon English authorities. The claim of the Appellants against the Testator's estate arises out of transactions entered into between their firm and the Isle of Man Banking Company subsequently to the death of the Testator. The stoppage of the Bank was upwards of three years after the Testator's death; and we contend, that the debt which subsisted at the time of his death was liquidated by subsequent payments made to the Appellants' firm. *Clayton's case* (1 Mer. 576), *Warwick v. Richardson* (14 Sim. 281), *Bodenham v. Purchas* (2 Bar. and Ald. 39; see also *Henniker v. Wigg* (4 Q. Ben. Rep. 792). The case of *Pemberton v. Oakes* (4 Russ. 154), relied upon by the Appellants, is distinguishable from the present. In that case it was the guarantee of an old debt, and the question there was, whether the existing debt was an old debt or a new one. The Appellants admit that they did not know who were the shareholders except from the list furnished them. They, therefore, were not induced by any knowledge of the estate of the Testator to give credit. Let us see how the case stands with regard to the executor. The Will does not authorize him to continue the partnership, or to [214] employ the Testator's assets in conducting its affairs. How then can the Testator's estate be made answerable to the Appellants' firm in respect of the claim made by them on the Isle of Man Banking Company? The authorities show that where a Testator has authorized his executor to carry on a partnership, the executor, if he does so, undertakes an unlimited personal liability. *Exp. Garland* (10 Ves. 110), *Wightman v. Townroe* (1 Mau. and Sel. 412). An executor can pledge the partnership property of his Testator, but his own personal liability is not indemnified. The fallacy of the argument of the Appellants is in mixing up the different engagements of Carre Cook Tupper, whether on his own behalf or as executor. Upon the Testator's death he became the sole holder and pro-

prietor of the shares belonging to the Testator, and, therefore, individually liable in respect of such shares, and this would constitute an effectual transfer of the shares held by the Testator, so as to relieve the estate, even as against his surviving partners in the banking co-partnership, from all liability in respect of those shares. A plea of *plene administravit* at law could not be sustained by evidence that the whole estate of the Testator had been disposed of to meet partnership debts incurred after the Testator's death. In cases under the Winding-up Acts, it has been held to be immaterial whether the party was liable to creditors or not, for that was *res inter alios*. Dodgson's case (3 De Gex and Sm. 85). As regards shareholders, the case cannot be carried higher. If there was a contract that must be specifically performed, if it is broken, then damages could be sued for the breach, *Downs v. Collins* (6 Hare, 418). Such a stipulation as is contained in [215] this deed of partnership, requiring the substitution of another shareholder, has already been the subject of judicial decision, and it had been held that it is not to be considered as a subsisting and continuing partnership. *Kershaw v. Matthews* (2 Russ. 62). If another partner was substituted, he might be liable; but, if not, as in this case, third parties have no claim against the Testator's estate for debts subsequently incurred. Co-partners might have a claim for damages for non-performance of the covenant, *Exp. Blakeley's Executors* (3 Mac. and Gor. 726), but a stranger cannot sue on another's contract. *Tweeddel v. Tweeddel* (2 Bro. C.C. 152), *Walters v. The Northern Coal Mining Company* (5 De Gex, Mac. and Gor. 629).—[The Lord Justice Knight Bruce: The contention of the Appellants is, that the sale under the Testator's Will could not take place till after the stoppage of the Bank.]—As executor under the Will he had no discretion. He was bound, within a reasonable time, to convert these shares. *Kirkman v. Booth* (11 Beav. 273), *Cafe v. Bent* (5 Hare, 24). The co-partners, if they have any claim at all, could only call for a rateable contribution. At any rate, if the Appellants could show that their claims arose in respect of a debt due at the time of the Testator's death, their neglect for so long in bringing forward a claim against the Testator's estate is of itself a legal and equitable defence to the suit brought by the Appellants.

The Attorney-General [Sir Richard Bethell], in reply.—The Testator's estate must be held liable to the Appellants' claim. It is evident, from the directions in the Will, that the Testator contemplated that his [216] executors would carry on his interest in the banking business, and he threw upon them the obligation of becoming co-partners in the Bank. An executor might be a partner under an obligation incurred in the Testator's lifetime, and if he became a partner his liability as executor necessarily followed. He is, in this case, not only liable himself, but his Testator's estate is made liable. The executor, on the death of the Testator, was bound to give in his name in connection with the shares, or the estate would not have been benefited by the dividends accruing due. The Directors had power to call upon him to execute the deed, or forfeit the shares. It is clear, by the sixtieth section, that the Directors could not refuse registering his name. That circumstance concludes the question. The cases cited show that an executor is liable as between himself and his co-partners, and that he is a contributory in respect of the dealings subsequent to the death of the Testator.—[The Lord Justice Knight Bruce: As executor he might have rejected the shares, but he would have rendered himself liable to an action for damages.]—I do not dispute that an executor might so refuse and take the consequences, but the means that have here been resorted to, and the defence set up, is such, that it deprives the Appellants of the means of recovering their debt against the Testator's estate, and is founded in fraud; the executor, who is worth nothing, has colluded with the parties interested under the Will.

Judgment was delivered by

The Lord Justice Knight Bruce (June 27, 1859).—This appeal has been argued on each side, upon the supposition that there is no difference between the law of England and that of the Isle of Man as to the [217] principles and rules applicable to the particular questions between the parties; and it seems to their Lordships reasonable and right to believe that no such difference exists. The first point in dispute is, whether the debt which, at the time of the death of John Colton Tupper,



in January, 1840, was due to the Appellants' house of business from the Joint-stock Banking Company, called "The Isle of Man Joint-stock Banking Company," the Company constituted and intended to be regulated by the deed of the 2nd of July, 1836, and the memorandum of the 22nd of August, 1837, and the liabilities under which that Joint-stock Company was to the Appellants' house, at John Colton Tupper's death, were paid and discharged before the stoppage and failure of that Joint-stock Company in August, 1843; and their Lordships think it plain, that this point must be decided against the Appellants, namely, that the payment and discharge just mentioned must, upon the materials before their Lordships, be deemed to have taken place (as to principal and interest) before August, 1843. The Appellants' answer to the bill filed by the Respondent, Tupper, contains these passages:—"And these Defendants further severally answering say, that the debt which was on the day of the death of the Testator, namely, on the 22nd of January, 1840, due to these Defendants, and Robert Williams the elder, another Defendant to the Bill, and now deceased, from the partnership Joint-stock Company, of which the Testator was a partner, consisted of the sum of £15,267 17s. 3d., but that, at the time of the decease of the Testator, these Defendants, together with Robert Williams the elder, had accepted bills drawn upon them for and on behalf of the Joint-stock [218] Company to the amount of £45,000, and which bills then outstanding, were, after the decease of John Colton Tupper, paid by these Defendants and Robert Williams the elder, now deceased; and these Defendants further severally answering, say they (together with Robert Williams the elder, since deceased) during his life have, since the decease of the Testator, received moneys for and on account of the Banking Company, to the amount of £1,100,000, and upwards, but the same comprises the amount of the credit side of the account between the Banking Company and these Defendants, and Robert Williams the elder, from the 22nd day of January, 1840, without taking into account and without deducting from such credit side, or from the amount of such credits, any sum or sums for advances, or for any other debt, demand, or claim, charged by these Defendants, or by them and Robert Williams the elder, now deceased, against the Joint-stock Banking Company since the 22nd of January, 1840. But these Defendants further severally answering say, that during the period of the receipt of the moneys by these Defendants and Robert Williams the elder, they paid and advanced moneys on account of the Joint-stock Banking Company, and there always continuously remained very large balances due and owing from the Joint-stock Banking Company to these Defendants and Robert Williams the elder, notwithstanding the aforesaid receipts. And these Defendants submit whether, under the circumstances aforesaid, the debt, which was up to and at the time of the death of the Testator due to these Defendants and Robert Williams the elder, from the partnership Joint-stock Company, was or was not entirely or otherwise [219] reduced or discharged by payments made to these Defendants and Robert Williams the elder, subsequently to the decease of the Testator, by the survivors of the partnership, and whether in fact all or any part of such aforesaid debt had or had not been long since or otherwise paid or satisfied. And these Defendants further severally answering say, they have heard and believe that Carre Cook Tupper, after the decease of the Testator, continued according to the terms of the co-partnership deed, to carry on with the Testator's share of the capital of the bank which existed at the time of the death of the Testator and with his other assets, in conjunction with the surviving partners, under the style or firm of "The Isle of Man Joint-stock Banking Company," but not as a new partnership, but as a continuation of the old partnership. And these Defendants further severally answering say, that after the decease of the Testator, debts to a very large amount were contracted by the continuing partnership with these Defendants and Robert Williams the elder, since deceased; and that such continuing banking partnership carried on by Carre Cook Tupper, and the other surviving partners as aforesaid, stopped payment on the 14th day of August, 1843, and has not resumed payment.

There is not any reason or ground on which, as it appears to their Lordships, it can be reasonably suggested that a sufficient amount of the receipts of the Appellants' house on account of the Joint-stock Company between the death of John Colton Tupper and the stoppage, ought not, according to the regular and ordinary course,

to be ascribed to the debt and liabilities existing at the former period. Then comes the question, whether the Appellants, in respect of the debts [220] which became newly due to their firm from the Joint-stock Company after the death of John Colton Tupper (I mean of course debts not connected with any liability that existed in his lifetime), have a right of recourse against the assets of John Colton Tupper; the same right in effect as they would have had for the debt due at his death had it not been discharged. The Appellants assert the affirmative of this proposition, upon the ground that Carre Cook Tupper, the only acting executor of John Colton Tupper, did in that character, upon and from his death, claim the shares in the Company which he held; that this claim, this title, of Carre Cook Tupper, was recognized by the directors of the Company, and that accordingly in that character he received the dividends which, between the death and the stoppage, were declared on the shares, under the forty-sixth clause of the deed, there having been no transfer of any of the shares after the death, but the shares having been uniformly from the death treated by the executor and the Directors as belonging to the executor in that character. It is certainly, we apprehend, true, nor is it denied on either side, that Carre Cook Tupper became personally liable as a partner in the Company to the Appellants' house in respect of the dealings subsequent to John Colton Tupper's death, and that Carre Cook Tupper would, by the course of conduct that has been mentioned, have made himself so, even if he had not been, as he was, a shareholder in his own right, independently of John Colton Tupper's shares. It may possibly likewise be, though we do not assert it, that the assets of John Colton Tupper are liable to the Company, or to Carre Cook Tupper, or to both, in respect of John Colton Tupper's shares, by reason of the partnership [221] deed, and the transactions and course of dealing subsequent to his death. But any such consideration seems to their Lordships not, for any present purpose, material. The question is, whether the debt and liabilities to the Appellants' house existing at John Colton Tupper's death having been satisfied, the Appellants can come upon his assets as creditors by reason of the shares held by him, and of what took place after his death; and their Lordships' opinion is, that, whatever the construction of the partnership deed may be, and whatever the true interpretation of his Will, they cannot.

If it was competent to Carre Cook Tupper to charge the assets in their favour, no such thing was done. The fact that he traded or dealt with the Appellants' house as executor and also in his own right, had not the effect of creating such a charge, nor is it material that all John Colton Tupper's property, actually placed or invested in the Joint-stock Banking business, must probably be treated as lost, and that the separate estate of John Colton Tupper has not claimed, nor does, nor probably can, claim, anything from the joint estate.

The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after his death, whether he is entitled, or not entitled, to be wholly, or to any extent, indemnified by the Testator's personal estate, and whether it is sufficient, or insufficient, for the purpose; nor does the propriety of his conduct, as between himself and those beneficially interested in the Testator's personal estate, give the creditors of the trade becoming so after the death, [222] the rights of creditors of the Testator. It being immaterial also, as far as they are concerned, whether the Testator, if he had a partner, was bound by a covenant with him, that his (the Testator's) executors should continue the trade in partnership with the surviving partner. The latest authorities on the point are, we conceive, to this effect, and appear to their Lordships preponderant and correct. A sufficient number of these authorities, including *Exp. Garland* (10 Ves. 110), *Exp. Richardson* (1 Madd. 138), and *Wightman v. Townroe* (1 Mau. and Sel. 412), were cited at the Bar during the argument.

The terms of the decree in the principal suit, that in which the Appellants are Defendants, might perhaps, without impropriety, receive some alteration, but substantially that decree seems to us to be, as well as the dismissal of their bill, right.

It was argued that the decree of January or February, 1849, of which execution was awarded on the 10th of March, 1849, entitled the Appellants to success in the



present appeal. That, however, is not our opinion. The state of the parties to the suit in which that decree was made, and the nature of the cause, rendered the decree, in our judgment, of no avail against the suit of Emily Tupper and others, in which the principal decree now under appeal was pronounced. It has been contended also, that, whatever the merits, there was not a right, according to the proper course of judicial proceedings in the Isle of Man, to institute such a suit against the Appellants. We think, however, that the Appellants had taken such proceedings and so acted as to expose themselves to the suit, and that it was regularly and properly instituted against them. The arrests of the [223] estate of the Testator in 1843, were of themselves enough for the purpose. As there must, we think, substantially at least, if not formally also, be a dismissal of the appeal, the Appellants, in their Lordships' opinion, ought to pay the costs of it.

[Mews' Dig. tit. EXECUTOR AND ADMINISTRATOR, X. ADMINISTRATION, c. 2. *Debts generally*, (b.) *Accrued since death*, 6. *Calls on shares*, c. *Carrying on the trade of the deceased*; tit. ISLE OF MAN, 2. LEGISLATURE, LAWS, AND CUSTOMS. S.C. 5 W.R. 797. See *Strickland v. Symons*, 1884, 26 Ch.D. 248.]

# ON APPEAL FROM THE COURT OF CHANCERY OF THE ISLE OF MAN.

ROBERT BOARDMAN and THOMAS AVISON,—*Appellants*; MARK HILDESLEY QUAYLE and RICHARD QUIRK,—*Respondents* \* [June 18, 1857].

After the passing of the Manx Act of Settlement, 4th of February, 1703, the Act of Tynwald of the 24th of June, 1645, which rendered the consent of the Lord of the Manor of the Isle of Man necessary to alienation by a tenant, was, although not expressly repealed, no longer in force in the Island; and under the provisions of the Act of Settlement, a tenant of the Manor became entitled, upon payment of the proper fine, to alienate lands without the consent of the Lord [11 Moo. P.C. 264, 265].

A mortgage is not void by the 5th section of the Act of Settlement of 1703, if the mortgagee does not come in to be admitted. *Quære*. If by the provisions of the 11th section of that Act, it can operate so as to subject the mortgagee to the payment of a fine to the Lord [11 Moo. P.C. 265].

There is a distinction between the "Records" and the "Court Rolls" mentioned in the 5th section of the Act of Settlement of 1703 [11 Moo. P.C. 266].

The Provisions of the 11th section of the Act of Settlement of 1703, as to change of tenants, are not confined to changes by alienation only, but apply to changes by death. [11 Moo. P.C. 266].

A grant by a tenant, of customary land and premises is not invalid by reason of the grant being made in favour of two or more persons. Therefore, where a deed in the nature of a mortgage, Bond and security, charging customary lands and premises in the Island, was made to two persons, it was held, that it was not void on that account, although one person only could be admitted upon it [11 Moo. P.C. 264-5].

A., a licensed Banker in the Isle of Man, executed a security, in the nature of a deed of mortgage, Bond and security, of customary freehold lands belonging to him, to certain Government officers, conditioned to secure payment, by him and his partners, B. and C. (members of the Banking firm), of notes to a specified amount to be issued in the Island under licence of the Government. Two of the partners died subsequently, at different periods, and fresh licences were renewed in the names of the survivors, for further issues, but under the original deed of security. The effect of such security on the notes so

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Patteson.

issued and in circulation at the respective deaths of the partners, upon failure of the Bank, considered and ascertained [11 Moo. P.C. 268-270].

A promissory note of the Douglas and Isle of Man Bank, in the following form, "We promise to pay the Bearer on demand, One pound British in Bank notes or Bills on London," is a negotiable note, within the meaning of the Manx Banking Act of 1817 [11 Moo. P.C. 267].

The questions in this appeal were, first, whether customary freehold lands and premises held in the [224] Isle of Man, given in security by a deed, in the nature of a mortgage, Bond and security, dated the 16th of November, 1844, granted by James Holmes, of Douglas, in the Isle of Man, Banker, since deceased, unto John M'Hutchin, the then Clerk of the Rolls, and George Quirk, the then Receiver-General, upon the granting of a licence for the issue of bank notes in the Island, were liable to the extent of such deed for the cash notes, or Bankers' notes which were issued by Henry Holmes, and John Holmes, Esq., both since deceased, and James Holmes (who carried on business in Douglas as Bankers in co-partnership), and which were in the hands of *bona fide* holders; and secondly, whether the date of each note, signed by or for the three partners, and in the hands of a *bona fide* holder (such date being anterior to the death of Henry Holmes, who died on the 16th of January, 1848, before either of his co-partners), was not *prima facie* evidence that such note was issued by the three partners.

[225] The Appellants were the devisees in trust, under the Will of James Holmes, who died in insolvent circumstances. The Respondents were the successors, in their respective offices, of M'Hutchin and Quirk, the grantees in the deed of the 16th of November, 1844, both of whom were dead.

By an Act of Tynwald, promulgated on the 31st of July, 1817, intituled "An Act to prevent the negotiation of promissory notes in Inland Bills of Exchange, within the said Isle, under a limited sum," it was, among other things, enacted:— "That from and after the promulgation of this Act, no person, or persons, should make and issue any bills, notes, or other negotiable paper or instrument whatever, for the payment of 20s. British or upwards, by way of a circulating medium, without the licence of the Governor or Lieutenant-Governor and Council of the said Isle for the time being, to be granted or refused at their discretion, under penalty for £50 for every such bill, note, or other instrument, issued contrary to this Act: which licence should remain in force for one year only, and be renewable from year to year, at the discretion of the Governor or Lieutenant-Governor and Council, and that the sum of £20 British should be paid for each and every such licence into the hands of the Clerk of the Rolls, to be added to the highway fund." And it was further enacted "That every such Banker or Bankers as aforesaid should be bound to take up and pay all such notes, or other negotiable paper or instruments whatever, made and issued by them, or any of them, within the said Isle, by paying the full value in gold, silver coin of the legal currency of Great Britain, promissory notes of the Bank of England, or by direct bills of exchange on London at a [226] date not exceeding two months." By an Act of Tynwald, promulgated on the 25th of October, 1836, this last section of the Act was amended by enacting, that direct bills of exchange given in payment of the Island bank notes should be payable in London at a date not exceeding twenty-one days.

On the 20th of October, 1817, Henry Holmes, John Holmes and James Holmes, who carried on the business of Bankers at Douglas under the style and firm of Messrs. Henry Holmes and sons, applied to the then Lieutenant-Governor and Council of the Island for a licence to issue notes at the value of £1 each to the extent of £12,000, proposing certain persons, therein named, as sureties for one-third of the amount of such issues; and a licence to issue cash notes, or Bankers' notes of the value of 20s. or 21s. British each, to the extent of £12,000, was granted to them in pursuance of the above first-mentioned Act of Tynwald. Accordingly, James Holmes, on behalf of himself and his co-partners, and two other persons as sureties, signed a Bond to the Crown in the penal sum of £4000, with a condition thereunder written for making void the same, if James Holmes, Henry Holmes and John Holmes should pay the amount of cash notes, or Bankers' notes issued by them under their licence. A new licence was granted in 1818, to issue cash notes, or Bankers' notes



of the value of 20s. or 21s. British each, to the extent of £12,000 British, and a Bond was also given in the same form. Messrs. Holmes obtained annually, till November, 1822, a new licence similar to the licence of the 21st of October, 1818, but the extent of the issue which was permitted varied in the different licences.

By a resolution of the Governor and Council of [227] the Island, bearing date the 29th of October, 1822, Messrs. Holmes were to be licenced to issue cash notes, or Bankers' notes of the value of 20s. British each, to the extent of £25,000 British, for one year, to commence from the 1st of November following: they first giving security to the amount of such issue of £25,000 British to Robert Stewart, Receiver-General, and John M'Hutchin, Clerk of the Rolls, to take up, pay, and discharge such cash notes, or Bankers' notes as they should or might issue or have in circulation, pursuant to the licence for which they had applied. By a Bond, dated the 14th of November, 1822, James Holmes, for his co-partners and himself, became bound to Stewart and M'Hutchin, in the sum of £25,000, to be paid to them and their successors in office; and they thereby assigned to Stewart and M'Hutchin certain securities therein mentioned, with a condition for making void the Bond and assignment if they, the Messrs. Holmes, should take up, pay and discharge such cash notes, or Bankers' notes as they should or might issue or have in circulation, pursuant to the licence for which they had applied. A licence was accordingly granted to issue notes to the extent of £25,000, and a Bond was given in the penal sum of £200. A similar licence was granted and a Bond given for the year 1823.

On the 4th of November, 1824, the Governor and Council of the Island made an order for a renewal of the licence to these co-partners, and also a renewal of a licence to other Bankers, as follows:—"The application of Henry Holmes, junior, John Holmes, and James Holmes; and of Edward Gawne and Llewellyn M'Whannell, Bankers, for the renewal of their several [228] licences, being laid before the Governor-in-Chief and the Council, it is ordered that the licences heretofore granted to the said persons respectively be renewed for one year from the 1st of November, instant, in terms of the Act of Tynwald, in manner following, (that is to say,) the licence to Henry, James and John Holmes to be renewed, to enable them to issue to the amount of £17,000 British, and the licence to Edward Gawne and Llewellyn M'Whannell to the several amounts mentioned in their respective licences; all such renewals to be granted upon the express terms of the different securities heretofore given by the said several persons continuing and remaining in full force and effect." Similar orders for renewals of the licences of the Messrs. Holmes were made by the Governor or Lieutenant-Governor and Council of the Island, every year until the 7th of November, 1843; the extent of the issue permitted, and the date of the licence being varied.

On the 12th of January, 1844, Messrs. Holmes having applied that their licence might be extended, it was ordered by the Governor and Council of the Island that the licence should be extended or renewed, to enable them to issue notes of the value of £1 each, to the amount of £25,000 in the whole: the security remaining in full force and effect.

On the 12th of November, 1844, the Messrs. Holmes, by James Holmes, applied to the Governor and Council of the Island for a licence to issue £25,000 notes of £1 each; and on the 16th of the same month, James Holmes executed the following Bond and security for the payment of the notes so licensed to be issued:—"Know all men by these presents, that James [229] Holmes, of Douglas, Esq., doth hereby own and acknowledge himself to be and stand justly indebted unto John M'Hutchin, Esq., Clerk of the Rolls, and George Quirk, Esq., Receiver-General, in the sum of £30,000, to the payment whereof, with interest, costs, and charges, well and truly to be made unto the said John M'Hutchin and George Quirk, their assigns and successors in office, he binds and obliges himself, his executors and administrators, in and under the penalty hereinafter mentioned. And, for the further and better security of the said John M'Hutchin and George Quirk, their successors in office and assigns, in the premises, further know ye that the said James Holmes, for and in consideration of the said sum of £30,000, hath given, granted, transferred, and assigned, and by these presents doth give, grant, transfer, and assign, in security unto the said John M'Hutchin and George Quirk, all and singular those estates, lands and premises situated in the parish of Andreas, called by the name of Balla-

voddan, the lesser Bailavoddan, Ballasteen, Knocketholt, Ballakelly, Ballaseyre, and the Lhane Moar. Also, that estate situate in the parish of Lurby, called and commonly known by the name of Ballavarran. Also, all and singular those estates, lands, and premises situate in the parish of Rushen, called and commonly known by the name of Ballacreggin, Ballavararey, Port le Murray, and Rheywyllyn, the same being the whole estates, lands, and premises of the said James Holmes, situate in the parishes of Andreas, Lurby, and Rushen, together with all ways, waters, watercourses, easements, rights, and appurtenances to the same belonging or appertaining. To have and to hold the whole of the said estates, lands, and premises to the said John M'Hutchin and [230] George Quirk, their successors in office, and assigns, until repayment of the said sum of £30,000, with interest in respect thereof, and all costs and charges. And, for the true and faithful performance hereof the said James Holmes binds and obliges himself, his executors and administrators, in and under the penalty of £60,000. As witness his subscription, this 16th day of November, 1844. Whereas the said James Holmes, and Henry Holmes, and John Holmes, carrying on business in Douglas aforesaid as Bankers, have made application to His Excellency the Lieutenant-Governor and the Honourable the Council of this Isle, for a renewal of their licence to issue cash notes, or Bankers' notes of the value of £1 each, to the amount in said licence and in the several renewals thereof mentioned: Now, the condition of the foregoing Bond and security is such, that if the said Henry Holmes, John Holmes and James Holmes shall and will take up, pay, and discharge, in terms of the Act provided in that behalf, such cash notes, or Bankers' notes as they shall or may issue or have in circulation pursuant to the said licence and renewals thereof, or any future renewals thereof, and according to the terms thereof, then the foregoing Bond and security to be void, otherwise to be and remain in full force and virtue.—James Holmes." This deed was acknowledged, captioned and recorded in the Rolls Office, and, under the Act of Tynwald of 1847, forwarded to the Registry office thereby established, but was not presented by the Setting Quest, or enrolled on the Court Rolls.

The above customary freehold lands, given in security by this mortgage deed, Bond and security, were all purchased by James Holmes.

By an Act of Tynwald, promulgated on the 14th [231] of December, 1847, for the registration of deeds and other instruments, it was enacted by sect. 19, that a certified copy, under the hand of the Registrar or Deputy Registrar (appointed under the provisions of the Act), of any document or writing by that Act directed to be registered, enrolled or recorded in the office of Registry, should be received in evidence in all Courts whatsoever in that Island, to the same extent as copies of record certified by the Clerk of the Rolls were then admitted in evidence in the Courts in the Island; and by sect. 22 of the same Act, it was enacted that from and after the promulgation of that Act, no deed or instrument in any manner affecting any lands, tenements or hereditaments should be enrolled or recorded in any office of record otherwise than the Registry office established under the provisions of that Act. And, it was further provided, that all deeds and instruments at that time on record in the office of the Clerk of the Rolls (save and except such deeds or instruments as were annexed to any records of the Courts), together with all indexes of such deeds, should, at and immediately after the expiration of six calendar months from and after the promulgation of that Act, be forwarded by the Clerk of the Rolls to the said Registry office, and being there deposited, should be deemed and taken to be part of the records of the said office.

Licences similar to those already stated, were granted by the Government to the firm of Messrs. Holmes in each successive year from the year 1844 to 1852. The licence in force at the death of Henry Holmes, in 1848, authorized the issues of notes to the amount of £12,000, and for the years 1850, 1851, and 1852, for £10,000 only.

[232] From the month of October, 1817, till the time of the death of Henry Holmes in January, 1848, Henry Holmes, John Holmes and James Holmes carried on the business of Bankers in co-partnership in the town of Douglas, and from time to time issued cash notes, or Bankers' notes of the value of £1 each to a large amount in number (by virtue of the licence granted to them as aforesaid), which notes were circulated in the Island; and each of such notes was signed by one or



two of the co-partners in the name of the firm, and was in the following form (the date, number, and signature being varied in different notes):—"Douglas and Isle of Man Bank.—We promise to pay the bearer, on demand, one pound British in bank notes or bills on London.—Douglas, 1 January, 1846.—For Henry Holmes, jun., Jno. Holmes, and Jas. Holmes. Entd. Robt. Kelly. Jas. Holmes. [One pound.]"

Such notes were issued as a circulating medium in the Island, and a large number of them were in common circulation for nearly a month after the death of James Holmes, on the 7th of November, 1853.

After the death of Henry Holmes, John Holmes and James Holmes carried on the business of Bankers in co-partnership, and licences, similar to those already stated, were granted to them to issue notes to the amount of £12,000, which was afterwards, in 1849, 1850, 1851, and 1852, reduced to the sum of £10,000, and they continued the business till the time of the death of John Holmes, on the 22nd of October, 1853, from which time such business was carried on by James Holmes alone, to the time of his death; but no notes were issued in the names of John Holmes and James Holmes, or James Holmes alone. The partnership estate of John Holmes and James Holmes was insol-[233]-vent on the 22nd of October, 1853, the day of the death of John Holmes; James Holmes from that day was also insolvent. Shortly after the death of James Holmes, an arrangement was made between the Lieutenant-Governor and Council of the Island, and the Directors and Company of the Bank of Mona, that the Bank of Mona, for the relief of the Island, but without prejudice to their right to recover the amount of the notes from the estate of Messrs. Holmes, should take up the notes of Messrs. Holmes; and in the month of November, 1853, the Bank of Mona published a notice in the newspapers that they would pay any notes issued by Messrs. Holmes, that might be brought to them.

A large number of the notes so taken up by the Bank of Mona were, in the month of December, 1853, presented for payment at the Banking office in Douglas, where the firm of Henry Holmes, John Holmes and James Holmes, and the survivors and survivor of them, carried on business, and to Samuel Harris, the administrator of the estate of James Holmes, the survivor of the co-partners; but payment of the notes was refused, and the notes were dishonoured.

On the 25th of February, 1854, the Respondents, Mark Hildesley Quayle, the then Clerk of the Rolls, and Richard Quirk, Receiver-General, filed a Bill in the Court of Chancery of the Island, against Isaac Holmes, brother and heir-at-law of James Holmes, deceased; Samuel Harris, of Douglas, administrator of the estate and effects of James Holmes with his Will annexed; and against the Appellants, Robert Boardman, and Thomas Avison, trustees under the Will of the real estate of James Holmes; and others beneficially interested under the Will of James Holmes; and [234] William Douglas Scott, and William Gell, of Douglas, Treasurer of the Isle of Man Bank for Savings, judgment creditors upon the estate of James Holmes, the surviving partner of the firm of Henry Holmes, John Holmes and James Holmes. The bill stated, that for many years previously to the year 1844, Henry Holmes, John Holmes and James Holmes carried on business in co-partnership as Bankers, in the town of Douglas, and, as such Bankers, were licenced to issue cash notes, or Bankers' notes of the value of £1 each, to the amount specified in their licence and in the several renewals thereof; the bill also stated the deed of Bond and security of the 16th of November, 1844; and that Henry Holmes, John Holmes and James Holmes carried on business as Bankers for several years after the date of the deed, and obtained several renewals of their licence; and that Henry Holmes, John Holmes, and James Holmes, both before and after the date of such deed, issued and had in circulation, cash notes or Bankers' notes to the amount of £25,000. And, the bill further stated the death of Henry Holmes, John Holmes, and James Holmes, and that they did not take up, pay and discharge, in terms of the Act provided in that behalf, the cash notes, or Bankers' notes issued and kept in circulation by them in terms of their licence, or of the several renewals thereof; and that the larger part of such notes were still unpaid, and many of such notes had been duly presented for payment at the late Banking office of Henry Holmes, John Holmes and James Holmes, and to the Defendant, Harris, as administrator of the estate of James Holmes, the last survivor of the co-partners; but that such notes, when presented, had been refused payment and had been dishonoured. That, amongst the

notes [235] so presented and dishonoured, were notes for the payment, in the whole, of the sum of £12,343, which were held by the Directors and Company of the Bank of Mona. And they prayed, that the Defendants, or one of them, might be ordered to pay to the Respondents the sum of £30,000, the principal money of the deed of Bond and security, with interest thereon from the 16th of November, 1844, until paid, with the costs of suit; or, that the estates, lands and premises, given in security by the deed, or a sufficient part thereof, might be ordered to be sold for payment of the sum of £30,000, with the interest, costs and charges aforesaid, with the costs of suit. And the bill further prayed, that that sum and interest might, by order of the Court, be distributed amongst the holders of the cash notes, or Bankers' notes, and the other persons entitled thereto, according to their respective rights.

The Defendant, Holmes, demurred to the bill, for want of equity, but such demurrer was upon argument overruled.

The Defendant, Harris, and the present Appellants, Boardman and Avison, put in separate answers to the Bill. Avison, by his answer, which raised the material questions in the cause, after referring to the deed of Bond and security of the 16th of November, 1844, stated, among other things, that he was advised and believed that the several lands and tenements professed to be granted or affected by the deed of Bond and security were divers ancient quarterlands or farm lands, within and parcels of the Manor of Man, holden by the tenant thereof, from time to time, of Her Majesty, the Lady of the Manor, as customary freeholds of inheritance, according to the laws [236] and customs of the Manor; and the Defendant submitted, that the deed of Bond and security did not convey to or vest in McHutchin and Quirk any estate, right, title or interest whatever in the lands and premises professed to be granted or affected by such instrument, or one of them, inasmuch as the Defendant had been informed and believed it to be true, that such deed of Bond and security was never made known to, or received the approbation, consent, allowance, or confirmation of Her Majesty, as Lady of the Manor of Man, or of any Steward, Seneschal, or other officer or officers of such Manor having authority to act in that behalf, as should have been the case, according to the laws and customs of the Manor; and inasmuch also as McHutchin and Quirk, or either of them, did not, nor did the Respondents, their successors, or either of them, ever become tenants or a tenant to Her Majesty in respect of the last-mentioned lands and tenements or any of them, as Defendant was advised and believed, they McHutchin and Quirk, or one of them, and the Respondents, or one of them, should have become according to such laws and customs: and the Defendant craved leave to have the same benefit of such laws and customs as if he had pleaded the same; and the Defendant, after admitting that Henry Holmes, John Holmes and James Holmes had carried on business as Bankers from the date of the instrument, or deed of Bond and security up to the death of Henry Holmes thereafter mentioned, and obtained several renewals of their original licence, the last whereof was, as the Defendant believed, granted on the 4th day of November, 1847, and that Henry Holmes, John Holmes, and James Holmes, between the times last aforesaid, had issued a number of instru-[237]-ments, of the nominal value of £1 each, in the form hereinbefore stated, and the instruments last mentioned were the cash notes, or Bankers' notes in the Bill stated to have been issued and kept in circulation by Henry Holmes, John Holmes, and James Holmes: submitted that such instruments were not negotiable instruments, either at Common law or by any custom of the Isle of Man, nor did such instruments fall within the meaning of the Act or Acts of Tynwald in that behalf made and provided, nor was the issue, re-issue, or negotiation of such instruments authorised by any licence granted to Henry Holmes, John Holmes and James Holmes, as such Bankers as aforesaid, or by any renewal or renewals of such licence; and the Defendant craved the same benefit from the Acts of Tynwald as if he had pleaded the same or demurred to the bill. The answer admitted that Henry Holmes departed this life on the 16th of January, 1848; and submitted to the Court, that the licence to issue notes originally granted to Henry Holmes, John Holmes and James Holmes, as in the bill mentioned, expired on the death of Henry Holmes: and that after such death, namely, on the 17th of November, 1848, a new licence to issue notes was granted to John Holmes and James Holmes for one year; and after stating



such licence, and the renewal thereof in the month of October, 1853, the Defendant stated, that, to the best of his knowledge, information, and belief, John Holmes and James Holmes dealt largely in business as Bankers, adopted, received, paid, took up, and retired all or the greater part of the instruments in the bill called cash notes, or Bankers' notes, which had been issued by Henry Holmes, John Holmes and James Holmes; and for the purposes of their business, in order to meet the exigencies thereof, they, from time to time, re-issued many of such instruments by virtue and according to the terms of the new licences granted to John Holmes and James Holmes as aforesaid, or one of such licences, and not in pursuance of the original licence granted to Henry Holmes, John Holmes and James Holmes; and he further admitted that John Holmes departed this life on the 22nd of October, 1853, and after his decease James Holmes alone continued to deal as a Banker in Douglas aforesaid on his own account, up to the time of his death, which took place on the 7th of November, 1853, and issued and re-issued many of the last-mentioned instruments for similar purposes, James Holmes making such issues and re-issues under the last new licence of the 28th of October, 1853; and the Defendant submitted that, even if the Court should be of opinion that the aforesaid instruments or deed of Bond and security did convey to or vest in McHutchin and Quirk, or either of them, any estate, right, title, or interest in or to the lands and tenements professed to be granted by such instruments, or one of them, the same, or the deed of Bond and security, did not apply to the first-mentioned new licence, the secondly-mentioned new licence, or the several renewals thereof, or to the last-mentioned new licence, granted to John Holmes and James Holmes as such Bankers as aforesaid; and the Defendant denied that Henry Holmes, John Holmes and James Holmes, or one of them, did not, as alleged in the bill, take up, pay, and discharge the instruments in the bill called cash notes, or Bankers' notes, stated in the bill to have been issued and kept in circulation by them, and that the larger or any part of such [239] instruments was still unpaid, but, on the contrary, the Defendant was informed, advised and believed that all or the greater part of such instruments had long since been taken up, paid off, retired, discharged, or satisfied in terms of the Act provided in that behalf, and according to the terms of the original licence and the renewals thereof, through or by reason or means of the dealings therewith of John Holmes and James Holmes jointly acting under and by virtue of the several licences and renewals of such licences granted to them as Bankers on their own account, or of James Holmes, alone acting as aforesaid; and that the Defendant had been informed and believed, that at the time of the death of James Holmes, few, if any, of the cash notes, or Bankers' notes, were in circulation pursuant to the original licence granted to Henry Holmes, John Holmes and James Holmes, or any renewal thereof. And the Defendant further said that he had been informed and believed, that a large number of instruments of the nominal value of £1 each, bearing the names of Henry Holmes, John Holmes and James Holmes, and which the Defendant believed were part of the instruments called in the bill, cash notes, or Bankers' notes, but incorrectly stated in such bill to have been issued by Henry Holmes, John Holmes and James Holmes, were shortly after the decease of James Holmes presented for payment at the banking office, formerly of Henry Holmes, John Holmes and James Holmes, by persons in whose hands the same were, but he was unable to state whether such persons were the original holders of such instruments or not, and that such instruments were refused payment; and he further answered and said that he had been informed, and believed it to be true, that many of such instruments, as last described, were also, some time after the death of James Holmes, presented for payment to the Defendant, Harris, in his capacity of administrator of the personal estate of James Holmes, by persons being, as he was informed and believed, not original holders of such instruments, and which last-mentioned instruments he had been informed were refused payment, and that amongst the instruments so presented was a large number (but what number in particular he could not set forth to his belief or otherwise) which he had been informed and believed were held by the Directors and Company of the Bank of Mona, but which had not been issued to the Directors and Company of the Bank of Mona, by Henry Holmes, John Holmes and James Holmes; and the Defendant went on to say that he had been informed and believed that the greater part of such last-mentioned instruments were received

by or came to the hands of the Directors and Company of the Bank of Mona after the decease of James Holmes, who survived Henry Holmes and John Holmes, as before mentioned; and the Defendant, after admitting that the Respondents were successors in office of McHutchin and Quirk, submitted that the Respondents were not, by reason of their holding the respective offices of Clerk of the Rolls and Receiver-General, as successors to McHutchin and Quirk, entitled, as was assumed in the bill, to the instruments, or either of them, called in the same bill, a deed of Bond and security; and the Defendant submitted that the Respondents were not then possessed of or entitled to any estate or interest in the lands and tenements professed to be granted or affected by such instruments, or one of them, for the Defendant submitted that, even supposing the Court [241] should be of opinion that McHutchin and Quirk, in their individual capacities, or in their respective capacity of Clerk of the Rolls, or Receiver-General, took some estate or interest in the lands and tenements, such estate or interest ceased or expired, neither of such offices being, as the Defendant averred, a corporation sole, on the death of Quirk, who survived McHutchin; or, at all events, that such estate or interest did not pass to or devolve upon the Respondents or either of them; and after admitting the Will of James Holmes, the Defendant further stated, that by an Act of Tynwald passed in the year 1738, intitled "An Act for the limitation of certain actions and claims for Debt, Trespass, and other things, for avoiding suits in law," it was enacted, that all actions or plaints in the nature of actions of debt, grounded upon any lending contract or demand, without specialty, should be commenced and effectually prosecuted within three years next after the cause of such actions, or plaints, and at no time after; and the Defendant insisted upon that Act and every clause and provision thereof, and claimed the same benefit as if he had pleaded the same.

The Defendants, Harris and Boardman, also put in answers.

Witnesses were examined on behalf of the Plaintiffs and the Defendants, but no evidence was adduced, on the part of the Defendants, that any of the notes held by the Bank of Mona, as mentioned in the bill, were taken up, paid off, retired, discharged or satisfied, in terms of the Act provided in that behalf, and according to the terms of the original licence and the renewals thereof, either by Henry Holmes, John Holmes [242] and James Holmes, or through or by reason or means of the dealings therewith of John Holmes and James Holmes, jointly acting under the several licences and renewals of such licences granted to them as Bankers on their own account; or of James Holmes alone acting as aforesaid. The Defendant, Avison, examined James Haining, who had been a clerk in Holmes' Bank for sixteen years prior to the 9th of November, 1849, who stated that, to the best of his belief, upwards of 100,000 of their own notes were paid in and paid out annually; not that they were all different notes, but the same notes were paid in and paid out frequently during the year to make up that number. He also examined a witness named Daniel Christian, who stated that he was and had been for more than twenty years a member of the Setting Quest of that parish, and as such he had been in the habit of attending the Courts Baron, which were held twice a year, for entering the names of the tenants; and he gave evidence of the practice of the Court: that notices of the holding of those Courts were issued half yearly in a printed form to the Moars, and that they also gave notice orally at the parish church; that the object was to give notice to all persons that came to estates by death, alienation, mortgage or otherwise, to attend and get entered, and they were directed to show their papers to the Setting Quest a week beforehand; and if the Setting Quest were satisfied, they produced the deeds to the Seneschal, whose duty it was to enter the tenant's name in the Books; that when original deeds were produced, after being examined by the Setting Quest, they were published in Court; but if copies were produced, they were not published: and he stated [243] that such practice, except as to the publishing, continued up to the present day; and being cross-examined, he stated that when copies were produced to make entries, the original deeds whereof they were copies must have been published at some preceding Court, or at some Chancery or Common law Court, and that then entries were made under such copies.

The cause came on to be heard before the Chancery Court on the 10th and 11th days of June, 1856, and by a decree of that date it was declared that the property given in security in and by the deed of Bond and security of the 16th of November,



1844, was liable to the extent of the Bond for the cash notes, or Bankers' notes issued by Henry Holmes, John Holmes and James Holmes, and then in the hands of *bona fide* holders, and that the date of each note (being anterior to the death of Henry Holmes) was *prima facie* evidence that such note was issued by the three partners, and the same was so ordered and decreed accordingly; and it was thereby referred to the Clerk of the Rolls to ascertain the amount of such notes then outstanding, and also to report whether the whole or what portion of the different properties given in security was necessary to be sold for the payment of such notes, and in what order, and report the same to the Court with all convenient speed.

The Defendants, Boardman and Avison, the devisees in trust under James Holmes' Will, brought the present appeal from this decree.

Mr. W. M. James, Q.C., Mr. Freeling, and Mr. Baylis, for the Appellants.—The decree appealed from cannot be maintained. Our objections to the decree are—first, that the deed [244] of mortgage, Bond and security is invalid; second, that the notes issued never were valid or legal promissory notes, bank notes, or Bankers' cash notes, within the meaning of that security; and, thirdly, that no such transmissibility was conferred by the law of the Isle of Man, upon the deed of mortgage and bond, as can give the Respondents, the present Clerk of the Rolls and the Receiver-General, any right to put that Bond in suit.

First. No estate or interest passed by the deed of Bond and security to McHutchin and Quirk; that deed never having been consented to, or confirmed on behalf of Her Majesty, the Lady of the Manor or Lordship of the Isle of Man; neither McHutchin and Quirk, or either of them, as mortgagees having been admitted tenants of the lands comprised in the deed. Lands in the Isle of Man are of the nature of customary estates of inheritance. By the fifth section of the Act of Settlement of the 4th of February, 1703 (Mill's "Stat. Laws of the Isle of Man," pp. 166, 361, edit. 1821), the legal right to messuages and lands is made to depend upon the alienation being entered on the Court Rolls of the Manor, and an admittance thereon. With regard to mortgages, they must, by this fifth section, be entered on the Records within six months, and after five years the mortgagee must be admitted and pay a fine. The object of that Act was to prevent alienations to the prejudice of the rights of the Lord, and it was passed to settle doubts which at that time had arisen between the Lord and the tenants arising out of the construction put on the Act of Tynwald of the 24th of June, 1645 (Mill's "Stat. Laws of the Isle of Man," p. 106, edit. 1821), respecting the right of [245] succession of tenants, and according to the provisions of that Act the practice has been to require the entry of all alienations on the Court Rolls. In Johnson's "Jurisprudence of the Isle of Man," p. 37, the form of such entry is given. Now, the Act of 1645 required the consent and confirmation of the Lord to any alienation by the tenant. That requirement is not repealed by the Act of Settlement of 1703, and as, therefore, the rights of the Duke of Athol, the former Lord of the Manor, are now vested in the Crown, the sanction of Her Majesty to the alienation was necessary. There never has been any attempt to give effect to equitable mortgages in the Isle of Man, they have always been dealt with as legal rights.—[The Lord Justice Turner: In *Birnie v. Caystile* (9 Moore's P.C. Cases, 303) the effect of the Act of the Settlement of 1703, with respect to mortgages, was considered.]—Another ground of objection on this head is, that one tenant only can be admitted upon an alienation on the Court Rolls. These grantees, therefore, could not be admitted.—[The Lord Justice Knight Bruce: If equitable interests are recognized, the fact of a single tenant only being admitted, may be consistent with the equitable rights of the others, but it appears harsh law to say that two persons cannot be admitted at the same time.]—The next objection rests upon the form of the notes. Now, the Common law of England has been adopted as the Common law of the Island in all matters of general jurisprudence. By the law of England, a promissory note made payable in the alternative, either in cash or notes of the Bank of England, has been held invalid. *Exp. Ineson* (2 Rose's Bank. Cases, 225). *Exp. Davison* (1 Buck's Bank. Cases, 31). The instruments issued by Henry [246] Holmes, John Holmes and James Holmes were not cash notes, or Bankers' notes, such as they were authorized to issue by the several licences, and were not transferable or negotiable instruments, and were, we contend, wholly invalid. The object of the Bankers' Act of 1817 was to provide negotiable notes that should pass from hand to hand and form part of

the currency of the Island.—[The Lord Justice Turner: The Act was passed to secure payment of the notes issued by the Bankers, to the persons who should be holders of the notes. It would be difficult to say that the Bankers would be free, because they issued notes that were invalid.]—Notes in the form of those in question were not authorized by the Banking Act of 1817; the words and form required by that Act have not been followed. If, then, they are not valid and transferable, they are not promissory notes within the meaning of the Act. The words of the Act are, "paying the full value in gold, silver coin of the legal currency of Great Britain, promissory notes of the Bank of England, or by direct Bills of Exchange on London, at a date not exceeding two months." But the notes issued were in these words, "to pay one pound British in Bank notes, or Bills on London." To pay in what Bank notes? It is not said they are to be in Bank of England notes. That cannot be: £5 notes are the lowest now allowed by law to be issued: neither can it be in any Bills on London, without limit as to the time they have to run, and whether they were direct on London, or not. There is neither time nor place mentioned, in connection with the notes, in which they are to be paid. Another ground of objection is, that by the dealings of John Holmes and James Holmes, after the decease of Henry Holmes, all the notes issued by the firm of Henry, John and James [247] Holmes were taken up and discharged. The business between the years 1848 and 1853 was carried on with the old notes. The issue was at one time £25,000, but the circulation of the Bank amounted, as the evidence shows, to nearly £100,000 a-year. The case must be considered as though Henry Holmes had given security singly for the payment of these notes: and then the notes having been brought in after the death of Henry Holmes and discharged, were re-issued by the remaining two partners, and became the notes of the survivors, and were not the notes of the three original partners.—[The Lord Justice Knight Bruce: Then you contend that every one of the notes that came into the Bank after the death of Henry Holmes was, for the present purpose, cancelled?—Yes. *Bartrum v. Caddy* (9 Ad. and Ell. 275), *Lazarus v. Cowie* (3 Q. Ben. Rep. 459). The two survivors could not re-issue these notes according to true intent of the security. That deed must be construed strictly: the word "they" in it, cannot be construed to mean "one or more of them." The notes are the notes of the three, and the security is of the three; indeed the decree appealed from proceeds upon that hypothesis. The Court declared that the dates of the notes are *prima facie* evidence of these issues, and that such issues were anterior to the death of Henry Holmes: we submit, therefore, that none of these notes come within, or are covered by, the Bond. No evidence has been given that any single note came back to the Bank. There can be no relief, as three years have elapsed: so the Island Limitation Act of 1738 is conclusive. The third ground of objection is, that the Clerk of the Rolls and the Receiver-General of the Island not being cor-[248]-porations sole, the estate and interest of McHuchin and Quirk, in the land and premises comprised in the mortgage Bond and security, did not devolve upon or pass to the Respondents as their successors in the respective offices, so as to entitle them to be Plaintiffs in this suit.—[The Lord Justice Knight Bruce: If you were successful on this point it would not benefit the Appellants, as it would only occasion a new suit by other parties.]—The Appellants then abandoned this objection.

Mr. Cairns, Q.C., Mr. E. F. Smith, and Mr. Maude, for the Respondents.—As to the first point raised by the Appellants that there was a failure to comply with the provisions of the Act of Settlement of 1703, in not having the deed of mortgage, Bond and security entered on the Court Rolls and admittance thereon: and that such non-compliance rendered it invalid: our answer is, that the deed was published in the Rolls Office, and ordered to be recorded, which was done in the proper registry of the Island, and that is the "Record" mentioned in the Act of 1847, namely, the general Registry of the Chancery Court in the Island. By that deed and Bond, the lands and hereditaments charged were vested in the Respondents, as successors in office of the grantees: the Respondents being capable, by the law of the Island, of taking by transmission as such successors the securities granted, without any allowance or confirmation of the deed in question by the Lady or other officer of the Manor. No law has been cited or, indeed, could be, which requires any such confirmation or allowance to render the grant valid, nor does the want of entry on the Court Rolls [249] affect the validity of the grant. The relative rights of the Lord



and tenants are regulated by the Act of Settlement of 1703, which is the Magna Charta of the Island, and if a tenant refuses to have his name entered, he may, by the eleventh section of that Act, be fined, but that has reference only to the rights of the then Lord, and not to any question arising between the grantor and the grantee. The power of alienation by a tenant, however, is left untouched by that Act, and the provision respecting incumbrances evidently refers to the Registry of the Island, as the word "Record" is used. Without going into the question of an equitable charge, which was quite untouched by the Appellants, yet it is open to the Respondents to contend there was an equity.—[The Lord Justice Turner: Is there any recognition in the Island of equitable mortgages?—No case has occurred. There may be a contract with respect to title deeds, which can be enforced in the Court when all the requirements of the Act had been complied with. *Christian v. Goldie* (2 Moore's P.C. Cases, 226), and *Birnie v. Caystile* (9 Moore's P.C. Cases, 303), treats of an equity of redemption, and shows that equitable principles are acted upon in the Island. The objection to the want of confirmation by the Lady of the Manor, as required by the Act of Tynwald of 1645, is untenable; such confirmation was repealed by the Act of Settlement of 1703, which is now the basis of the tenures in the Island. So again, with regard to the argument that only one tenant could be admitted. Alienation is not restricted to one; there is nothing in the Act of Settlement to make an alienation to more than one person void. It was next insisted, that [250] from the form of the notes, they were not negotiable at all by the law of England, and, therefore, not good notes by the Manx law, and that the security contemplated negotiable notes only. We admit they are not valid promissory notes under the Statutes, 3rd and 4th Anne, c. 9; but our answer is, that the English law, and cases relied upon on this point, do not apply, as the notes were made payable in the mode required by the Island Banking Acts of 1817 and 1836, and were negotiable according to the Common law of the Island, and within the covenants of the deed of mortgage, Bond and security. *Tufnell v. Constable* (7 Ad. and Ell. 798). To admit such an objection would be fatal to the whole circulating currency of the Island, for at this moment all notes in circulation are in this form. The Appellants' argument assumes that the Common law of England and the Isle of Man are the same. That is a fallacy; if anything, the Manx law has a greater affinity with the law of Scotland. In the Manx Courts both law and equity, as in the Scotch Courts, are administered. Instruments under seal, which we term specialties, are not known in the Island; thus, Bonds and mortgages are merely under hand. *Fayle v. Ray* (Bluett's Advocates' Note Book, 30). The cases referred to on this part of the argument are not in point. *Exp. Imeson* (2 Rose's Bank. Cases, 225) was a mere proof in bankruptcy, and *Exp. Davison* (1 Buck's Bank. Cases, 31) turned upon the form of an action, whether it could be admitted to proof in bankruptcy. Here the notes are assignable by the law of the Island. The next point the Appellants raise is, that the notes have been satisfied, even if they [251] were authorized by the terms of the licence and the security. This objection involves two questions, one of fact, as to the re-issue of the notes, and the other of law, as to the consequences of such re-issue. The burden lies on the other side to prove that the notes had come in, and the amount paid. Surely those who having taken these notes in the usual course of business, and have them still in their hands, are not bound to prove their case. The decree puts this point fairly enough. The date of each note being before the death of Henry Holmes, was *prima facie* evidence of the date when it was issued. *Potez v. Glossop* (2 Exch. Rep. 191), and *Morgan v. Whitmore* (6 Exch. Rep. 716) are authorities which establish that the date of an instrument is *prima facie* evidence of the date of its issue, but we submit in that respect the decree was too narrow in confining the case to the issue by the three co-partners, and ought to be altered, for the deed of mortgage, Bond and security must be construed to be applicable to issues by the three co-partners, and great injustice would be done, if the words of the condition of this deed are not to be construed distributively. The security given is available to secure payment of all notes to be issued by the firm of Messrs. Holmes, or any one or more of the partners carrying on the business of the firm.

Mr. W. M. James, Q.C., in reply.—It was absolutely necessary to have the deed of mortgage, Bond and security entered on the Rolls of the Manor; the very object of the Act of Settlement of 1703 was, that no alienation should be valid unless it

was enrolled; as a private conveyance would de-[252]-prive the Lord of the fruits of his manorial rights.—[The Lord Justice Turner: That Act does not make the mortgage void.]—We admit that *prima facie* the date of a document is evidence of its issue, and, therefore, of its existence at the period indicated by the date. Next, as to construing the security distributively, so as to make a security by three copartners to be a security of two or only one, that, we submit, is contrary to all principles of law. Suppose A. had made his property a security for the firm, and died. The partnership would thereby be at an end. It cannot, in such a case, be said that a security given for three partners would continue to be a security for notes issued not by three, but a partnership of two, of which A. was not a member. The security cannot be read except as a security for the notes of the three partners.

Their Lordships' judgment was now pronounced by

The Lord Justice Turner (July 22, 1857).—In this case, Henry Holmes, John Holmes and James Holmes, for many years previous to the year 1844, and thenceforth until the death of Henry Holmes, carried on the business of Bankers, in partnership together, at Douglas, in the Isle of Man.

By a law of the Island, passed in the year 1817, and intituled "An Act to prevent the negotiation of promissory notes and Inland Bills of Exchange within the said Isle, under a limited sum," it was enacted, amongst other things, as follows:—"And be it further enacted that from and after the promulgation of this Act, no person or persons shall [253] make and issue any bills, notes, or other negotiable paper or instrument whatever, for the payment of 20s. British or upwards, by way of a circulating medium, without the licence of the Governor or Lieutenant-Governor and Council of the said Isle for the time being, to be granted or refused at their discretion, under penalty of £50 for every such bill, note, or other instrument issued contrary to this Act; which licence shall remain in force for one year only, and be renewable from year to year, at the discretion of the said Governor or Lieutenant-Governor and Council." The Act then, after imposing a fee for the granting of every licence, provides that it is not to be construed to extend to prevent "the making or passing of notes or bills of any amount without a licence, so as the same be done in the common and ordinary course of trade or business, and not in the way of cash notes or bills, or Bankers' notes or bills." And then the Act proceeds thus: "And be it further enacted, that every such Banker or Bankers as aforesaid shall be bound to take up and pay all such notes or other negotiable paper or instruments whatever made and issued by them, or any of them, within the said Isle, by paying the full value in gold, silver coin of the legal currency of Great Britain, promissory notes of the Bank of England, or by direct bills of exchange on London, at a date not exceeding two months."

In pursuance of this Act the three Messrs. Holmes applied for and obtained a licence, by which they were licenced to make, and issue, and keep in circulation, cash notes, or Bankers' notes of the value of 20s. British, each; and this licence was renewed to them from year to year. The amount of notes [254] authorized by the new licences varied in different years. In some years the renewed licence extended so far as to authorize the issue of notes to the amount of £25,000. By the licence which was in force at the time of the death of Henry Holmes, notes to the amount of £12,000 only were authorized to be issued. Henry Holmes died on the 16th of January, 1848. After his death, John Holmes and James Holmes continued to carry on the business in partnership together, until the death of John Holmes. In the month of November, 1848, a new licence was granted to John and James Holmes, to make and issue, or have and keep in circulation, cash notes or bank notes of the value of 20s. each, and to the extent of £12,000. This licence was also renewed to John and James Holmes, from year to year; but the amount of notes authorized by it was, in the year 1849, reduced to £10,000, and so continued until the death of John Holmes. John Holmes died on the 22nd of October, 1853; at the time of his death an application was pending for a renewed licence to John and James Holmes to issue notes for the ensuing year to the amount of £8000; and on the 28th of October, 1853, some days after the death of John Holmes, a renewed licence was issued, by which he and James Holmes were purported to be licenced to make and issue, or have and keep in circulation, notes of the value of 20s. each, to the extent of £8000. James Holmes,



however, died on the 7th of November, 1853, very shortly after the granting of this licence.

Upon the granting of the licences and renewed licences to which we have referred, security have been required by the Government of the Island for [255] the payment of the notes which were authorized to be issued. It does not seem to be material to consider the securities on which the licences and renewals anterior to the year 1844 were granted. The question to be decided upon this appeal mainly, if not wholly, depends upon the security which was given in that year; that security was in the nature of a Bond and mortgage, dated the 16th of November, 1844. [His Lordship here read the instrument, *ante*, p. 228.]

All the licences and renewed licences which were granted after the date of this security, except the licence or renewed licence granted in the year 1853, appear either to have been expressed to be granted upon the terms of the security remaining in force, or to have been granted in pursuance of applications which referred to the security, and imported that it was to be available for securing notes to be issued under the licence which was applied for. Upon the occasion, however, of the licence granted in the year 1853, no reference appears to have been made either to the security of 1844, or to any other security, except a Bond for £200, conditioned for the notes being marked and numbered in a manner specified in the Bond.

Messrs. Henry, John and James Holmes issued notes under the authority of the licences and renewed licences granted to them. [His Lordship here referred to the form of one of the notes. See same, *ante*, p. 232.]

No alteration appears to have been made in the form of the notes after the death of Henry Holmes. The old notes were continued to be issued. Indeed, so far as at present appears, every note of the Bank [256] which was in circulation at the time of the death of James Holmes was of a date anterior to the death of Henry Holmes. The transactions of the Bank appear to have been of an extensive nature. One of the witnesses, whose evidence is before us, and who was a clerk in the Bank up to November, 1849, stated that to the best of his belief upwards of 100,000 of their notes were paid in and paid out annually; and in his cross-examination he explained this to mean, not that the 100,000 notes were all different notes, but that the same notes were paid in and paid out frequently during the year to make up that number. Taking this evidence in connection with what has been stated as to the form and dates of the notes issued after the death of Henry Holmes, it must, we think, be assumed that many, at least, of the notes which were outstanding at the death of Henry Holmes were afterwards paid into the Bank and re-issued by John Holmes and James Holmes. There were, it appears, only two Banks in the Island, Holmes's Bank and the Bank of Mona, and great difficulties having arisen in consequence of the death of James Holmes, the Council of the Island came to an arrangement with the Bank of Mona to take up the notes of Holmes's Bank. Under this arrangement the Bank of Mona proceeded to take up Holmes's notes, and, as appears by the evidence before us, have taken them up to the amount of upwards of £11,000. Others of the notes, however, seem to be still outstanding. In this state of circumstances the Bank of Mona applied for the permission of the Lieutenant-Governor and Council of the Island to use the names of the present Clerk of the Rolls and Receiver-General of the Island (who [257] are the successors in office of the Clerk of the Rolls and Receiver-General to whom the security of 1844 was given) in any proceedings which they might be advised to institute upon the footing of that security; and this permission having been granted, they, on the 25th of February, 1854, filed a Bill in the Court of Chancery of the Island in the names of the Respondents, the now Clerk of the Rolls and Receiver-General, against the personal representative of James Holmes, the devisees in trust of his real estate under his Will, and their *cestui que trusts*, and two of his judgment creditors, for the purpose of rendering the security available against his estate. The bill prayed that by decree of the Court, the Defendants, or one of them, might be ordered to pay to the Complainants the sum of £30,000, the principal money of the deed of Bond and security, with interest thereon from the 16th day of November, 1844, the date thereof, until paid, and the costs and charges of the deed, with the costs of suit, or that the estate, lands and premises given in security by the deed, or a sufficient part thereof, might be ordered to be sold for payment of the sum of £30,000, with interest, costs, and charges aforesaid, with the costs of this

suit. And the Complainants also prayed that such sum and interest might be, by order of the Court, distributed amongst the holders of the cash notes, or Bankers' notes, and the other persons entitled thereto, according to their respective rights.

The grounds of resistance to the claim made by this bill may be conveniently stated from the answer of the Defendant, Avison, one of the Appellants. He said that he was advised and believed that the several lands and tenements professed to be granted or af-[258]-fected by the instrument in writing hereinbefore last in part set forth, were divers ancient quarterlands or farm lands, within, and parcels of the Manor of Man, holden by the tenants thereof, from time to time, of Her Most Gracious Majesty, the Lady of the Manor, as customary freeholds of inheritance, according to the laws and customs of the Manor; and the Defendant submitted to the Court that the instruments in writing hereinbefore in part set forth, or either of them, did not convey to or vest in John McHutchin and George Quirk, any estate, right, title, or interest whatever, in the lands and premises professed to be granted or affected by such instruments, or one of them, inasmuch as the Defendant had been informed, and believed it to be true, that the instrument in writing hereinbefore lastly in part set forth was never made known to, or received the approbation, consent, allowance or confirmation of Her Majesty as Lady of the Manor of Man, or of any Steward, Seneschal, or other officer or officers of such Manor having authority to act in that behalf, as the Defendant was advised and believed should have been the case, according to the laws and customs of the Manor. And, inasmuch, also, as McHutchin and Quirk, or either of them, did not, nor did the Complainants, or either of them, ever become tenants or a tenant to Her Majesty, in respect of the said last-mentioned lands and tenements, or any of them, as Defendant was advised and believed, McHutchin and Quirk, or one of them, and the Complainants, or one of them, should have become, according to such laws and customs; and the Defendant craved leave to have the same benefit of such laws and customs as if he had pleaded the same. He next sets out the form [259] of the notes issued by the Holmes's, and submitted to the Court that such instruments were not negotiable instruments, either at Common law or by any custom of the Isle of Man, nor did such instruments fall within the meaning of the Act or Acts of Tynwald, in that behalf made and provided, nor was the issue, re-issue, or negotiation of such instruments authorized by any licence granted to Henry Holmes, John Holmes and James Holmes, as such Bankers as aforesaid, or by any renewal or renewals of such licence; and the Defendant craved the same benefit from the Acts of Tynwald, as if he had pleaded the same or demurred to the Complainants' bill. And by his answer he further said that the licence granted to Henry, John and James Holmes expired on the death of Henry Holmes; and then he sets out the licences granted to John and James Holmes and the licence which was issued after the death of John Holmes; and the Defendant further stated that, under and by virtue of the new licences of the 17th day of November, 1848, and the 28th of October, 1849, and the several renewals of the latter licence, and under and by virtue of the new licence of the 28th of October, 1853, to the best of this Defendant's knowledge, information, and belief, John Holmes and James Holmes dealt largely in business as Bankers, adopted, received, paid, took up, and retired, all, or the greater part, of the instruments in the Complainants' bill called cash notes, or Bankers' notes, which had been issued by Henry Holmes, John Holmes and James Holmes; and for the purposes of their business, and in order to meet the exigencies thereof, they from time to time re-issued many of such instruments by virtue and according to the terms of the new licences granted to John [260] Holmes and James Holmes as aforesaid, or one of such licencees, and not in pursuance of the original licence granted to Henry Holmes, John Holmes and James Holmes. And the Defendant by his answer admitted that John Holmes departed this life on the 22nd day of October, 1853, and, after his decease, James Holmes alone continued to deal as a Banker in Douglas aforesaid, on his own account, up to the time of his death, which took place on the 7th of November, 1853, and issued and re-issued many of the last-mentioned instruments for similar purposes, James Holmes making such issues and re-issues under the last new licence of the 28th of October, 1853, granted to John Holmes and James Holmes as aforesaid; and the Defendant submitted that, even if the Court should be of opinion that the aforesaid instruments, or pretended deed of Bond and security, did convey to, or vest in, McHutchin and Quirk, or either



of them, any estate, right, title or interest in or to the lands and tenements professed to be granted by such instruments, or one of them, the same or the pretended deed of Bond and security did not apply to the first-mentioned new licence, the secondly-mentioned new licence, or the several renewals thereof, or the last-mentioned new licence granted to John Holmes and James Holmes, as such Bankers as aforesaid. And the Defendant denied that Henry Holmes, John Holmes and James Holmes, or some or one of them, did not, as alleged in the Complainants' bill, take up, pay and discharge the instruments in such bill called cash notes, or Bankers' notes, and stated in such bill to have been issued and kept in circulation by them, and that the larger or any part of such instruments was still unpaid; but on the contrary [261] that the Defendant was informed, advised, and believed, that all or the greater part of such instruments have long since been taken up, paid off, retired, discharged, or satisfied, in terms of the Act provided in that behalf, and according to the terms of the original licence and the renewals thereof, through or by reason or means of the dealings therewith of John Holmes and James Holmes, jointly acting under and by virtue of the several licences and renewals of such licences, granted to them as Bankers on their own account, or of James Holmes alone acting as aforesaid. And the Defendant further said he had been informed and believed that at the time of the death of James Holmes, few, if any, of the cash notes, or Bankers' notes were in circulation pursuant to the original licence granted to Henry Holmes, John Holmes and James Holmes, or any renewal thereof. And the Defendant further answered, that he had been informed and believed that a large number of instruments of the nominal value of one pound each, bearing the names of Henry Holmes, John Holmes and James Holmes, and which Defendant believed were part of the instruments called in the Complainants' bill, cash notes, or Bankers' notes, but incorrectly stated in such bill to have been issued by Henry Holmes, John Holmes and James Holmes, were shortly after the decease of James Holmes presented for payment at the Banking office, formerly of Henry Holmes, John Holmes and James Holmes, by persons in whose hands the same were, but the Defendant could not state whether such persons were the original holders of such instruments or not, and such instruments were refused payment. And that the Defendant had been informed and believed, that many of such instruments as last described were also, [262] some time after the death of James Holmes, presented for payment to the Defendant, Harris, in his capacity (as Defendant believed) of administrator of the personal estate of James Holmes, by persons being, as this Defendant was informed and believed, not original holders of the instruments, and which last-mentioned instruments the Defendant has been informed were refused payment, and that, amongst the instruments so presented was a large number (but what number in particular the Defendant could not set forth to his belief or otherwise), which the Defendant has been informed and believed were held by the Directors and Company of the Bank of Mona, but which had not been issued to the Directors and Company of the Bank of Mona, by Henry Holmes, John Holmes and James Holmes, and that the Defendant had been informed and believed that the greater part of such last-mentioned instruments were received by, or came to the hands of, the Directors and Company of the Bank of Mona after the decease of James Holmes as aforesaid, who survived Henry Holmes and John Holmes as before mentioned. The answer also insisted that the interests of Messrs. McHutchin and Quirk, in the property comprised in the security of 1844, if they took any interest in it, did not pass to the Plaintiffs: and the Island Statute of Limitations is likewise set up: but the first of these two latter objections was waived, and the other of them abandoned in the course of the argument before us.

At the hearing of the cause the following decree was pronounced on the 10th and 11th days of June, 1856, by the Court of Chancery of the Island:—"This Court is of opinion that the property given in security in and by the deed of Bond and security [263] of the 16th of November, 1844, is liable to the extent of the Bond for the cash notes, or Bankers' notes issued by Henry Holmes, John Holmes and James Holmes, and now in the hands of *bona fide* holders, and that the date of each note (being anterior to the death of Henry Holmes) is *prima facie* evidence that such note was issued by the three partners, and the same is so ordered and decreed accordingly. And, it is hereby referred to the Clerk of the Rolls to ascertain the amount of such notes now outstanding, and also to report whether the whole or what portion of the

different properties given in security is necessary to be sold for the payment of such notes, and in what order: and report the same to this Court with all convenient speed."

The present appeal was brought by the devisees in trust, under the Will of James Holmes, from the above decree. The points on which the Appellants insisted in the argument before us were in substance those which have been stated from the answer of the Appellant, Avison. The first question, therefore, which we have to determine, is, whether the instrument of 1844 passed to Messrs. McHutchin and Quirk any estate or interest in the lands which are purported to have been granted by it. The Appellants insisted that it did not, upon three grounds: first, that the instrument never received the approval of Her Majesty, in whom the Lordship of the Island is vested; secondly, that neither Messrs. McHutchin and Quirk, nor the Respondents, their successors in office, nor any of them, ever became tenants to Her Majesty in respect of the lands comprised in the instrument: and, thirdly, that the instrument purports to be a grant in favour of two persons, and that the laws of the [264] Island do not permit such a grant; a point, it may be observed, which is not referred to in the answer.

The first of these grounds rests upon an Island Act of the year 1645, by which it was enacted that no person should have power, by virtue of certain grants, or of certain agreements therein mentioned (and which their Lordships assume, but without meaning so to decide, affected all the lands in the Island), but according to the usual and customary laws of the Island, namely, as to farm and quarterlands to descend in manner therein mentioned, "except it be by gift, grant, or assignment, in case of poverty, or for or upon some other just cause or reason, and the same made known, approved by, and consented unto by the Lord of the Island," and that all manner of grants to the contrary shall be utterly void and of no effect; but, after the passing of this Act, and in the year 1703, another Act of the Island was passed "For the perfect settling and confirmation of the estates, tenures, fines, rents, suits, and services of the tenants" of the Lord within the Island: and upon examining the provisions of that Act, we are fully satisfied, that, after it came into operation, the Act of 1645, so far as it rendered the consent of the Lord necessary to alienation, could no longer be in force. The Act of 1703 was plainly intended fully to define and regulate the relations which were, for the future, to subsist between the Lord and the tenants, and the terms on which those relations were to be founded. It prescribes the fines to be paid upon alienation; it describes what was to be accounted as an alienation: and it enacts that all and every of the tenants of the Island, their and every of their heirs and assigns, should thenceforth quietly and peaceably hold and enjoy their lands as customary [265] tenants against the Lord, his heirs and assigns. We think that, consistently with the provisions of this Act, it could not have been held that the then tenants were not entitled, upon paying the proper fines, to alienate their lands without the consent of the Lord, and that the Act cannot be construed to have placed the future tenants in any worse position.

The second ground of objection to the validity of the instrument of 1844 was, that the mortgagees were never admitted tenants to the Lord; but, in our judgment, this objection is equally unfounded. It rests upon the fifth section of the Act of 1703, by which it is provided that, if any tenant who has mortgaged his lands, etc., does not redeem the mortgage within five years, the mortgage is to be looked upon as an alienation: the mortgagee is to be admitted; his name is to be entered on the Court Rolls; and he is to pay a third part of the general fine: but there is no provision that the mortgage shall be void if the mortgagee does not come in to be admitted; and this enactment cannot, as it seems to us, operate further than to subject the mortgagee to a fine under the provisions of the eleventh section of that Act, if indeed, it can operate so far, as to which we give no opinion. It was attempted to assist the Appellants' argument upon this part of the case by reference to the enactment at the close of the fifth section of the Act, that mortgages should be of no effect if not entered into the records within six months after they were executed; but this instrument having been entered into the records of the Court of Chancery within the six months, we can give no effect to this argument unless we are satisfied that the Records referred to in this part of the fifth section of the Act are the Court Rolls, and we are of opinion [266] that they are not. The Act appears



to us to distinguish between the Records and the Court Rolls; and we find it laid down that all deeds whereby lands are alienated, are to be recorded at the Chancery, Common law, or Baron Courts. We think, too, that this view of what was meant by the term "Records" in this Act is, in some degree, fortified by the provisions to be found in the Act of 1847, which was referred to in the argument. We are of opinion also, that the instrument in question cannot be held to be invalid in consequence of the grant having been made in favour of two persons, though it may be that only one could be admitted upon it. The provisions of the eleventh section, as to changes of tenants, apply not merely to changes by alienation, but to changes by death; and surely it could not be contended that if the next of kindred succeeded to the inheritance, and there were several of them, they would not all take, although one only might be entitled to be admitted. Their Lordships are of opinion, therefore, that the first point insisted upon on the part of the Appellants cannot be maintained.

We come then to the second point put forward by the answer, and insisted upon in the argument before us; that the notes issued by this Bank were not negotiable, and that the issue of them was not authorized by the licences. It may not perhaps be necessary for us to give any opinion upon the negotiability or non-negotiability of these notes. This suit is founded not upon the notes, but upon the security. The object of the security was to ensure payment by the Bankers of the notes which they might issue: and it may be sufficient to say that the notes were issued by them; that they were issued pursuant to, or, in [267] other words, in pursuance of, the licence; and that they were issued according to the terms of the licence, the licence stipulating only for the value of the notes and the extent of the issue. We do not, however, desire to dispose of this case upon so narrow a ground. We think it right to state that, looking to the state of the circulation in the Island at the time when the Act of 1817 was passed, and to the provisions of that Act, the notes in question were, in our opinion, negotiable notes within the meaning of that Act.

No other notes were at any time issued by these Bankers, and we cannot suppose that the licences which were issued would have been annually renewed if the notes which had been previously issued, and were in circulation, had not been deemed to be in conformity with the provisions of the Act. The English decisions which were referred to in the argument have not, in our judgment, any bearing upon the case. The question must be decided according to the law of the Island; and although the law of England, or the general law of Merchants, may to some extent prevail there, we do not think that it can so prevail where there are express statutory provisions applicable to the subject in question.

It may be right to add that since the hearing of this appeal we have ascertained, from inquiries in the island, that notes in the form now called in question have been current in the Island for the last forty years, and that during that period there have occurred several cases of insolvency of Bankers in which such notes have been sued upon, and in every case the full amount of the notes has been recovered and paid out of the security taken by the Council from the Bankers; and we may further add that we have also been in-[268]-formed by the Island authorities, that the Common law there differs in many points from that of England, and, amongst others, in respect to promissory notes: that there is no Act which makes them negotiable, but that by the Courts of the Island they have always been held to be so at Common law, and suits have been constantly maintained upon them.

There remains then only the question which is also raised by the answer, and was discussed in the argument, whether the notes which were originally issued by Henry, John, and James Holmes, and which were paid into the Bank after the death of Henry, and afterwards re-issued by John and James, or by James after the death of John, ought to be considered to have been paid and discharged, and not to be covered by the security in question. In order to solve this question, it will be convenient to consider the case with reference to the different periods of the death of Henry Holmes, of the death of John Holmes, and the death of James Holmes. And first, with reference to the death of Henry Holmes, we think that all the notes which were issued in the lifetime of Henry, and which did not after his death find their way into the Bank, must be covered by the security to the full

extent which Henry, John and James Holmes were at any time licenced to issue, to the extent of £25,000. Notes so circumstanced would plainly, to use the terms of the security, be notes which Henry, John, and James Holmes had issued or had in circulation pursuant to their licence or some renewal thereof. Then with reference to the period of the death of John Holmes, we think that John and James Holmes having accepted their licence and the renewals thereof [269] upon the terms of the security remaining in force (for their licence and the renewals of it, with the single exception which we have mentioned, and which does not appear to us to be material, were either expressed to be upon the terms of the security remaining in force, or were applied for upon those terms), it could not be competent to them, or either of them, to say, that the notes which they issued to the extent to which they were at any time licenced to issue, that is, to the extent of £12,000, were not covered by the security in whatever form those notes were issued. We think, therefore, that the notes of Henry, John and James Holmes, which were issued by John and James Holmes after the death of Henry Holmes, must be covered by the security to the extent of £12,000.

Lastly, with reference to the period of the death of James Holmes; we are not satisfied that the notes, if any, which were issued during this period, can be held to have been covered by the security. We think that the better opinion is, that as to notes issued after the 1st of November, 1853, when the licence to John and James Holmes determined, they cannot be so covered. Such notes could not, we think, be held to fall within the licence purported to be granted to John and James Holmes after the death of John. In the result, therefore, our opinion is, that the security must be taken to cover all the notes which were issued in the lifetime of Henry Holmes, and were not paid into the Bank, and re-issued after his death, to the extent of £25,000, and all the notes which were issued by John and James Holmes after the death of Henry Holmes, which were not paid into the Bank and re-issued [270] after the death of John Holmes. But then arises this question: Supposing it cannot be ascertained when the several notes were issued, are all the notes which were outstanding at the death of James Holmes to be taken to be covered by the security? We are of opinion, that in the absence of proof that they were issued after the 1st of November, 1853, they must be so taken, for we think that *prima facie* it must be assumed that all that was done, was rightfully done, and we do not see how, after the 1st of November, 1853, James Holmes could have any authority to issue any notes.

This being our view of the case, we think that the decree is in substance right; but we think that the declaration, that the date of each note being anterior to the death of Henry Holmes is *prima facie* evidence that such note was issued by the three partners, does not fully meet the case. The notes may have been issued by the three partners, and yet may not be covered by the security. We think, therefore, that the declarations of the decree ought to be altered, and that it should stand thus:—"This Court is of opinion, that the property given in security in and by the said deed of Bond and security of the 16th of November, 1844, is liable to the extent of the Bond for the cash notes, or Bankers' notes issued by Henry Holmes, John Holmes, and James Holmes to the extent of £25,000, or by John Holmes and James Holmes, after the death of Henry Holmes, to the extent of £12,000, and now in the hands of *bona fide* holders, and that in the absence of proof to the contrary, the outstanding notes ought to be taken to have been issued by Henry Holmes, John Holmes and James Holmes, in part of the said £25,000, or by [271] John Holmes and James Holmes, in part of the said £12,000."

We shall, therefore, humbly recommend to Her Majesty so to vary the decree; but as the variation will evidently not be productive of any beneficial result to the Appellants, we shall further recommend that the Appellants pay the costs of the appeal.



## ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

JOHN BATTEN.—*Appellant*: OUR SOVEREIGN LADY THE QUEEN, PATRICK O'MALLEY, and WILLIAM TOWNSEND, Esq., Her Majesty's Procurator-General, in Her Office of Admiralty,—*Respondents* \* [29th and 30th June, and 4th July, 1857].

## THE "MARIA."

If any doubt exists as to the character of a ship claimed to be the property of a neutral, being still enemy's property, the rule of the Prize Court is, that the Claimant shall be put to strict proof of ownership, and any circumstance of fraud or contrivance, or attempt at imposition on the Court, in making out his title, is fatal to the Claimant. Condemnation of the ship as enemy's property necessarily follows [11 Moo. P.C. 286].

A vessel (formerly Russian) was seized as prize, as being enemy's property, after she had become the property of neutrals. Restitution was claimed by the parties to whom the property in the ship had been formally transferred before the declaration of war. Held, that as the Claimants were shown to be invested with the character of owners, and there being no other party who could set up a title against them, they were entitled to restitution, but under the circumstances, respecting the ownership, without costs and damages.

This was the case of a Belgian ship which left Rio Grande, in the Brazils, on the 27th of July, 1855, laden with a cargo of hides and horns, bound to Cork or Falmouth for orders, and arrived off Cork on the [272] 27th of October following, where she was seized as prize by Patrick O'Malley, Esq., the Commander of Her Majesty's Revenue Cutter, *Eliza*, on suspicion of being Russian property.

From the evidence, it appeared, that just previous to the breaking out of the late Russian war, the Russian schooner *Maria* was consigned by her Russian owners to Messrs. Sasse and Huger, shipbrokers, at Antwerp in Belgium, and that subsequently that firm received a power for sale from her owners. In accordance with this power, Messrs. Sasse and Huger, on the 9th of May, 1854, sold and executed a bill of sale of *The Maria*, to the firm of Messrs. Huger and Co., merchants and shipowners at Antwerp; their father, Maurice Huger, a cashier and book-keeper in the firm of Messrs. Sasse and Huger, the shipbrokers, signing the acceptance of the bill of sale, by procuration for them. The money was remitted to the agent of the Russian owners, and the regular forms to make her a Belgian vessel were gone through, and on the 26th of May, 1856, by a Royal decree the vessel was nationalized as a Belgian ship, and as owned by, or being the property of, Messrs. Huger and Co. Some time after this purchase, she was despatched by her owners on a voyage to England, and whilst at Goole, in Yorkshire, in the month of September, 1854, she was seized by officers of Her Majesty's customs as being [273] the property of Russian subjects. Her owners, however, upon being informed of such seizure, transmitted copies of her bill of sale, sea pass, certificate of nationalization, and other documents, to the Belgian minister in London, by whom they were produced to the British Government; and after a short detention, *The Maria* was released, and in the same month sailed with a return cargo to Antwerp. In the month of April, 1855, after several intermediate voyages, *The Maria* sailed from Antwerp with an assorted cargo for Rio Grande, in the Brazils, and thence, in the month of July following, again sailed, bound to Cork, with a cargo of hides and horns. She arrived off Cork on the 27th of October, and was again seized, and proceeded against in the Admiralty Court. This second seizure of *The Maria* was occasioned by, and solely owing to, a letter written to the Government, by a witness named

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Dodson, the Right Hon. Sir William H. Maule, and the Lord Chief Justice of the Common Pleas (The Right Hon. Sir Alexander Cockburn, Bart.).

“Smithies,” undertaking in the event of a second seizure, to furnish such information as would enure to condemn the schooner as prize.

A claim was put in by the Appellant as the agent of Huger and Co., Belgian subjects, and sole owners of the ship and freight. In the Court of Admiralty, the cause was heard, in the first instance, upon the evidence of the captured crew, and the ship's papers alone. And upon that evidence, it appeared, from the evidence of the Master and mate in preparatory, on the standing interrogatories, that the owners of the schooner were, not Messrs. Huger and Co. of Antwerp, shipowners, on whose behalf it had been claimed, but the other Antwerp firm, that of Messrs. Sasse and Huger, shipbrokers. It also appeared that the Master had been appointed by Messrs. Sasse and Huger acting as brokers of *The Maria*, and that [274] he was not acquainted with the circumstances attending the sale and purchase, and consequently with the real ownership, of the schooner, there being no Bill of sale on board. Upon this discrepancy between the claim and the evidence of the Master, as to the ownership of *The Maria*, the Judge of the Admiralty Court (The Right Hon. Dr. Lushington) ordered further proof (see case reported upon this point, nom. *The Maria*, 1 Spinks's Prize Cases, 321) as to the ownership of the schooner: the Claimants thereupon elected to proceed by plea and proof, and thereby opened the case to further proof on the part of the Crown. An allegation on the part of the Claimants and responsive allegation by the Respondents were then given in.

In the allegation on the part of the Claimants, the sale and purchase of *The Maria*, by the firm of Huger and Co., and the circumstances attending and connected with that sale and purchase, and the history and employment of the schooner herself, were pleaded; and in support of that allegation, witnesses were examined. On the part of the Respondents, the responsive allegation set up that Messrs. Sasse and Huger, of Antwerp, and Messrs. Samuel Jackson and Co., of Manchester, salt merchants, or James Jackson, or George Henry Lord, partner in that firm, or one of them, were the true owners, in moieties, of *The Maria*, and liable to condemnation, from the existence of English interests in the schooner. One witness only, Smithies, was examined in support of this allegation, who was the party upon whose information *The Maria* had been a second time seized. His evidence was to the effect, that Messrs. Jackson and Co., or James Jackson and George Henry Lord, or one of them, were co-owners, in moieties, [275] of *The Maria*. On the hearing on the further proofs, it was contended on behalf of the Claimants, that the allegation on their behalf setting up the ownership of Huger and Co. in opposition to that of Sasse and Huger, was sufficiently proved; and that the responsive allegation on behalf of the Crown, setting up that Messrs. Jackson and Co., or James Jackson, or George Henry Lord, or one of them, partners in that firm, were co-owners, either with Messrs. Huger and Co., or with Messrs. Sasse and Huger, supported only by the evidence of Smithies, was wholly deficient in proof, and restitution was prayed on that account. On the part of the Crown, it was insisted that the allegation given in on its behalf was fully proved by the evidence, and condemnation of the schooner was prayed on the part of the Crown.

The Judge of the Court of Admiralty (The Right Hon. Dr. Lushington) delivered judgment on the 27th of February, 1857, whereby he condemned the vessel as prize, and as droits and perquisites of Her Majesty in Her office of the Admiralty. In this judgment he expressed his opinion, that the evidence to establish the claim wholly and totally failed, and that alone was the question he was called upon to decide; that he was not called on to say whether Sasse and Huger did not really purchase the vessel, in the names of Huger and Co., to evade the Belgian law; and that it was unnecessary to inquire whether Jackson and Co. had any interest in the vessel; the law of Prize being, as enunciated by Lord Stowell, and confirmed by undeviating practice, that whoever claimed a ship during war must prove his title to restitution, by establishing that the ship was the property of the person claiming it. He, therefore, condemned the vessel; observing, [276] that there had been a determined attempt on the part of the Claimants, to impose on the Court that Huger and Co. were the real owners; that the real fact might be, that Sasse and Huger purchased the vessel on their own account; and that as they could not hold the property by the Belgian law, they had assumed the names of Huger and Co. to evade



it. That Huger and Co. having made their claim, they had supported it by fraud and falsehood.

From this sentence of condemnation the present appeal was brought.

Dr. Addams, and Dr. Twiss, for the Appellant; and The Queen's Advocate (Sir John Harding), The Admiralty Advocate (Dr. Phillimore), and Mr. Atherton, Q.C., for the Respondents.

Three questions were raised and discussed at the hearing of the appeal:—

First. It was submitted by the Appellant, that the title of Messrs. Huger and Co., as the sole owners of the ship and freight, was made out; and that they were entitled to restitution, with costs and damages. That being brokers they were forbidden by the law of Belgium, of which Kingdom they were domiciled residents, from being shipowners. They cited and commented upon the following authorities: *The Jonge Joslers* (1 Hay. and Marr. 148), *The Jonge Juffers* (*ib.* 272).

Second. The Respondents supported the Sentence on the ground, that the judgment by the Court below was correct, and in accordance with the Prize law and the practice of Prize Courts; according to which practice [277] two parties only could be recognized: first, Claimants; and secondly, enemies; and that as the Claimants had not established their title as right owners by the ship's papers, and evidence in preparatory, in the absence of a Claimant entitled to restitution, condemnation of the vessel seized as enemy's property necessarily followed. Upon this point they cited *The Magnus* (1 Rob. 31), *The Elsebe* (5 Rob. 176), *The Ida* (1 Spinks's Prize Cases, 34). Story "On Prize Courts," p. 26 (Pratt's Edit.).

Thirdly. That the alleged transfer of the ship to the Claimants was fraudulent and fictitious, and that they were not the real transferees. That Messrs. Jackson and Co., an English firm, were part owners of the ship, and that such purchase by them of an enemy's ship was void and inoperative, so as to divest the enemy of his property therein, even if it should appear that part of the ship was the property of neutrals. *The Rosalie and Betty* (2 Rob. 343), *The Fortuna* (1 Dods. 84), *The Vrouw Elizabeth* (5 Rob. 2), *The Recovery* (6 Rob. 349), *The Eliza and Katy* (6 Rob. 185), *The Benedict* (1 Spinks's Prize Cases, 319), *The Soglasie* (1 Spinks's Prize Cases, 105), *The Rapida* (1 Spinks's Prize Cases, 172), *The Fanny and Elmira* (1 Edw. 117), *The Tobago* (5 Rob. 222).

The following American authorities were also cited in the course of the argument: *The Sally and Cargo* (1 Gallison's Amr. Rep. 409), *The San Jose Indiano* (2 Gallison's Amr. Rep. 269), *The Merrimack* (8 Cranch's Amr. Rep. 333), *The Mary* (9 Cranch's Amr. Rep. 147).

[278] Judgment was delivered by

The Lord Chief Justice Cockburn (July 14, 1857).—In this case, the ship *Maria* having, in the month of September, 1854, been seized, while under Belgian colours, at Goole, in Yorkshire, by officers of Her Majesty's Customs, as being the property of Russian subjects, was afterwards, on the production of certain documents brought forward as evidence of her being Belgian property, released; but was again, in the month of October, 1855, while sailing under Belgian colours, seized off Cork, under the direction of the Lords of the Admiralty, by the Commander of one of Her Majesty's revenue cutters, such second seizure having been directed by the Government in consequence of intelligence privately communicated by a person of the name of Smithies, who undertook, in the event of a second seizure, to furnish such information as would lead to the condemnation of the schooner. The vessel having been seized, was proceeded against in the Court of Admiralty. She was claimed by the Appellants, but condemned, and from this sentence of condemnation the present appeal was brought.

The vessel in question, *The Maria*, was originally the property of Russian subjects. In the month of January, 1854, she arrived at Antwerp, with cargo, consigned to the firm of Charles Isaac Sasse and Francis Huger, shipbrokers of that city. On the 17th of the ensuing month of February, a letter, dated the 31st of January, was received there by Charles Isaac Sasse, of that firm, from the managing owner of the vessel, stating that in consequence of the aspect of affairs having become more gloomy for the Russian [279] flag, the owners of *The Maria* were willing to sell her for 25,000 marks banco, if that price could be obtained. Sasse and Huger having offered the vessel for sale, by letter of the 3rd of March informed the

owners that the highest price which had been offered was 18,500 francs; and, in reply, received from the managing owner a letter of the 23rd of March, authorizing the sale of the vessel for 18,500 francs, if no higher price could be got for her, and directing that the money should be remitted to one Wedel, an agent of the owners at Lubeck, by whom a power from the owner to sell the vessel was to be transmitted to Sasse and Huger. The power to sell having been transmitted in due course to Charles Isaac Sasse, the latter, on the 9th of May, 1850, executed a bill of sale of the vessel to Huger and Co., of Antwerp; after which, the ownership of the vessel, as belonging to Huger and Co., was duly registered before the proper tribunal at Antwerp, Maurice Huger, as representing the firm of Huger and Co., having first made oath that the vessel "had been purchased by the house of Huger and Co.; that the purchase had been made unconditionally, without reserving any part or interest to others, or any promise made, or that it should subsequently be reckoned to the benefit of whoever it might be, still less to the benefit of any foreigner;" and, "finally, that no funds had been furnished by any foreigner upon the ship." After this *The Maria* was in due form nationalized by Royal decree, as a Belgian ship, on the petition of Huger and Co. It appears from the evidence of Charles Isaac Sasse, that the amount of the purchase-money was remitted to Wedel, the agent of the Russian owners; and on the 28th of May, Wedel wrote to Sasse and [280] Huger, acknowledging, on behalf of the Russian owners, the receipt of remittances amounting to the sum of 18,500 francs.

Upon this state of facts, the learned Judge of the Admiralty Court indicated an opinion that the transfer of the property in the vessel from the Russian owners, prior to the seizure, had been sufficiently established, and that the vessel was not liable to seizure as enemy's property. He abstained, therefore, from condemning her on that ground. In this view we entirely concur. We think that the correspondence between the Russian owners and Sasse and Huger, together with the personal testimony of the witnesses, clearly establishes that the Russian owners, under a sense of the danger to which the ship was exposed from the peril of war, authorized the sale, and that the price which, upon the representation of Sasse and Huger, that no better terms could be obtained, they consented to take, was in fact transmitted to them. As between the vendors and the purchasers, whoever the latter may have been, the transaction was, beyond a doubt, a *bona fide* one: the vessel ceased to be the property of a belligerent enemy, and was, therefore, no longer liable to seizure.

The opinion of the learned Judge having been thus in favour of the vessel, so far as her nationality was concerned, her condemnation was based upon a different ground, which we will now proceed to consider.

On the part of the seizors it was alleged, in answer to the claim, that, whatever might be the nationality of the vessel, the Claimants, Huger and Co., were not, as they had represented themselves, the sole owners, but that an English firm, Jackson and Co. of Man-[281]-chester, were part owners of the vessel: that Huger and Co. were not, therefore, entitled to restitution; and that in the absence of any party entitled to restitution, conformably to the practice of Prize Courts, condemnation must necessarily follow. In addition to which it was contended that the purchase by British subjects of an enemy's ship was illegal and void, and inoperative to divest the enemy of his property in the ship.

The learned Judge adopted the view maintained by the seizors to the extent that, in the absence of any Claimant entitled to restitution, condemnation of a vessel seized as enemy's property must follow, although it should be made to appear that such vessel was in fact neutral property: and he proceeded to condemn *The Maria*, not, however, on the ground that Jackson and Co. had been shown to be part owners (on which point he abstained from pronouncing any opinion), but on the ground that Huger and Co. had not in fact been the real purchasers of the vessel from the Russian owners.

An alleged interest both in Jackson and Co., and in Sasse and Huger, as also in Maurice Huger, the father of the partners in the house of Huger and Co., was insisted on, in the argument before us, as sufficient, on the legal grounds above mentioned, to support the sentence of condemnation. We think it right, therefore, to advert to these questions, although the judgment of the learned Judge is founded on the supposed defect of ownership of Huger and Co. We are of opinion, however,



that no sufficient case is made out of property, either in Jackson and Co., or in Sasse and Huger, or Maurice Huger, to override the formal and authentic proofs of title adduced on behalf of Huger and Co., the Claimants.

[282] With regard to the alleged interest of Jackson and Co., it certainly appears that as early as the month of April, 1854, Sasse and Huger, having then authority to sell *The Maria*, proposed to Jackson and Co. to take a share in the vessel, and that the latter agreed to contribute £500 towards the purchase, and to become half owners in the vessel; whereupon, it was arranged that this amount should be allowed by Jackson and Co. in account with Huger and Co., this firm being at that time indebted to Jackson and Co. in respect of cargoes of salt consigned to them by the latter. Before, however, anything had been done towards actually making over to Jackson and Co. any property in the vessel, doubts were raised in their minds by Smithies, their agent at Antwerp, as to the legality of the transaction; whereupon, they desisted from requiring that any property in the vessel should be transferred to them, preferring, as it would seem, that the £500 should be left as a matter of claim against Huger and Co., rather than to embark that amount in the ownership of a vessel which they were led to believe might be liable to seizure.

Under these circumstances, we are of opinion, that no property in the vessel ever passed to Jackson and Co., so as to prevent the Claimants, if otherwise entitled, from being considered as the owners. It becomes, therefore, unnecessary to determine whether (as was contended before us, on behalf of the Appellants) the purchase of an enemy's ship by British subjects, although previously illegal, was not legalized by the Order in Council of the 15th of April, 1854, by which a certain permission to trade with the enemy was conceded to Her Majesty's subjects.

We proceed now to consider whether Sasse and [283] Huger, or Maurice Huger, the father of the two Claimants, G. F. E. Huger and J. J. H. Huger, who constitute the firm of Huger and Co., are shown to be the owners, so as to oust the Claimants of the right to restitution which the possession of the ordinary and formal muniments of title would otherwise give them. For it is to be observed, that the bill of sale, whereby the property in the vessel was transferred by the Russian owners, being made out in favour of the Claimants, and the transfer having been duly registered before the proper Belgian tribunals, with all the necessary formalities, as a transfer to the Claimants, these facts (the transfer by the Russian owners having been established to be a *bona fide* one) entitle the Claimants to be considered, *prima facie*, as the owners of the vessel.

It is said, however, to be established by the evidence that the transfer to Huger and Co., the Claimants, was fraudulent and fictitious, and that they were not the real transferees. There is, no doubt, a good deal of evidence which tends to this conclusion. Not only had Sasse and Huger been, throughout, the parties conducting the transaction, but they, although in the name of "Huger and Company," engaged a Master and crew for the vessel, and corresponded with the Master when the vessel was afloat; nay, the Master and mate, on the seizure of the vessel, stated that Sasse and Huger, whom alone they had known and communicated with, and whom they looked upon as "Huger and Company," were the owners of the vessel. Doubts, too, were cast on the reality of the existence of such a firm as "Huger and Company." It appeared that G. F. E. Huger, and J. J. H. Huger, who were said to constitute the firm, were themselves clerks in [284] other mercantile establishments, and it was admitted on their behalf that the affairs of this firm were carried on entirely by Maurice Huger, their father, they themselves taking no part in the management. It was suggested that Sasse and Huger, the latter member of which firm was a brother of the two Claimants, had fraudulently put forward this fictitious firm to cover a transaction in which they could not safely avow themselves to be the principals, inasmuch as, being shipbrokers, they were by the law of Belgium prohibited under penalties from becoming shipowners; or, if Sasse and Huger were not to be deemed the real purchasers of the vessel, then Maurice Huger, it was contended, must be taken to be the only person interested as "Huger and Company," it being suggested that Maurice Huger, having been insolvent, was carrying on business in the name of his sons, with a view to avoid any claim by his creditors on the capital embarked in the house.

The circumstances to which we have adverted are, no doubt, such as to throw suspicion on the reality of the ownership of Huger and Co. On the other hand,

the presumption arising from the formal transfer to the Claimants is confirmed by the evidence of the parties whose title is thus set up against that of the Claimants, and by the positive oath of Sasse, and of Huger his partner, not only that the purchase was on behalf of Huger and Co., but that the purchase-money, having been transmitted by Sasse and Huger to the sellers, was afterwards repaid by Huger and Co.; and it is possible that the belief of the Master and mate as to Sasse and Huger being Huger and Co., and, therefore, their owners, may have arisen from the firm of Huger and Co. being an obscure and unknown [285] firm, while Sasse and Huger were well known as shipbrokers, and from the correspondence having been conducted by Sasse and Huger, one of whom bore the name of Huger. These circumstances may very well have led the Master to confound Sasse and Huger with Huger and Co.

Admitting that the matter remains in some degree of doubt, we think that the credit due to the bill of sale and the formal proceedings before the Belgian authorities must prevail, and that the Claimants, Huger and Co., must be taken to be the owners.

We have the satisfaction of knowing that by our thus holding, no injustice can be done. Setting aside the alleged interest of Jackson and Co., of which we have already disposed, it is not pretended that, if Huger and Co. are not the real owners, any one except Sasse and Huger, or Maurice Huger, is so. But if Sasse and Huger, or Maurice Huger, be in fact the real owners, no injustice will be done to them, as they themselves concur in representing Huger and Co. as the owners, and may be said to be assenting parties to the judgment we are now pronouncing in favour of the Claimants. If they have any claim, as against Huger and Co., to have the benefit of the restitution decreed to the latter, we may safely leave them to such remedy or means of enforcing their rights as the Belgian law may afford them. On the other hand, if they have been guilty of any violation of the local municipal law, or of any fraud to evade the latter, these are matters with which we have no concern. We cannot modify our judgment with a view, indirectly, to punish Sasse and Huger for any infraction of, or fraud upon, the Belgian law. We have before us the case of a vessel seized after she had [286] become neutral property, and when she was, therefore, no longer liable to seizure, and of restitution claimed by parties to whom the property in the ship has been formally transferred, and who are, therefore, invested with the character of owners; while there is no other party who can now set up a title against them.

The view which we have taken of the facts of this case renders it unnecessary to pronounce any opinion upon the important principle of law involved in the judgment of the Court below, as to the effect of a Claimant failing to make out his ownership, where the neutrality of the vessel plainly appears. We are only desirous of guarding ourselves, in disposing of this case on the facts, against being taken to assent to this principle as one of universal application. Although this doctrine has no doubt been propounded by very high authority, and has been asserted to have been uniformly adopted in the practice of Prize Courts, the instances in which it has been applied appear to have been cases in which the question has been, whether the ship was not still enemy's property. When any doubt remains on this score, the rule that the Claimant shall be held to strict proof of ownership, and that any circumstances of fraud or contrivance, or attempt at imposition on the Court, in striving to make out his title, shall be taken as fatal to his claim, is a very sound and wholesome one. In such a case, the question being between the enemy's property and the Claimant's, if the latter fails, the condemnation of the vessel as enemy's property necessarily follows.

It is obviously a very different thing to apply the same principle to a case where the Court, in pronouncing [287]-ing sentence, is obliged to start with the fact that the vessel is neutral property, and was, therefore, not liable to seizure. To say, in such a case, that, because the party whose claim is put forward may not have the legal title, while another has the beneficial interest, the vessel, though neutral property, must necessarily be condemned, is a proposition to which we must not be taken as giving our assent, though the facts of the present case do not render it necessary for us to pronounce judgment upon it. We proceed in this case upon the ground, that the property is clearly established to be neutral, and that we have before us



all the parties who are or can be interested in it, all of whom agree in affirming the title of the Claimants.

Their Lordships will, therefore, humbly report to Her Majesty that the sentence of condemnation pronounced in the Court below should be reversed, and that restitution of the proceeds to the Appellants should be decreed. But, we think, there should be no damages for the detention of the vessel, or costs. The Claimants must be considered as themselves in some decree to blame, if not for the seizure, at all events for the detention of the vessel. No documents were found on board evidencing the transfer of the ship, and the statement of the Master and the Mate as to who were their owners turned out to be incorrect. There were, also, circumstances of grave suspicion as to the participation of British subjects in the transfer of the ship from the enemy, which the Claimants have not shown all the alacrity to remove that might have been expected from them. We shall, therefore, recommend that Her Majesty's Order be limited to simple restitution.

[Mews' Dig. tit. WAR: 3. PRIZE OF WAR; a. *Rights as to*. By s. 18 of the Judicature Act 1873 (36 and 37 Vict., c. 66) and s. 4 (3) of the Judicature Act 1891 (54 and 55 Vict., c. 53) the admiralty jurisdiction of the Judicial Committee, except as to prize, was transferred to the Court of Appeal.]

[288]

# ON PETITION FROM NEW SOUTH WALES.

*Ex parte* JOHN ANDERSON ROBERTSON.

*In re* THE GOVERNOR-GENERAL AND EXECUTIVE COUNCIL OF NEW SOUTH WALES.

[July 21, 1857,\* and June 14, 1858 †].

The office of Commissioner of Crown Lands, in New South Wales, created by the Act of the Legislature of that Colony, the 4th Will. IV., No. 10, is not a patent office, though made under the Great Seal of the Colony, within the meaning of the Imperial Statute, 22nd Geo. III., c. 75; but is an office held *durante bene placito*, and there is no right of appeal to the Queen in Council under that Statute, from an Order of amotion from such offence by the Governor-General and Executive Council [11 Moo. P.C. 295].

Statute, 22nd Geo. III., c. 75, applies only to offices held by patent, for life, or for a certain term [11 Moo. P.C. 295].

The Judicial Committee have no jurisdiction to take into consideration the propriety of the dismissal of a public servant by a Governor-General of a Colony from an office held during his pleasure, unless the matter is expressly referred to them by the Crown [11 Moo. P.C. 296].

Order for leave to appeal granted upon the report of the Judicial Committee, without prejudice to the right of the Respondents showing cause against such Order [11 Moo. P.C. 290].

Cause being shown upon a counter petition, such Order rescinded.

The original petition in this case was presented by Robertson, praying for leave to appeal against an Order of amotion from the office of Commissioner of Crown lands in New South Wales, made by the Governor-General and Executive Council of New South Wales. The petition set forth that Robertson [289] had been ap-

\* Present at the hearing of the Petition for leave to appeal: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

† Present on the petition to dismiss the Order granting leave to appeal: The Lord President (The Marquis of Salisbury), the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John T. Coleridge.

pointed on the 3rd of January, 1852, a Commissioner of Crown lands for the District of Bligh, under the Great Seal of the Colony by the then Governor-General. That while in the discharge of his duties he had been wrongfully convicted by the local Magistrates in Petty Session, for an indecent assault, and fined one farthing; that, thereupon, he received a communication from the Governor-General and Executive Council, calling upon him to show cause why he should not be removed from his office of Commissioner; that he transmitted his defence in writing, in which he denied the commission of the offence imputed to him, and impeaching the legality of the conviction, and praying to be heard personally in his own defence; that an Order was made in the first instance that the Petitioner should be heard in person, but that this Order was afterwards rescinded, and a final Order was made by the Governor-General and the Executive Council, dismissing the Petitioner from his office; whereupon he presented his petition to Her Majesty in Council, and submitted, that he was entitled to redress, and prayed for leave to appeal against the Order of amotion, under the Statute, 22nd Geo. III., c. 75, and that the whole of the proceedings relating to his case might be transmitted without delay, and that the Governor-General should be notified to appear to the petition.

Mr. Anderson, Q.C., in support of the petition.—The Petitioner's appointment being under the Great Seal of the Colony, he has a patent office, and as a public officer is within the Statute, 22nd Geo. III., c. 75, and entitled to appeal. In *Willis v. Gipps* (5 Moore's P.C. Cases, 379), [290] *Montagu v. The Lieutenant-Governor of Van Diemen's Land* (6 Moore's P.C. Cases, 489), the question under this Statute related to judicial officers. But in *Cloete v. The Queen* (8 Moore's P.C. Cases, 484), the question, as here, was one of alleged misbehaviour, and an appeal was allowed under the general jurisdiction of this Court.—[Sir William H. Maule.—It may be a question whether the office of Commissioner of Crown lands is not held during pleasure.]—It was not so considered by the Local Government.

The Right Hon. Dr. Lushington.—Taking into consideration the nature of the proceedings that have taken place, leave will be given to appeal under the Statute, 22nd Geo. III., c. 75, without prejudice, however, to the right of the Governor-General and Executive Council to show cause against such allowance, and to move to dismiss the Order granting such leave.

By an Order in Council, dated the 27th of August, 1857, it was ordered that leave be granted to the Petitioner to enter and prosecute his appeal from the Order of amotion of the Governor-General and Executive Council of New South Wales, under the Statute, 22nd Geo. III., c. 75, without prejudice to the right of the Governor-General and Executive Council to show cause against such right of appeal, if they should be so advised; that notice of the appeal be served on the Governor-General of New South Wales, with leave to appear and answer the same, and that the Governor-General be ordered forthwith to transmit under seal to the Registrar of the Privy Council, authenticated copies of all the correspondence, [291] orders, minutes of the Executive Council, proceedings before the Magistrates' Court, and other documents proper to be laid before Her Majesty on the hearing of this matter, and that a copy of Her Majesty's Order upon this report be transmitted to Her Majesty's Secretary of State for the Colonial Department.

The Order in Council having been served in the Colony on the proper parties, and the papers transmitted to England, a counter-petition was presented by the Governor-General and Executive Council of the Colony to rescind the leave given. This petition set forth that Robertson was appointed by a warrant under the Act of the Local Legislation of the Colony, 4th Will. IV., No. 10, and that, although the appointment was signed by the Governor-General and sealed with the Great Seal of the Colony, there was no law to authorize that act, and that such appointment was by the Colonial Act, 4th Will. IV., No. 10, not a freehold office, but one to be held only during "the pleasure of the Governor-General." That by the Act of the Imperial Parliament, 18th and 19th Vict., c. 54, the Governor-General, with the advice of the Executive Council, had alone power to appoint to public offices, and that as Robertson held the office of Commissioner of Crown lands only during the pleasure of the Governor-General, or Governor-General and Executive Council, the order of amotion was conclusive and final, and there was no right of appeal therefrom, under the Statute, 22nd Geo. III., c. 75; and the petition further alleged that



the removal of Robertson had been confirmed by the Colonial Secretary in England, and prayed that the Order in Council of the 27th of August, 1857, allowing Robert-[292]-son to prosecute his appeal from the Order of amotion, might be discharged.

Mr. R. Palmer, Q.C., and Mr. Dickinson, for the Governor-General and Executive Council, now moved to dismiss (14th June, 1858).

This appeal ought never to have been allowed. The office of Commissioner of Crown lands is created by the Act of the Local Legislation, 4th Will. IV., No. 10, which provides that the Governor may, "by warrant under his hand and seal," appoint proper persons to fulfil such office, "during the pleasure of the Governor." It is, therefore, an office held during pleasure only, and there is no right of appeal from an Order of amotion made by the Governor-General and Executive Council, from such an office under the Statute, 22nd Geo. III., c. 75; that Statute being confined to judicial offices, which are in the nature of freeholds. It is immaterial that the Petitioner's appointment was under the Great Seal of the Colony, instead of the appointment being by warrant under the Governor-General's "hand and seal," as provided by the Colonial Act, 4th Will. IV., No. 10: that fact cannot make it a patent or freehold office within the meaning of the Imperial Statute, 22nd Geo. III., c. 75, as it was not competent to the Governor-General to alter the nature of the office defined by the Colonial Act, *Hill v. The Queen* (8 Moore's P.C. Cases, 138).

The Lord Advocate (Mr. Inglis), and Mr. Anderson, Q.C., opposed.—This appointment was made by the Governor-General, under the Great Seal of the Colony, and [293] recorded in the office of patents, and by such registration must be treated as a patent office. If so, it is within the provisions of the Statute, 22nd Geo. III., c. 75, as that Statute is clearly not confined to judicial offices only, but extends to any office held under the Crown in the Colonies.—[Mr. Pemberton Leigh.—Is it necessary, even if it is a patent office, that it is to be held otherwise than during pleasure?]—The words of the second section of the Statute, 22nd Geo. III., c. 75, authorizing amotion by the Governor-General, are, "shall neglect the duty of such office or otherwise misbehave therein." That section alone justifies this removal. This office has been treated by the local authorities as a patent office, from which the holder could not be removed without inquiry. The Petitioner has been called upon by the Governor-General and Executive Council sitting in a judicial capacity, to show cause, and after a judicial inquiry, at which he was not present, he has been dismissed. An appeal, in such a case, is provided by the Statute in question. If it is denied, the Petitioner has no redress, and such a decision so seriously affecting his character will prevent him ever holding office again. *Morgan v. Leech* (3 Moore's P.C. Cases, 368), is an authority that this Tribunal will admit an appeal, although it may not be an appealable grievance by Charter.

Mr. R. Palmer, Q.C., in reply.—The Governor-General and Executive Council have power to dismiss without reference to the Statute, 22nd Geo. III., c. 75. The 18th and 19th Vict., c. 54 (see also as to power of suspension of any officer appointed under commission or warrant, sec. No. 18, of Royal Instructions of 1855), [294] gives the Governor-General sole power and discretion in the appointment of officers, and consequently the power of removal from office.

The Right Hon. Dr. Lushington.—The question for the consideration of their Lordships is, whether the Order which was made on the 27th of August, 1857, *ex parte*, giving Robertson leave to appeal against his dismissal from the office which he held in New South Wales, shall or shall not be discharged.

An appearance has now been given on the part of the Governor and Council, and for the reasons stated in these proceedings they contend that that Order ought to be rescinded.

The facts of the case seem to be as follows:—

Robertson held an office called a "Commissioner of Crown lands," in the Colony of New South Wales, which office was created under an Act of the Colonial Legislature of New South Wales, in the year 1833; and by the provisions of that Act, a "Commissioner" is to continue in his office, as such, "during the pleasure of the said Governor." We must presume that all the proceedings in New South Wales were intended to be in conformity with the powers conferred by that Statute, and it will be advisable to have reference to them, and to the appointment itself.

It has been contended that the appointment confers a patent right on Robertson, and that it is important for their Lordships to bear in mind, in deciding this case, that he holds as a patentee. The patent states, "We do give unto you, either alone or in conjunction with one or more other Commissioners [295] of such Crown lands, full power to do and perform, during your continuance in such office, by and under the direction of the Governor for the time being of the said Colony," and so on. It appears then, according to the statement made by the Lord Advocate, to have been enrolled in the office where other patents were enrolled.

Now, in the opinion of their Lordships, it is not a matter of great importance whether this office may be said to be held by patent or not; but the question is, what were the terms on which the office was held with reference to its continuance and duration. We must of necessity presume that, in granting this patent, it was intended to act in strict conformity with the Statute, and, therefore, that this appointment, which contained no express terms to the contrary, conferred the office on Robertson merely during the pleasure of the Governor. Then, if this be an office held during the pleasure of the Crown, two questions immediately arise: first, whether it can be considered as comprised in the terms of the Statute, 22nd Geo. III., c. 75, or if not comprised within the terms of that Statute, whether removal from such an office is an appealable grievance according to the practice of this Court.

Now, we are all of opinion that the office being held merely "*durante bene placito*," it cannot be considered as coming within the terms of that Statute. We think that Statute applies only to offices held by patent, and to offices held for life or for a certain term. Then, if this office be not within the terms of the Statute, 22nd Geo. III., c. 75, the next question is, whether the dismissal is an appealable grievance by itself.

[296] Their Lordships are all of opinion that the practice of this Court is not to enter into the consideration of such a dismissal unless by the express command of Her Majesty. They do not enter into the consideration of such acts as are done by the Governor and Council of a Colony in the exercise of the power and authority committed to them, whereby they dismiss persons from holding situations in that Colony, they holding them not by any patent right, but simply and only during the pleasure of the Governor himself. Therefore, upon that ground we are of opinion that the original petition cannot be sustained.

Then it has been contended before their Lordships that this is a great grievance, because the Governor and Council entered into a sort of judicial investigation of all the facts, and, therefore, the dismissal by the Governor and Council did, at the same time, raise such an implication of the conduct of Robertson, and such a declaration with reference to that conduct, as seriously to affect his prospects in life.

But their Lordships cannot help thinking that Robertson, though he may have reason to complain of the ultimate judgment, can have no reason to complain that he has not been heard. It is impossible to put forward that ground in the case, as a grievance: for instead of being dismissed without a hearing, he had an opportunity of justifying himself, if, in the judgment of the Governor and Council, he could do so. For all these reasons, their Lordships are of opinion that we should advise Her Majesty that the Order granting leave to appeal should be rescinded: but, upon the whole, we do not think it necessary to accompany it with any recommendation as to costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 3. *Leave to appeal*, 4. *Jurisdiction of Privy Council*; tit. PUBLIC OFFICER, E. IN OTHER CASES, 1. *Appointment*. S.C. 8 St. Tr. N.S. 1066. See note to *Willis v. Gipps*, 5 Moo. P.C. 379; see also *Dunn v. Reg.* (1896), 1 Q.B. 116; *Dunn v. Mardonald* (1897), 1 Q.B. 555; *Gould v. Stuart*, 1896, A.C. 575; *Worthington v. Robinson*, 1896, 75 L.T. 446; *Shenton v. Smith* (1895), A.C. 229.]



## [297] ON PETITION FROM THE EXCHEQUER AND PREROGATIVE COURT OF YORK.

ALICE BROWN.—*Appellant*: JAMES DAVENPORT and THOMAS LIVESEY.—  
*Respondents* \* [July 21, 1857].

A sentence of the Prerogative Court of York, in a testamentary cause, was pronounced in August, 1856. This sentence decreed probate of the Will in question, costs being given out of the Testator's estate to both parties. These costs were taxed and paid in November of that year, the Proctor of the opposing party attending. In June, 1857, application was made by the party originally opposing the Will for leave to appeal. Such application refused, on the ground that the taxation and receipt of the costs was an acquiescence in the sentence, and perempted the appeal.

This was an application for leave to prosecute an appeal from a final sentence of the Exchequer and Prerogative Court of York, dated the 1st of August, 1856, in a cause of proving in solemn form the Will and Codicil of John Mason; and to bring in an allegation in the cause, and examine witnesses. The grant of probate was opposed by the Appellant, Alice Brown, the only next of kin of the Testator, but no allegation was brought in on her behalf. The execution of the Will having been proved by the attesting witnesses, the Court decreed probate, allowing costs out of the estate to both parties. No appeal was asserted within the fifteen days limited for that purpose, and the sentence was acquiesced in by the Appellant's Proctor [298] attending the taxation of the costs, and afterwards, in November, 1856, receiving the same.

The application was supported by an affidavit of the Appellant, which stated that she was a very poor and illiterate woman, and that shortly after the death of the deceased she called upon the Rev. Alfred Hewlett, Clerk, Incumbent of the Parish of Astley, in the County of Lancaster, a Surrogate of the Right Worshipful Granville Harcourt Vernon, Commissary and Keeper General of the Exchequer and Prerogative Court of York, and consulted him as to what course she should pursue in order to oppose the Will. That he caused a caveat against the grant of probate of the Will and Codicil, to be entered in the Court of York, and also in the Consistorial Court of Chester. That a citation issued under the seal of the Exchequer and Prerogative Court of York, citing her to show cause why the Will and Codicil of the deceased should not be admitted, and probate granted to the Respondents, Davenport and Livesey, two of the executors named in the Will. That the Rev. A. Hewlett then employed Sutton, a Proctor of the Exchequer and Prerogative Court of York, to act for her. That at the request of the Rev. A. Hewlett she had an interview with him at his Parsonage, when he produced and read to her a proxy, authorizing and empowering Sutton to appear on her behalf and oppose the Will and Codicil, and to give in an allegation on her behalf, to take the necessary steps to oppose the Will and Codicil. That on the assurance of the Rev. A. Hewlett that the proxy was to the purport and effect aforesaid, she executed the same, and did not thereby mean and intend to give any authority whatever to Sutton to abstain from pleading and from [299] examining witnesses on her behalf, or to withdraw from the suit, or to consent to probate of the Will being granted without any opposition being made thereto. That some time in the month of June last the Rev. A. Hewlett requested her to sign a paper writing which he had prepared, to the effect that she would divide the property of Mason equally amongst his relatives. That she requested the Rev. A. Hewlett to permit her to take the paper writing home, for the purpose of consulting her son. That having done so, she called upon the Rev. A. Hewlett in the course of a few days and declined to sign the same. That she was then informed by him that her signing the paper was of no consequence, as the case

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Dodson, and the Right Hon. Sir William H. Maule.

would not be tried, or would not go into Court, or words to that effect, and she said that this was the first intimation she received that the cause would not be tried: and she further said, that from the conversation she then had with the Rev. A. Hewlett, she was under the impression that Sutton, the Proctor aforesaid, considered it was of no use going on in the Court in which the cause was then depending, and that it was going to be removed into another Court. That shortly after the above-mentioned circumstance, she was called upon by certain friends and relations of hers, who informed her that Sutton had written a note (which they then showed to her) to the Rev. A. Hewlett, stating that he should withdraw the case, or to that effect, when it came on to be heard. That she immediately signed a paper in the words following:—*Hatherton, July 1st, 1856.* Dear Sir,—In reply to your letter of the 28th June, I the undersigned Alies Brown, have determined the case should come into Court, and I authorise [300] you to take the necessary proceedings on my behalf. Alies Brown. Witness, James Robinson.” Which paper she caused to be delivered to Sutton. And she further said, that she had been informed, and believed, that William Roberts of Rochdale, Solicitor, and Moore, his clerk, who attested the execution of the Will, were alone examined as witnesses in the cause; and that on the first day of August last, sentence was given in the cause, the Will and Codicil were pronounced for, and probate thereof decreed to the Executors. And she further said, that it was not until some time after the 1st of August that she became aware that the cause had been concluded, and probate of the Will and Codicil granted, but that no plea had been given in, no witnesses examined, no opposition, in fact, made on her behalf. And she positively said that she never authorized either the Rev. A. Hewlett, or Sutton, to consent to the probate being granted without opposition thereto, but that, on the contrary, she fully believed and intended that all the facts and circumstances on which she relied for disproving the capacity of the deceased, to make the pretended Will, would be brought before the Court. And she further said, that prior to the cause being heard, she requested Richard Eckersley and John Crook to call upon Sutton, and instruct him to allege an appeal from the sentence of the Court, if it should be adverse to her, and which she verily believed they did, but that no appeal was ever entered by him: and she further said, that her interest had been entirely neglected by the Proctor, and her rights as next of kin sacrificed by the proceedings aforesaid. And she further said, that she verily believed that she had good and valid grounds of opposition to the Will, which she set forth. And [301] she said, that she verily believed she should be able to establish by sufficient evidence that during the time therein particularly mentioned, and especially on the day of the date of the pretended Will, the deceased was wholly incompetent to do any act requiring thought, judgment, and reflection, and quite incapable of making his last Will and Testament.

Affidavits were filed in answer denying that the interests of the Applicant had been neglected. The most important was by Sutton, the Proctor, who stated that upon investigation of the circumstances attending the execution of the Will, and after examining the attesting witnesses, he was satisfied that there was in reality no case as against the Will and Codicil, and had accordingly advised the Applicant that no defensive pleading should be offered, and that such advice was assented to by her friends, Eckersley and Crook, on her behalf, who were moreover present at the hearing of the cause, and consented to the Sentence pronounced, and that no dissent was made, or desire to appeal was then, or within the usual time limited for appealing, expressed by the Applicant herself, or by Eckersley or Crook, on her behalf.

Dr. Phillimore, in support of the application.—No appeal having been asserted by the Applicant's Proctor, though he was, as she states by her affidavit, instructed to do so, her interests were in fact abandoned, and that circumstance entitles her to the indulgence of the Court, notwithstanding the practice in the Ecclesiastical Courts of asserting an appeal within fifteen days. A question, however, arises, whether she is not entitled to appeal on another ground, namely, that a year and a day had not elapsed before her ap-[302]-plication here for leave to appeal. Appeals in the Ecclesiastical Courts are regulated by the Statute, 24th Hen. VIII., c. 12. Sect. 6 prescribes the time within which an appeal is to be alleged to fifteen days. The 25th of Hen. VIII., c. 19, sect. 4, created the Court of Delegates, with jurisdiction



to take cognizance of appeals. That Court was abolished by the Statute, 2nd and 3rd Will. IV., c. 92, the jurisdiction being transferred to the Queen in Council, and afterwards by the 3rd and 4th Will. IV., c. 41, to this Tribunal. Appeals before the Privy Council, where no special local regulation interfered, have always been regulated by the rule of the Civil law, which allows an appeal to be interposed within a year and a day from the date of the Sentence, and that rule is not abolished by the Statute, 3rd and 4th Will. IV., c. 41, under which we make this special application, and not under the 24th Hen. VIII., c. 12. The subsequent Statutes, 6th and 7th Vict., c. 38, and 7th and 8th Vict., c. 69, only enlarge the powers of the 3rd and 4th Will. IV., c. 41. The time for appealing is unaffected by either of these Statutes. Secondly, this Court being an appellate Court, may admit a fresh allegation in testamentary causes. *Price v. Clark* (3 Hagg. Ecc. Reps. 265), *Girdler v. Lamb* (cited in *Fletcher v. Le Breton*, 3 Hagg. Ecc. Reps. 369). So also in a matrimonial cause, *Anonymous* (9 Moore's P.C. Cases, 434), where all the cases upon this subject are collected.

Dr. Addams and Dr. Twiss opposed.—This Tribunal has no power to grant the application. It is in the same position as the Court of De-[303]legates, created by Statute, 25th Hen. VIII., c. 19, sect. 4, and like that Tribunal is prescribed by sections 6 and 7 of the 24th Hen. VIII., c. 12, to appeals that have been asserted within fifteen days. This latter Statute altered the old rule of the Civil law which limited the appeal to ten days. Oughten, "*Ordo Judiciorum*," Tits. cclxxvii. and cxcix. 2 Browne's "Civil Law," ch. ix. p. 436. The Privy Council Acts, 3rd and 4th Will. IV., c. 41; the 6th and 7th Vict., c. 38; and the 7th and 8th Vict., c. 69, do not alter the practice of the Ecclesiastical Courts in this respect. The rule of the Civil law adopted here, of allowing an appeal within a year and a day, applies to Colonial appeals only, and has no application to appeals from Ecclesiastical or Maritime Courts. No instance of the allowance of an appeal from the Ecclesiastical Courts in such circumstances can be shown. An objection, however, exists to this application, which is fatal. The appeal is absolutely perempted. The Sentence of the Court below has been acquiesced in by the Appellant's Proctor attending the taxation of the costs and accepting them. *The Clifton* (3 Knapp's P.C. Cases, 375), *The Aquila* (6 Moore's P.C. Cases, 102), *Fell v. Law* (1 Roberts. Ecc. Rep. 726), are conclusive authorities upon this point that the appeal is thereby perempted.

The Right Hon. Dr. Lushington.—Two questions are raised by this application, which are entirely distinct from the merits. The first point that has been taken, is one of considerable importance, novel in its nature and never before agitated, namely, whether there is any power in this Court to allow an [304] appeal to be prosecuted from a final Sentence of an Ecclesiastical Court, where such appeal has not been alleged within fifteen days from the Sentence. The second question brought forward by the Respondents, is, that the appeal is perempted by reason of the Applicant's Proctor having attended the taxation, and received the costs given by the Sentence sought to be appealed from. It is unnecessary to deal with the first question, as we are of opinion, upon this last ground alone, that according to the universal practice of this Court, the appeal is perempted, and without reference to any other circumstances, we must refuse leave to appeal. From the nature of the case, however, no costs will be given.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to Appeal*.]

## ON APPEAL FROM THE SUDDER DEWANNY ADAWLUT, BENGAL.

RANEE HURROSOONDREE DIBIAH,—*Appellant*; RAJAH PRAN  
KISHEN SING,—*Respondent* \* [Dec. 7, 1857].

Restoration of an appeal allowed, upon condition of the Appellant lodging in England security for costs of the appeal. Six months having elapsed without the Appellant having lodged the required security, the Respondent applied to dismiss the appeal by reason of the non-performance of that condition. As it appeared that the Appellant's agent was in daily expectation of funds from India, the case was, upon the Appellant paying costs of the day, ordered to stand over for three months, for the Appellant to perform that condition; in failure thereof, the appeal to stand dismissed.

The facts relating to the restoration of this appeal are reported *ante*, p. 152. A petition was now pre-[305]-sented by the Respondent to dismiss the appeal. The petition set forth that six months had elapsed since the date of the Order in Council, but that the Appellant had not complied with the terms on which the conditional Order restoring the appeal was made, and, in particular, had not given such security for costs as therein prescribed, or any security whatever, and, that the Appellant had not lodged a petition of appeal, although she was proceeding with the printing of the transcript, and thereby involving the Respondent in unnecessary expense and costs before any petition of appeal lodged, or security given. This petition was opposed and an affidavit filed by the Appellant's agent, setting forth, that a petition of appeal had been lately lodged and that the printing was going on, but that the appeal could not be heard before the February sittings, that he had not yet received from India the amount of the securities required to be lodged in the Council office for costs, etc., but that he was in daily expectation of receiving the same.

Mr. Leith, for the Respondent, urged that there was no excuse for the delay and non-compliance with the Order in Council.

Mr. Wigram, Q.C., for the Appellant, submitted that there had been no real delay, and that the only fault arose from not depositing security, which the agent of the Appellant being without remittances, had been compelled to omit, but being in [306] daily anticipation of receiving funds, that omission would be immediately supplied.

The Lord Justice Knight Bruce.—In the circumstances, we think that the Appellant should have three months more time, but she must pay the costs of this application, and expedite proceedings so that the case may be heard at the sittings in February next. A peremptory Order will be made that the appeal stand dismissed, unless within three months from this day the security be perfected as previously ordered.

It was, therefore, ordered by their Lordships, that the costs of the Respondent on this application should be forthwith taxed by the Registrar of the Privy Council and paid by the Appellant, or her agents in this country, and, that their Lordships would report to Her Majesty, that the appeal be dismissed, unless the sum of £500, for security for costs, be deposited with the Registrar on or before the 7th of March next.

The costs were taxed accordingly, but the Appellant having failed to comply with the condition imposed by the Order, it was finally ordered, that the appeal be dismissed, and the Appellant further condemned in the costs incurred by the Respondent on the application of the 7th of December, 1857.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL: 6. *Practice*, d. *Restoring*. See O. in C. of 13th June, 1853, s. 5 (Stat. R. and O. Rev. iv. p. 305.)]

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, and the Right Hon. The Lord Justice Turner.



## [307] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

WILLIAM MORGAN and Others.—*Appellants*: JAMES SIM and Others,—  
*Respondents* \* [Dec. 15, 1857].

## THE "LONDON."

The fact of its being a clear bright moonlight night, does not relieve a sailing vessel hove-to, from compliance with the Admiralty Regulations, made in pursuance of the Statute, 14th and 15th Vict., c. 79, sec. 295, for exhibiting a light.

The omission to show a light being the cause of the collision, as it was probable that if a light had been shown the collision would not have occurred, and there being no default of a look-out by the steamer, the owners of the sailing vessel were held concluded by section 298 of Statute, 17th and 18th Vict., c. 104, from recovering damage against the steamer.

The *onus probandi* lies on a party seeking to recover compensation for damage occasioned by a collision, and that party must establish that the loss was attributable to the neglect or default of the other party, or else he cannot recover.

This was a collision case. The suit was promoted by the Appellants, the owners of the vessel and cargo and the crew of the fishing-smack *Celerity*, of 64 tons burden, against the *City of London*, 722 tons, a steamship belonging to the Respondents, the Aberdeen Steam Navigation Company.

The collision took place on the 3rd of January, 1857, at about 7 o'clock in the evening, at the lower part of the Gunfleet Sand, at the mouth of the Thames, where The *Celerity* had hove-to, in order that her mainsail might be reefed. At the time of the collision the weather was clear and the moon shining brightly, but the wind was blowing hard. [308] The *City of London*, on her way from London to Aberdeen, ran into The *Celerity*, and she went down head foremost in less than two minutes. The mate and an apprentice were drowned, and the master and the rest of the crew were saved by getting into the boat, and were taken on board the steamer. No light was exhibited by the smack, but it was alleged on her behalf, that the night was so clear that the steamer must have seen her, in time to have avoided the collision, if a good look-out had been kept, and that the smack herself was unable to take any step for that purpose, because she was lying nearly dead upon the water. The defence of the Respondents was, that she was keeping a good look-out and showing proper lights, but in consequence of no light being shown by the smack she was unable to see her until it was too late to avoid the collision; that directly she saw the smack she ported her helm and stopped her engines, and that the smack alone was to blame for the accident, not having done anything to get out of the way of the steamer, although she was lying in the fair way or ordinary track of vessels, and although she saw the steamer at a distance of two miles. It was also contended on behalf of the Respondents that they were free from blame, and that the smack not having complied with the Admiralty Regulations made under the 14th and 15th Vict., c. 79, with regard to the exhibition of lights by sailing vessels, she was prevented from recovering by the 298th section of the Merchant Shipping Act, 17th and 18th Vict., c. 104, as the real cause of the collision was the smack's omission to show a light or to take any step to avoid the collision. A responsive plea was brought in on behalf of the owners of the smack, which pleaded, that in [309] consequence of the clearness of the night and the brightness of the moon, the collision was not caused by the omission of those on board the smack to exhibit a light. Witnesses were examined on both sides. The evidence of the survivors of the crew of The *Celerity*, went to show, that they saw the steamer two miles off, that they hailed her but did not show any light. On the other side, it was deposed that a good look-out was kept by them, but that there was no light on board the smack which was hove-to, deeply laden,

\* Present: The Right Hon. Lord Wensleydale, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir John Dodson.

and that as *The Celerity* was a small vessel, she was not seen by the steamer till close upon her, when the steamer ported her helm, but too late to avoid the collision. The Judge of the Admiralty Court (The Right Hon. Dr. Lushington) submitted two questions to the consideration of the Trinity Masters, by whom he was assisted, first, whether or not the steamer was to blame in respect of the collision; and secondly, as to the conduct of those on board the smack. The learned Judge directed them, that it was not because it was a bright night that it was unnecessary to obey the Act of Parliament, by not exhibiting a light; that the question was, whether the collision was occasioned by the non-exhibition of a light, or whether the collision was occasioned by the want of a good look-out on board the steamer, and whether if there had been a light on board the smack, the steamer would have seen it, and so in all probability have avoided the collision. The Trinity Masters were of opinion that there were no circumstances to justify the smack's departure from the Admiralty Regulations, and that if a light had been shown, there would in all probability have been no collision. The Judge, thereupon, by his Sentence, [310] decreed that the smack could not recover under the 298th section of the 17th and 18th Vict., c. 104, and dismissed the steamer, with costs (see case reported, *nom. The City of London*, 1 Swabey's, Adm. Rep. 248).

The present appeal was brought from this sentence.

Mr. Forsyth, Q.C., and Dr. Jenner, argued the appeal on behalf of the Appellants.

It was admitted in the argument that no light was exhibited as required by the Admiralty Regulations, made in pursuance of the 295th section of the Statute, 14th and 15th Vict., c. 79; and that the *onus probandi* was upon the Appellants to prove that the steamer was the cause of the collision: but it was contended that, as it was a clear moonlight night, if the steamer had kept a good look-out, the collision could have been avoided, and that that circumstance took the case out of the Statute, 17th and 18th Vict., c. 104, sec. 298.

The Queen's Advocate (Sir John Harding), and Mr. Wilde, Q.C., appeared for the Respondents, but were not called upon.

The Right Hon. Lord Wensleydale.—We do not think it necessary to hear the Counsel for the Respondents, because their Lordships consider the case has been very well argued by the Appellants, and we are in full possession of the facts.

This cause is brought by way of appeal from a judgment pronounced by the learned Judge of the Admiralty Court, and having read that judgment, it certainly would appear, as has been argued by the [311] Appellants, that the learned Judge had some little doubt in his own mind as to the conclusion to which he should arrive. He left two questions for the consideration of the Trinity Masters. First, whether they were of opinion that the collision was occasioned by the want of a good look-out on board the steamer; and, secondly, whether, if there had been a light on board the smack, the steamer would have seen it, and in all probability have avoided the collision. The first question has not been distinctly answered by the Trinity Masters, but they have answered the second very distinctly, which is also an answer to the case of the Appellants, namely, that if a light had been exhibited on board of the smack there would in all probability have been no collision. Now, we have had the benefit of the assistance of the Sailing Masters, who have fully considered the case, and they say in answer to the first question, that they are not satisfied upon the evidence that the steamer was at all to blame; but they are satisfied upon the other question, that if a light had been exhibited on board the smack, then in all probability the collision would have been avoided. That being so, the Appellants have not succeeded in satisfying us that the judgment appealed from was wrong. The Respondents being in possession of the judgment must be taken to be *prima facie* right, and it lies on the Appellants to show the judgment to be wrong. If their Lordships entertain any doubt upon the question, they are bound to decide in favour of the party that has obtained the judgment of the Court below. With respect to the *onus probandi* in this case, as it was properly admitted by the Appellants, there is no question or doubt about the law. The party seeking to [312] recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is



to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed. Now, on the present occasion their Lordships are of opinion, that he has not satisfied the conscience of the Court that the cause of the collision was through the misconduct of the steamer. He has at all events left the matter in doubt, so that it is impossible in the most favourable point of view to decide whether the collision was occasioned by the misconduct of the steamer, or by the default of the smack herself. Now, there can be no question in this case, but that it was the duty of the smack in the position in which she was, being hove-to, and seeing a vessel approaching, to exhibit a light, and if the Master of a sailing ship chooses not to exhibit a light to the vessel approaching he must take the risk of his neglect. Looking at the whole of the evidence, their Lordships are of opinion, that on the balance of evidence, it is tolerably clear that if a light had been exhibited, the accident in all probability would never have happened. That was the opinion of the Trinity Masters in the Court below, and that is the opinion of the Sailing Masters, who have assisted us to-day; and being of the same opinion ourselves, it is our duty to affirm the judgment of the Court below, with costs.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 1. *Negligence*; c. *Proof of Negligence*; 11. THE REGULATIONS; b. *Cases on the Regulation in S.C.* SWABEY 300; 5 W.R. 678. On point (i.) as to inscrutable fault, cf., *Papayanni v. Russian Steam Navigation Co.*, 1863, 2 Moo. P.C. (N.S.) 187-189; (ii.) proof of negligence, cf., *Wakelin v. L. and S.-W. Ry. Co.*, 1886, 12 A.C. 41; (iii.) as to burden of proof, cf., *The Marpesch*, 1872, L.R. 4 P.C. 212. As to Admiralty Jurisdiction of Privy Council, see note to *Batten v. Reg.*, 1857, 11 Moo. P.C. 287.]

### [313] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

SIDNEY HALSEY and Others,—*Appellants*; WILLIAM VERWEY ALBERTUSZEN and Others,—*Respondents* \* [Dec. 15, 1857].

#### THE “JONGE ANDRIES.”

A foreign vessel, fifty miles off the Dutch coast, being in difficulty, in consequence of the boisterous state of the weather, and being leaky, called in the assistance of an English fishing-smack, and engaged the Captain, by a written agreement, “to pilot and to sail a-head for £50.” After four days of boisterous weather, during which the Captain of the smack worked at the pumps, the vessel was got into port. The owners of the smack refused the tender of £50, and brought an action for salvage services rendered to the vessel. The Court of Admiralty was of opinion, that the agreement being to perform a service for a specific sum was not to be set aside because the weather became tempestuous, and, by reason thereof, that the vessel was longer in arriving at a port of safety than might reasonably be anticipated, and held, that salvage was barred by the agreement, as nothing was done to convert pilotage service into a salvage service, and that the sum specified in the agreement was a sufficient compensation. Affirmed on appeal by the Judicial Committee.

The Court will not favour a claim for salvage by a party originally engaged as a pilot; but at the same time pilots are not to be compensated by mere pilotage remuneration for salvage services [12 Moo. P.C. 318-319].

This was an action brought by the Appellants, the master and crew of the fishing-smack *Intrepid*, of Yarmouth, against The *Jonge Andries*, a galliot, belonging to Russian owners, and her cargo, for salvage services rendered to that vessel, which

\*Present: The Right Hon. Lord Wensleydale, the Right Hon. T. Pemberton Leigh, and the Right Hon. Sir John Dobson.

services commenced on the 13th of November, 1856, whilst the [314] galliot was fifty miles off the Dutch coast, and continuing till the 17th of that month, when she reached Lowestoft.

The Act on Petition set forth, that The *Jonge Andries*, a Russian vessel of 118 tons burden, was bound from Cronstadt to the river Maas, with a cargo of rye, and when about fifty miles from the land off Southwood, the weather being boisterous, hailed The *Intrepid*, a fishing-smack, for the purpose of being piloted into an English port. That the parties on board the smack informed the Master that they were no pilots, but fishermen, and inquired if the vessel was leaky, to which the Master of The *Jonge Andries* replied that she was not, and that there was nothing amiss with her; that the Master then asked them how much they would charge to pilot her to an English port, and they asked £50, which sum was agreed to, and the following agreement executed:—"The undersigned Captain A Steffans, of the ship *De Jonge Andries*, acknowledges to have engaged as pilot and to sail a-head Captain Sydniwai, for the price of 50, say £50. At sea, 13th of November, 1856." That the Master, Halsey, went on board, and that during the night there was a heavy gale from the northward, and the galliot worked heavily, and made much water, so that the pumps required to be worked, and the crew being all worn out, he, the Master, worked at the pumps during the whole night, and was completely drenched to the skin, as the sea made a clear breach over the galliot; that the smack kept her company with a light burning all night; that the next morning the Captain of The *Jonge Andries* requested some of the crew of the smack to come on board to pump, but as it blew [315] a complete hurricane, it was impossible in the then state of the weather to get any hands out of the smack; that the galliot had very bad weather for some days, and was ultimately taken in tow by the smack, and after great exertions got safe into port. And the Act on Petition further alleged, that though when the agreement was signed the Captain said that the vessel did not leak, yet that she was at that time leaky and making water rapidly, and that nearly all the time the Master of the smack was on board he had to pump and clear the pumps, and that such services were not only pilotage but salvage, for had it not been for his excessive exertions at the pump and the assistance rendered by the smack, the galliot would never have reached land.

The answer of the owners of The *Jonge Andries*, alleged, that the state of the vessel was well known to the Master of the smack when the agreement was entered into, and they denied that the weather was so bad or that the galliot made much water, as well also the fact of the incessant exertions of Halsey, as alleged in the Act on Petition; and with reference to the allegation that the services were not only of pilotage but salvage, the owners by their answer insisted, that the agreement which the Master of the smack entered into, was to include all the services of himself and the smack and crew, whether of pilotage or salvage, as might be necessary to get the galliot safely into port, and that the sum of £50, stipulated by the agreement, was to be the full remuneration for all such services, which amount had been tendered to the Master, but which he had refused to accept.

The Judge of the Admiralty Court (The Right Hon. Dr. Lushington) was of opinion, that no de-[316]-ception had been practised by the Captain of The *Jonge Andries*, as to the state of the vessel when the agreement was entered into, and he held, that the claim for salvage services was barred by the agreement, and by the final sentence the Court pronounced that the tender of £50, made by The *Jonge Andries*, was sufficient (see case reported, *nom.* The *Jogne Andries*, 1 Swabey's Adm. Rep. 226).

The appeal was from this sentence.

Mr. Forsyth, Q.C., and Dr. Jenner, for the Appellants. —The agreement set up by the Respondents as an answer to our claim for salvage service is not binding upon the Appellants. They were deceived by the Captain of The *Jonge Andries*, as to the true state of that vessel when the agreement was signed. The services rendered amounted to salvage services, which were not contemplated. Salvage services are more highly estimated and remunerated than ordinary pilotage or towage, and the amount awarded by the sentence ought to be increased. The *Duke of Clarence* (1 W. Rob. 346), The *Reward* (*ib.* 174), The *Betsy* (7 Jurist, 755), The *True Blue* (7 Jurist, 756).



Mr. Wilde, Q.C., and Dr. Addams, for the Respondents, were not called upon to address their Lordships.

The Right Hon. T. Pemberton Leigh.—Their Lordships have the satisfaction of agreeing in the conclusion at which the learned Judge of the [317] Court below arrived, and in the principles on which his judgment proceeded. The question between the parties is, what is the effect of the agreement into which they have entered, and what were the services which the smack *Intrepid* rendered to *The Jonge Andries*? If the services agreed to be rendered were merely that of steering as a pilot ordinary steers a vessel, where there is no danger or difficulty, and then something occurs, and additional services are rendered, then, of course, there is a just claim for additional compensation.

In order to construe this agreement, we must look at the circumstances under which the agreement was entered into, and the relative position of the parties between whom it was made. In this case, the galliot, though not in actual danger, nor having incurred any damage which could subject her to any risk, was nevertheless in some distress: she had been strained in some degree, the weather was bad, and the pumps were kept occasionally at work, and she was fast making water. Under these circumstances she required assistance, but of what kind? Not merely the assistance of a licenced pilot to take her into port, but assistance of a totally different character, and the agreement which was made was not such a one as would have been made by a person following the profession of a pilot. In the course of the voyage, the galliot, being in distress, hails the smack, and enters into the agreement in question, the effect of which is, that the Master of the smack was to go on board and pilot the galliot, and that the smack herself was to sail ahead. The question is, what was the meaning of that agreement? The learned Judge of the Court below has held, that the meaning of [318] that agreement was, not that the Master of the smack should act merely in steering the vessel, but that the Master and crew should stand by in case of necessity and give their aid, if required. That appears to their Lordships to be a perfectly reasonable construction of the agreement, having regard to the situation of the galliot at the time the agreement was made, and the parties between whom it was made.

Their Lordships agree entirely with the reasons upon which the learned Judge of the Court below founded his decision, and they are much struck with the concluding part of his judgment, which they deem to be important as a rule of the Court. He says (1 Swabey's Adm. Rep. 229) "I now come to the next point of the case. It happens as a matter of fact, though it appears to me it does not matter, one way or the other, that the vessel met with tempestuous weather, and she was considerably detained in the prosecution of her voyage to an English port. They seem to be undetermined as to what port to have her taken. Sometimes she was to go to Ramsgate, at other times she was to go to a port in the neighbourhood of the Norfolk coast. Now, what was done by the Master of the fishing vessel, which was to change the nature of the agreement? He says, in effect, 'I assisted in pumping; the weather became tempestuous; there was considerable labour employed in keeping the vessels free. I worked myself, and by this means I converted this, which was a pilotage, into a salvage service.' Now, I am of opinion, that a more dangerous doctrine than this could not be imported into this Court;" and in that opinion their Lordships concur. He then goes on, "The Court has always held, with regard to pilots, [319] that they are entitled to say when they get on board vessels which are not sea-worthy, and, therefore, in a state of danger, 'We do not come in the character of pilots only, but also in the character of salvors.' In such a case they are not entitled to abandon the vessels, but the Court has uniformly given them an additional reward, thinking they are not to be compensated for a salvage service by mere pilotage. But if you engaged a pilot, and he lends a hand, in consequence of the necessity of the case, arising from the wind becoming more boisterous than it was before, and everything which is not strictly pilotage is to be construed into salvage, Masters should be exceedingly cautious how they allow a pilot to touch a single rope, or to do more than give directions." In this case, their Lordships are of opinion, that the towage or salvage service which the Master of this smack actually rendered were services included under the agreement, which was entered into by the Master of the galliot for the purpose of getting that ship conducted to some safe port. We are of opinion,

therefore, that the Master is not entitled to any additional compensation beyond the £50, the sum which is mentioned in the agreement, which has been tendered: and the judgment of the Court below must, therefore, be affirmed, with costs.

[Mews' Dig. tit. SHIPPING, A. XVIII. SALVAGE; 8. *Salvage or Pilotage*; 17. *Salvage Agreements*. S.C. Swab. 303; 6 W.R. 198. See *The Waverley*, 1871, L.R. 3 Ad. and E. 377.]

[320]

## ON PETITION FROM THE ISLAND OF JERSEY.

IN RE THE STATES OF JERSEY.

IN THE MATTER OF THE PETITION OF PHILIP GIBAUT, ESQ., CONSTABLE OF ST. JOHN; THOMAS FILLEUL, ESQ., CONSTABLE OF GROUVILLE; EDWARD LE HUQUET, CENTENIER AND CHIEF OF POLICE OF ST. MARTIN; AND 1497 RATE-PAYERS, INHABITANTS IN THE DIFFERENT PARISHES IN THE ISLAND OF JERSEY, AGAINST AN ACTE OF THE STATES, DATED THE 30TH OF APRIL, 1857 \* [Feb. 1, 1858].

By the Order in Council of the 28th of March, 1771, every Acte of the States of the Island of Jersey must be lodged au Greffe, for fourteen days before it shall be determined for debate and consideration. Such rule applies to the preamble as well as the enacting part of the Acte.

This was a petition, presented by the above-named Petitioners, praying that Her Majesty would withhold Her Royal sanction from an Acte of the States of Jersey, dated the 30th of April, 1857, relative to the law of taxation, and to send back the same to the States to be amended in conformity with the views of the Petitioners. Among various objections taken by the Petitioners to the Acte in question, was one which, as it was held fatal to the legality of the Acte, it is alone necessary to mention. This objection, the eighth of those set forth by the Petitioners, was, that the preamble to the Acte was not lodged au Greffe, in accord-[321]-ance with the Jersey Code of 1771, and the Order in Council of the 28th of March, 1771, which ordered, "That when anything is proposed to the Assembly of the States it shall be wrote down in the form in which it is meant to be passed, and there shall be debated: after which it must be lodged au Greffe, for fourteen days, at least, before it shall be determined, in order that every individual of the States may have full time to consider thereof, and the Constables to consult their constituents, if they judge necessary."

The preamble to the Acte of 1857, now in question, stated, that "The States had resolved, with the sanction of Her Most Excellent Majesty in Council, to repeal the Articles 1 to 7, inclusive of the Law of the 7th of January, 1833, relating to the formation of the list of parochial rates, and to adopt the provisions of the proposed Law for the term of three years."

By Article 5, of the Law of the 7th of January, 1833, "Every person who shall think that he is over-assessed, or ought to be on the rate-list, shall have the right to cause the Constable or Chief of Police of the parish to be summoned before the Court, in order that such person may be permitted to make oath as to the value of his property, so that his rate may be fixed accordingly, and that at the expense of the parish, if the Claimant has taken measures to that effect at the time of the preparation or rectification of the parish rate."

It was alleged that by the repeal of this and the two succeeding Articles of the Law of 1833, as proposed in the preamble to the Acte of 1857, the rate-payers generally would be deprived of the right of [322] appeal to the Royal Court, from over or under assessment, or other error therein, and of making a declaration of the true

\* Present: Lords of the Committee for the affairs of Jersey,—The Lord President (Earl Granville), the Secretary of State for the Home Department (The Right Hon. Sir George Grey), the Judge of the High Court of Admiralty (The Right Hon. Dr. Lushington), the Chancellor of the Duchy of Cornwall (The Right Hon. T. Pemberton Leigh), and the Chancellor of the Duchy of Lancaster (The Right Hon. T. Baines).



value of their property; and that no intention of repealing the Law in either of these respects had been pointed at in any part of the proposed Articles of the new Law on the amendments, which alone had been lodged, au Greffe. That by such means an important right had been taken away without any opportunity being allowed to the members of the different parishes to consult their constituents on the subject; such preamble never having been lodged, au Greffe, notwithstanding a motion made by a Deputy of one of the parishes, for that purpose; but that the preamble was adopted by the majority of the Assembly of the States, and formed part of the proposed Law in question, and it was urged on behalf of the Petitioners, that the omission to lodge the preamble of the Acte, au Greffe, would alone necessitate the rejection of the proposed Acte by Her Majesty in Council.

In support of this view, an Order in Council of the 18th of April, 1815, was referred to, by which an Act of the States of the 2nd of October, 1813, making a rate on the inhabitants, was declared null and void, and ordered to be erased from the Records of the Island, because it had been passed without having been lodged, au Greffe, pursuant to the Order in Council of the 28th of March, 1771, notwithstanding the rate had been already levied.

This objection having been stated, their Lordships decided upon hearing Counsel on this point only.

Mr. R. Palmer, Q.C., and Mr. Mackeson, were heard for the Petitioners; and [323] Sir Frederic Thesiger, Q.C., and Mr. G. M. Giffard, for the States of Jersey.

Their Lordships intimated their opinion, through

The Right Hon. T. Pemberton Leigh, That the objection was fatal, the provisions of the Order in Council of the 28th of March, 1771, declaring that "after which it" (that is, the entire Acte, including of course the preamble) "shall be lodged, au Greffe, for fourteen days, at least, before it shall be determined, in order that every individual of the States may have full time to consider thereof, and the Constables to consult their constituents, if they judge necessary," were conclusive, and implied that when an Acte had been passed, it had been lodged for fourteen days, au Greffe, which it was not pretended the Acte of 1857 had been; and that their Lordships would report such as their opinion to Her Majesty in Council.

The following report was made: The Lords of the Committee in obedience to Her Majesty's Order of reference have taken the petition into consideration, and proceeded to hear Counsel in the matter on behalf of the Petitioners, and also on behalf of the States of the Island of Jersey; and it appearing in the course of such hearing, that the provisions of an Order in Council of the 28th of March, 1771, which directs that when anything is proposed in the assembly of the States, it shall be lodged, *au Greffe*, for fourteen days, at least, before it shall be determined, have not been duly complied with in respect of the *Acte* of the 30th of April last, their Lordships do agree humbly [324] to report as their opinion to Your Majesty, that it is not advisable for Your Majesty to confirm the said *Acte*. This report was approved by Her Majesty, and an Order in Council made in conformity with such recommendation.

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES; 13. *Jersey and Guernsey*; b. *Constitution*.

#### ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

The Reverend JOSEPH DITCHER, Clerk,—*Appellant*; The Venerable GEORGE ANTHONY DENISON, Clerk,—*Respondent* \* [Dec. 4 and 12, 1857].

Section 20 of the Church Discipline Act, 3rd and 4th Vict., c. 86, enacts, "that

\* Present: The Right Rev. and Right Hon. The Lord Bishop of London, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Patteson.

every suit or proceeding against any Clerk in Holy Orders, for an offence against the laws Ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards."

Held (affirming the decree of the Archies Court) that the "suit or proceeding" was not commenced by the issuing of a Commission under that Act, nor by the report made by the Commissioners, nor by the filing of articles in the name of the Bishop of the Diocese in which the alleged offence was committed, and service of the same on the accused; but

First, that the "suit or proceeding" only commenced when the accused was served with a citation to appear at a certain time and place before a competent Court to answer definite charges, as required by the 9th and 10th sections of the Act [11 Moo. P.C. 339, 344]; and

Second, that the limitation of two years, within the meaning of section 20, was to be reckoned from the time of the service of the citation [11 Moo. P.C. 342, 343].

Therefore, where application was made to the Archbishop for a Commission, under the 3rd and 4th Vict., c. 86, to inquire into certain alleged heretical doctrines contained in sermons preached in November, 1853, by a Clerk in Holy Orders, and the Archbishop, in November, 1854, issued a Commission, and the Commissioners reported that a *prima facie* case existed against the Clerk, whereupon criminal articles were exhibited and filed against him in August, 1855, and afterwards, on the 5th of June, 1856, a citation, or requisition, was served upon the Clerk to appear before the Archbishop, at a Court to be held in the Diocese, to make answer to such charges; it was Held: that the service of the citation being more than two years after the preaching of the sermons (the alleged offence with which he was charged), the suit was barred by the 20th section of the Act.

In this cause, the Appellant, the Rev. Joseph Ditcher, Clerk, Vicar of South Brent, in the County [325] of Somerset and Diocese of Bath and Wells, on the 20th of October, 1854, preferred a complaint before the Archbishop of Canterbury against the Respondent, the Venerable George Anthony Denison, Archdeacon of Taunton and Vicar of East Brent, in the same County and Diocese, for having in three sermons preached by him in the Wells Cathedral on the 7th of August, 1853, the 6th of November, 1853, and the 14th of May, 1854, respectively, affirmed or maintained doctrine directly contrary or repugnant to the Thirty-nine Articles of Religion.

The question raised upon appeal did not affect the merits as to the soundness or unsoundness of the doctrine maintained by the Respondent in these sermons, but was confined to the construction of the 20th section of the "Church Discipline Act," 3rd and 4th Vict., c. 86. By that section it is enacted, "That every suit or proceeding against any Clerk in Holy Orders, for any offence against the laws Ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards." On behalf of the Respondent, it was insisted that the commencement of the "suit or proceeding" [326] was referable to the service of the citation on him to appear before the Court at Bath, that being the only Court which had authority to adjudicate between the parties; and that then it was, for the first time, that he was called upon, in any "suit or proceeding;" the commencement of the suit being from that period. The case of the Appellant was, that the commencement of the "suit or proceeding" was either the issuing of the Commission by the Archbishop, or, if that was not the commencement, then at the time of the filing of the articles in the Consistory Court at Wells; or if the "suit or proceeding" was not commenced at either of those times, then that the service upon the Respondent of the articles must be taken to be the commencement of the proceedings; because they contained a charge against him, and, therefore, that that time must be held to be the commencement of the "suit or proceeding" in the cause.

The facts of the case were these:—

The Archbishop of Canterbury issued a notice, dated the 31st of October, 1854,



to the Respondent, of his intention to issue a Commission of inquiry into the grounds of such complaint under the Act, 3rd and 4th Vict., c. 86. This notice was served upon the Respondent, on the 3rd of November, 1854, and a Commission accordingly issued on the 30th of November, 1854, and a notice was issued and served on the 21st of December, 1854, by the Commissioners, of the time and place of meeting of the Commissioners. The Commissioners met on the 3rd of January, 1855, at Clevedon, in the County of Somerset, within the Diocese of Bath and Wells, and by adjournment on the 4th, 5th, and 6th days of that month. On the 10th of January, 1855, the Commissioners intimated their opinion, and [327] reported that there were *prima facie* grounds for further proceedings. Upon the receipt of this report and evidence by the Archbishop of Canterbury, the same was deposited in his principal Registry. The Appellant, however, being desirous of taking further proceedings against the Respondent, an application was made by him to the Bishop of Bath and Wells to sign Letters of Request to the Judge of the Arches Court of Canterbury to hear and determine the complaint under the provisions of the "Church Discipline Act," but he declined doing so; articles were then drawn up, and a copy served upon the Respondent, on the 5th of August, 1855. Application was then made to His Grace, to constitute a Court under the 3rd and 4th Vict., c. 86, sec. 9, and to give notice to the Respondent to appear before him. The Archbishop, however, declined to proceed any further in the matter, and an application was then made to the Court of Queen's Bench for a mandamus to compel him to proceed (reported, 6 Ell. and Bla. 546, 557). On the 22nd of November, 1855, a rule *nisi* was granted by the Court of Queen's Bench, which was made absolute on the 24th of January, 1856, and on the 19th of April, 1856, the rule was made peremptory. In May, 1856, the Archbishop made a return to the rule, stating that he had cited the Respondent to appear before him in the Common Hall of Doctors' Commons, London. This return to the rule was, on the 6th of May, 1856, quashed by the Court of Queen's Bench, who decided that the Archbishop ought to have cited the Respondent in the Diocese of Bath and Wells, and the rule peremptory was enlarged. On the 6th of June, 1856, the Archbishop made another return to the rule, to the [328] effect that he had cited the Respondent to appear before him at Bath, in the Diocese of Bath and Wells. The Respondent was no party to the proceeding by mandamus.

On the 5th of June, 1856, the Archbishop, by a citation, or requisition, under his hand cited the Respondent to appear before him at the Guildhall at Bath, on the 22nd of July then next. This notice was served upon the Respondent on the 10th of June, 1856. The Court met at Bath, on the 22nd of July following. The Respondent appeared before the Archbishop under the following protest: That the "suit or proceeding" (if any) then pending before His Grace the Archbishop of Canterbury, was commenced or instituted, by the service upon him, the Respondent, on the 10th of June, 1856, of a certain instrument in writing, or citation, under the hand of the Archbishop, dated the 5th day of that month, and calling upon him to appear at the Guildhall, in the city of Bath, either in person or by his agent duly appointed, at 11 o'clock in the forenoon of the 22nd of July, 1856, then and there to make answer to certain articles therein alleged to have been filed in the Registry of the Diocese of Bath and Wells, and of which articles it was therein also alleged that a copy was served upon him, the Respondent, on the 4th of August, 1855; that the articles did not set forth any alleged offence, which was the subject of inquiry before the Commissioners, as having been committed by him, the Respondent, within two years of such the commencement or institution of the suit, according to the provisions of the Act, 3rd and 4th Vict., c. 86, and, therefore, the party accused could not be called upon to make answer to such articles; and subject to [329] such protest gave a negative issue to the articles. This protest was overruled, and the Archbishop with his Assessors then proceeded to hear the cause; and after a lengthened hearing, finally declared the articles to be sufficiently proved, and a sentence of deprivation pronounced against the Respondent.

From this sentence the Respondent appealed to the Arches Court of Canterbury. The Appellant objected, that it was not competent to the Court of Arches to entertain the appeal, and the Dean of the Arches sustained this objection, and dismissed the appeal. The Respondent then applied to the Court of Queen's Bench for a mandamus, and that Court, on the 28th of January, 1857, directed a mandamus to

issue to the Dean of the Arches to entertain and hear the appeal, on the ground, that the Court of Bath and Wells was an inferior Diocesan Court, and that the Archbishop was only acting as Bishop of Bath and Wells, *pro hac vice*, and that the appeal under the 3rd and 4th Vict., c. 86, properly lay to the Court of Arches (see report, 3 Jurist, N.S. 439). The appeal in the Court of Arches was afterwards prosecuted, and in the month of April, 1857, came on for hearing, when Counsel on behalf of the Respondent insisted, that the validity of the protest should be argued and decided in the first instance; and acceding to that application, the Dean of the Arches (the Right Hon. Sir John Dodson) assigned to hear in the first instance arguments on the objection on the ground of limitation of the suit by lapse of time set forth in that protest; and after hearing the case on that point only, pronounced on the 23rd of April, 1857, for the validity of the protest, and dismissed the Respondent [330] from all further observance of justice in the suit, but made no order as to costs.

The ground of the protest so sustained by the Judge of the Arches Court was to the effect, that the Articles which the Respondent was called upon to answer at Bath, did not set forth any alleged offence as having been committed by the Respondent within two years of the commencement or institution of the "suit or proceeding" (reported, 1 Deane's Ecc. Reps. 334).

The present appeal was from this decree; the sole question raised being, whether the sentence of the Dean of the Arches was right in sustaining the validity of the objection above set forth in the protest of the Respondent, that the suit was barred by section 20 of the Act, 3rd and 4th Vict., c. 86, by lapse of time.

Sir Fitz-roy Kelly, Q.C., and Dr. Bayford, for the Appellant.—The decision of the Court below raises a new and important question: whether in proceeding against a clergyman under the "Church Discipline Act," 3rd and 4th Vict., c. 86, the period of two years, limited by the 20th section, for taking proceedings, is to be reckoned from the commission of the alleged offence, or whether it commences at the issuing of the Commission, or upon the filing of the articles, or, as has been held by the Judge of the Arches Court, it commences on the service of the citation upon the party accused. In effect, the whole question is narrowed to this point. What is the commencement of the proceedings? Our contention is, that the issuing of the Commission of inquiry, under the 3rd section, [331] is the commencement of the "suit or proceeding," mentioned in the 20th section, and that in this case the two years limited had not expired when the proceedings were taken. The machinery, so to call it, of the Act is this: If the Commissioners in their report are of opinion that there is ground for further proceedings, then it is competent to the Bishop to send the case for trial, at any time after the report, and that the first proceeding is the filing of the articles. And when that course is adopted, then we contend that the filing of the articles must be deemed to be the commencement of the "suit or proceeding." The 3rd, 6th, 9th, and 13th sections show what is intended by the word "proceeding" mentioned in the 20th section. It is analogous to the issuing of a subpoena in the Court of Chancery, and the suing out of a writ at Common law, which constitute the commencement of a suit or action, and by this Act the commencement of the "suit or proceeding" is either the issuing of the Commission, or service of the articles. In the present case the service of the citation to appear in Doctors' Commons, which followed the issuing of the Commission, and the filing and service of the articles, was the third step to be taken, and cannot be called the commencement of the "suit or proceeding." The cases of the *Bishop of Lincoln v. Day* (4 Notes of Cases, 290), *Brooks v. Cresswell* (4 Notes of Cases, 429), and *The Bishop of Hereford v. T—n* (2 Roberts Ecc. Rep. 595), are distinguishable from the present. They were decisions in cases which had come before the Arches Court by Letters of Request, issued by the Bishop. Even if these authorities can be held to apply to proceedings under a Commission, yet we insist that the decree [332] appealed from is erroneous, as the filing of the articles, in any circumstances, must be taken to have been the commencement of the proceedings.

Dr. Phillimore and Mr. Coleridge, for the Respondent.—The "Church Discipline Act," 3rd and 4th Vict., c. 86, has a threefold object: first, to afford a Council of advice to the Bishop; secondly, to effect an improvement in the Tribunal and the procedure of the Diocesan Courts; and lastly, to fix a limitation of time within which



proceedings can be taken against a Clerk in Holy Orders. It is upon the latter point only that we have to deal with it here, and we contend that the 20th section of the Act is clear and unequivocal in its terms. It was passed to remedy defects which existed under the Ecclesiastical law, whereby a charge of a criminal nature might be held, *in terrorum*, over a clergyman, for an indefinite time. The only difficulty suggested arises from the use of the word "proceeding:" that word is, however, used partly in a popular and partly in a technical sense. *Sherwood v. Ray* (1 Curteis's Ecc. Rep. 173) and upon appeal, *Ray v. Sherwood* (1 Moore's P.C. Cases, 353), are conclusive authorities that the service of a citation is the true commencement of a suit in the Ecclesiastical Courts. These decisions were made before the passing of the Church Discipline Act, and it is apparent that the words here used, having in view the object of the Statute, are to be construed according to the practice and usage of Ecclesiastical law. A suit in the Ecclesiastical Court commences by a citation, *Sherwood v. Ray* [1 Curt. E.R. 173]. So it is by the Civil law, Domat's Civil Law, B. IV., Vol. 2, p. 658; *The Code Napoleon*; *The American* [333] Code. No suit is said to be commenced till the accused is actually summoned. At Common law a notice of action is not the commencement of an action. As this is a penal Statute, carrying into effect a severe penal Act, the 13th of Eliz., c. 12, relating to the Articles of Religion, it must, by the universal rule of law, be construed strictly and literally against the party enforcing its provisions. If there is any doubt or ambiguity arising from the language of the Act, it is not to be strained to the prejudice of the party accused, but must receive a liberal construction in his favour. Bacon's Abr. tit. "Statute," (I.) 9. Dwaris "On Statutes," p. 646 (Edit. 1848), *Henderson v. Sherborne* (2 Mee. and Wels. 236), *Proctor v. Mainwaring* (3 Bar. and Ald. 145). Unless the proceedings are to commence by the citation, there is really no limitation at all provided by the 20th section of the Act, 3rd and 4th Vict., c. 86. But that section clearly limits proceedings to two years. Here the first proceeding taken, was when the Respondent was served with the citation dated the 5th of June, 1856, to appear and answer the charge, which was more than two years after the acts complained of were done. Being a Statute of Limitation it must be construed in conformity with the decisions of the Courts of Common law, in [construing] other Statutes of Limitation; which have always been in favour of the limitation. *Green v. Rivett* (2 Salk. 422), *Murray v. The East India Company* (5 Bar. and Ald. 204), *Short v. McCarthy* (3 Bar. and Ald. 626), *Rhodes v. Smethurst* (4 Mee. and Wels. 42; S.C. 6 Mee. and Wels. 351), *The East India Company v. Odit-churn Paul* (7 Moore's P.C. Cases, 85), *Tolson v. Kaye* (3 Brod. and Bingham, 217), *The Imperial Gas Com-[334]-pany v. The London Gas Company* (10 Exch. Rep. 39), *Kennet and Avon Canal Company v. The Great Western Canal Company* (7 Q. Ben. Rep. 824), *Pott v. Clegg* (16 Mee. and Wels. 321), *Granger v. George* (5 Bar. and Cr. 149), *Howell v. Young* (5 Bar. and Cr. 259), *Battley v. Faulkner* (3 Bar. and Ald. 288). So it has also been construed by Courts of Equity. *Hovenden v. Lord Annesley* (2 Sch. and Lef. 632), *Smith v. Fox* (6 Hare, 386), *Freake v. Cranefeldt* (3 Myl. and Cr. 499). They referred also to the following authorities upon the construction of the Church Discipline Act. *Bluck v. Rackham* (5 Moore's P.C. Cases, 305), *Re Monckton* (3 Notes of Cases, Suppl. p. lv.), *Bishop of Hereford v. T——n* (2 Roberts' Ecc. Rep. 595), *Brookes v. Cresswell* (1 Roberts' Ecc. Rep. 606), *Bishop of Lincoln v. Day* (4 Notes of Cases, 299); and as to the manner of proceeding under that Act, cited *The Dean of York's case* (2 Q. Ben. Rep. 1), *The Queen v. The Archbishop of Canterbury* (6 Bla. and Ell. 546).

The consideration of the judgment was postponed, and now delivered by

The Lord Justice Knight Bruce (6th Feb., 1858).—This is an appeal from a decree or definitive sentence of the Court of Arches, pronounced on the 23rd of April, 1857, in a cause of appeal before that jurisdiction, to which the parties were two clergymen of the Diocese of Bath and Wells; one, Joseph Ditcher, the Vicar of South Brent, in Somersetshire, the Appellant here; the other, George Anthony Denison, Vicar of the [335] neighbouring parish of East Brent, and Archdeacon of Taunton, the Respondent here. But in that Court, their positions were reversed.

The controversy arose thus. It appears that the Vicar of East Brent preached and published in the years 1853 and 1854, certain sermons which the Vicar of South

Br nt disapproved; whereupon (the preferments held by the Vicar of East Brent being in the gift of the Bishop of Bath and Wells, in right of that See), Ditcher, the Appellant, in October, 1854, made formally to the Archbishop of Canterbury, under the Statute, the 3rd and 4th Vict., c. 86, called "The Church Discipline Act," a written application or complaint.—[His Lordship here referred to the steps that had been taken, which are fully detailed in the statement of the case, and proceeded.]—The only point decided in the Arches Court by the decree, or sentence, under appeal having been that of time, the question is, whether the Appellant was barred, and the Respondent protected by the 20th section of the Act in question. It is on this Statute that much, or everything, turns here at present: whether under it, and in pursuance of it, the Archbishop had jurisdiction or authority to pronounce the decree or sentence of deprivation pronounced at Bath, which (reversed by the Court of Arches) the Appellant by the present appeal, seeks to set up again; for no other point has been argued before us. The parties have reserved themselves upon every other part of the litigation (in the event of a different view being taken here from that taken by Sir John Dodson), for a future discussion, or future discussions, here or elsewhere, or both elsewhere and here:—the Respondent continuing to [336] reject all imputation of heresy, while the Appellant still maintains that the impached sermons exhibit heterodox opinions. We, however, have only to endeavour to reach at a proper conclusion as to the sufficiency, or insufficiency, of the alleged bar by time, under the 20th section of the Church Discipline Act.

First, then, what is the true reading, and what the meaning, of that section, and more especially its commencing paragraph? A question upon which, if of easy solution, it is not likely that two such competent interpreters as the Judge of the Consistory Court of London, and the Dean of the Arches, would have differed.

Section twenty is in these terms: "And be it enacted, that every suit or proceeding against any such Clerk in Holy Orders for any offence against the laws Ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards: Provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any Court of Common law, such suit or proceeding may be brought against the person convicted at any time within six calendar months after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought." The words just read are found in a Statute containing twenty-six sections, every one of which has received from their Lordships great and prolonged (I had almost added painful) attention; for, probably, no [337] Statute ever in a stronger degree required that not any portion should be judicially construed without knowing and weighing the whole.

It cannot, in the first place, escape observation, that "suit" is a word properly of less extent and less general applicability, than "proceeding," or that, possibly, every suit may be correctly termed a proceeding, though not every proceeding, a suit. It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe, should not, without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use.

It is plain, however, that where there is a report, that report must follow a Commission, and, of course, precede a suit founded thereon: but the word "proceeding" comes in the 20th section after the word "suit." The 13th section, certainly, enables a Bishop to dispense with a report from Commissioners, so that there may be a suit under the Act without a report, and, probably, also without a Commission. As to the word "or" occurring between "suit" and "proceeding," in the 20th section, it is not, perhaps, immaterial to bear in mind the various purposes to which "or" is applicable in the English language. The word "proceeding" is, as a substantive, used in two other sections (the 17th and 23rd); the word "proceedings" in the 7th, 13th, and 14th sections, and elsewhere in the Act.

In the 7th section, the word "proceed" seems to deserve attention, as may also the expressions "preliminary" and "further" in the 4th section; and per-[338]-haps it is worth while to notice that the 17th section seemingly employs "proceed-



ing" in opposition to "inquiry," and to remark the purpose to which "proceeding" is applied in the latter half of the 20th section. The expression "for any offence" in that section must also be considered in connection with the 3rd section, which may, without a "charge," be brought into operation and activity upon rumour merely: for so we suppose must be interpreted the words "scandal or evil report." Possibly, however, "Commission" or "proceeding by Commission," or "proceeding by way of Commission," may be the meaning, or one meaning, of "proceeding" in the 20th section; a reading which, if it does not require, does not prohibit the attributing to the Act an intention that a suit should not, in any case, be commenced after the end of the two years. If the framers had that intention, they may well have deemed it prudent to forbid (not merely by implication) the issuing of a Commission under which no report could bring an erring or a slandered clergyman for conviction or acquittal before an Ecclesiastical Judge. Having, with such aid as these and some other considerations might afford, weighed the whole of the Statute (not, of course, without reference to the particular nature of the subjects with which it is concerned, and the state of the law on those subjects as it stood immediately before the passing of the Statute), their Lordships (differing, as they apprehend, on this point from the Most Reverend Prelate, and one, at least, of His Grace's Assessors) have come to the conclusion, that the phrase "every suit or proceeding" in the 20th section, unless the phrase means "every suit" merely, and nothing else, means "every suit and every pro-[339]-ceeding," nor less nor more: (As if, in effect, instead of "every suit or proceeding" "shall be commenced within two years," "and not afterwards," the Act had said "not any suit, nor any proceeding" "shall be commenced, unless within two years," and had omitted "and not afterwards.") Their Lordships consider also that the words "suit or proceeding," where they occur secondly, thirdly, fourthly, and fifthly, in the 20th section, must be construed of course by analogy to the construction proper to be put on the three words where they first occur in that section.

Before entering on the next question, that relating specifically to the decree or sentence under appeal, it may be well to observe that, notwithstanding the loose and inaccurate language to be found in the Act, the Legislature, as their Lordships think, has made a sufficient distinction between a "suit," properly so called, and the preliminary inquiries out of which a suit may arise. A Clerk may, indeed, with the concurrence of his accuser, obviate the necessity for a suit by submitting to a sentence on the result of the preliminary inquiries; but, unless he thinks fit to do so, he has a right to have the case against him decided, *secundum allegata et probata*, in a suit regularly constituted.

This "cause" (so it is termed in section 11) may either be heard before the Bishop with Assessors or may be sent by Letters of Request, to the Court of the Archbishop. But it is hardly denied that, if the matter be sent to the Archbishop's Court, the suit is not commenced before the service of the citation; and, if so, it seems to follow that, if the suit be before the Bishop, it must be held to commence with the [340] proceeding before that Tribunal which is most analogous to the citation in the Archbishop's Court; for the Legislature can hardly have intended that the period limited for the institution of the suit, should vary according to the Court in which it is heard. We then come to the question, whether the "suit" in which was pronounced the decree or sentence of deprivation pronounced at Bath in the year 1856, was "commenced within two years after" the offence, or any offence in respect of which the "suit" was "instituted, and not afterwards;" or, in other words, whether there was a "suit" "commenced within two years after" the Respondent had committed any offence, or the imputed or alleged offence, charged against him. This question, stated in the terms that have been used (because the decree or sentence of deprivation was made, was pronounced, in a "suit," and could have no validity unless made in a "suit" or pronounced in a "suit,"—and because if made or pronounced in an ill-founded suit, it cannot stand)—is one for the purpose of which their Lordships have been, and are, by the state of the evidence and the admissions, indeed, of the parties, enabled to dismiss from consideration, as Sir John Dodson was enabled to dismiss every, if any, such enunciation of heterodoxy—every, if any, such offence, as has taken place on the part of the Respondent

since the year 1853. His conduct in and since the year 1854 it is agreed that we must, and we accordingly do, regard as wholly immaterial. If, therefore, the suit in controversy was not commenced before the year 1856, it was ill-commenced, and the decree or sentence of deprivation must fail. Now, the Commission was issued in the year 1854; the report was made and registered in the [341] year 1855; the articles were filed in August, 1855; and the service of a copy of them on the Respondent took place also in August, 1855; but not until April, 1856, or later, was there any citation of him, or any requisition for him, to appear before any Judge, or to appear anywhere. The Appellant's Counsel, however, have contended, that the Respondent was deprived, in a "suit or proceeding" which they say was commenced by the Commission, or by what took place between the Commission and report, or by the report or its registration, or by the filing of the articles in August, 1855, or by the service in that month of a copy of those articles on the Respondent. Their Lordships, however, are of opinion with Sir John Dodson, that this proposition is untenable. The report was not, the inquisition, or investigation under the Commission, was not, nor was the Commission, nor was the Appellant's application to the Archbishop for a Commission, a suit, or the commencement, or any part, of a suit. The Commission and the inquisition or investigation under it, were merely steps for obtaining the opinion, and the report was merely the opinion so obtained, of five clerical gentlemen, in the selection of not one of whom had the proposed Reus a voice, whether there was *prima facie* ground for instituting a suit. Neither the report made, nor any report capable of being made under the Commission; no registration of the report, or of any report; no approval of it, amounted, or could have amounted, to an adjudication of heresy or error of any kind against the Respondent. He could not lawfully, before the year 1856, have been deprived, punished, or censured without his consent, nor in, nor after the year 1856, was it, independently of what took place in April, 1856, or the following [342] month, possible, without his consent, to deprive, punish, or censure him.

Then, as to the filing of the articles in August, 1855, and the service in the same month of a copy of them on the Respondent, each of these steps he was entitled to disregard until served with a citation or requisition under the 9th section of the Act, in the manner directed by the 10th section; as long as there was no such service of a citation or requisition, the articles (though preventing Letters of request) were, in truth, as against him, a nullity. The articles—not intitled in any Court, not headed, ended, or described, as belonging to or connected with any Court, purported to proceed from the Archbishop, as "Primate of all England, and Metropolitan." They did not cite, command, require, or invite the Respondent's attendance or appearance in any Court, or at any place or time, nor had any date of place or time; nor in fact until some time after March, 1856, was there any citation or requisition such as directed by the 9th section, or such as to require or make necessary any appearance or attention upon the part of the Archdeacon, or to render any such step material for his protection or to his interest.

And their Lordships, though in the present instance differing to some extent from the very able Judge who advised the Archbishop on the occasion of the Bath sentence, agree in the opinion then declared by that eminent lawyer, that the word "suit," used in the 20th section, "means a suit in the Arches Court, or any other Court of that description." Dr. Lushington added the words "properly answering to the terms in which it is expressed;" but he did not, we believe, by those words intend to change the sense [343] of what immediately preceded them. And, if we do not think with him that (to borrow again his language on the same occasion) "in a suit in the Court of Arches, the issuing of the citation is the commencement of the suit," we think that the service of the citation is so.—[His Lordship here referred to the judgment of the Right Hon. Dr. Lushington, at Bath, which was included in the transcript of the proceedings.]—The expression, however, "think with him," that I have used, may be not exactly accurate: for considering the cases of *Ray v. Sherwood* (1 Curteis, 173), and *Sherwood v. Ray* (1 Moore's P.C. Cases, 353), and the admitted course of the Ecclesiastical Courts at Doctors' Commons, their Lordships deem it likely, that in the passage just read, from the judicial opinion delivered at Bath, "service" was said or meant in the place of "issuing"



where the latter word occurs. The circumstance that, by the 13th section of the Act, Letters of Request are prevented from issuing after articles filed, as mentioned in the 7th section, does not appear to us to make the articles, or the filing of them, or the service of a copy of them, the commencement of a suit. They may, by the subsequent service of a valid citation, or requisition, be drawn down, in effect, to the date of that service, but cannot, as we conceive, bring up that service to an earlier date.

The rule, or maxim, "*Semper in dubiis benigniora praeferenda*," is, we believe, as true in the law of England as it was in the Roman law, and the Statute before us is at once a law of criminal procedure as to the offences to which it relates, and a Statute of Limitations as to penal prosecutions. With reference to that character, the presumption or inclination, [344] where presumption or inclination can find place, ought to be, as their Lordships conceive, not against, but in favour of, the person charged with an offence, and sued penally under it.

And their Lordships are of opinion, that they construe the 20th section consistently with the rules and idiom of the English language, and "*omni considerata scriptura*," agreeably to the spirit and general intention of this Act of Parliament, by holding, as they do, with the learned Dean of the Arches, that a suit was not instituted by the application for the Commission, or by the Commission, report, and articles, or by any one or more of them, or by the service of the articles on the Respondent; that the suit consequently, in which the Bath judgment was pronounced, was not commenced, was not a "proceeding" begun, before April, 1856; that the Respondent not having been proved to have committed any offence after the year 1853, there was accordingly no suit commenced within the time prescribed by the 20th section; that the Commission and report fall to the ground, therefore, and become wholly worthless; that every proceeding, if any, as existed before June, 1856, having thus, before June, 1856, failed, and become extinct, no such proceeding was capable of supporting or assisting anything done in or after June, 1856; and that as the necessary result of such a state of things, the proceedings against him subsequent to the year 1856, were altogether groundless and bad.

We are not unaware of the inconvenience possible to arise from unavoidable delay between the issuing of a Commission and the making of a report under it, according to our reading of the Act; but neither can we avoid seeing the mischief, equal or greater, as we [345] think, likely to arise, from holding that a penal suit may be instituted against a clergyman, founded on a report made twenty years before it. The Court of Queen's Bench possibly has, and possibly would exercise, the power of interfering, at the instance of an accused clergyman, in a case of long inaction, after the end of the fourteen days mentioned in the 8th section. That, however, is a point on which their Lordships think that they may well, and ought to, abstain from intimating any opinion. It may be added, with reference to the Letters of Request mentioned in the 13th section, that if they can be issued without a Commission, but not after the two years, or if the suit in the Court of appeal of the Province under the Letters of Request must be commenced within the two years, it is difficult (if not impossible) to conceive that it was intended that a private prosecutor or promoter, or even the Bishop of the Diocese, should be allowed an unlimited time for commencing a suit after a Commission and report. Construing the language of the Statute, as I have said, we feel somewhat less diffidence in differing from so high an authority as the learned Judge of the Consistory Court of London, than we otherwise should do, by reason of the early paragraphs (especially the second paragraph) of the opinion delivered at Bath by him, in favour of holding the Appellant not barred of his prosecution, by lapse of time.

It seems to be a just inference that the learned Judge was precluded from taking time for deliberation; nor is this all that tends to diminish our self-distrust. There is the weighty judgment now before us of that experienced and well-informed ecclesiastical lawyer, the present Dean of the Arches, and there are [346] previous judicial opinions entitled to much consideration and respect, with which that judgment agreed: We may instance the cases of *The Bishop of Lincoln v. Day* (4 Notes of Cases, 290), and *Brookes v. Cresswell* (1 Roberts. Ecc. Rep. 606), and that of *The Bishop of Hereford v. T——n* (2 Roberts. Ecc. Rep., 595, where probably by the way, at p. 605, the word "issuing" should be "serving"), respectively, before

Sir Herbert Jenner Fust and Sir John Dodson himself, to which, perhaps, may be added Monckton's case (3 Notes of Cases, Suppl. p. lv.) before Dr. Lushington.

For the reasons that have been now stated, it is their Lordships' intention to report to Her Majesty that, in their judgment, the present appeal should be dismissed, but without costs. Of course it is understood that upon the question of heterodoxy, the question whether the Respondent has at any time uttered heretical doctrine or committed any ecclesiastical offence, their Lordships have intimated no opinion.

[Mews' Dig. tit. ECCLESIASTICAL LAW; XXVIII. PRACTICE AND PROCEDURE; 1. Generally. S.C. 6 W.R. 342. See *Flamank v. Simpson*, 1866, L.R. 1 Ad. and E. 281; *Sheppard v. Bennett*, 1869, 39 L.J. Ec. 7; *Reg. v. Oxford (Bishop of)*, 1879; 4 Q.B.D. 549; *Julius v. Oxford (Bishop of)*, 1880, 5 A.C. 217.]

[347] ON APPEAL FROM THE SUPREME COURT OF VAN  
DIEMAN'S LAND.

MICHAEL FENTON and JAMES FRASER.—*Appellants*; JOHN STEPHEN  
HAMPTON,—*Respondent* \* [Feb. 3 and 4, 1858].

The "*Lex et consuetudo Parliamenti*" applies exclusively to the House of Lords and House of Commons, in England, and is not conferred upon a Supreme Legislative Assembly of a Colony, or Settlement, by the introduction of the Common Law of England into the Colony [11 Moo. P.C. 397].

No distinction in this respect exists between Colonial Legislative Councils, and Assemblies whose power is derived by grant from the Crown, or created under the authority of an Act of the Imperial Parliament [11 Moo. P.C. 397].

*Keilley v. Carson* (4 Moore's P.C. Cases, 63) reviewed and upheld [11 Moo. P.C. 395, 396].

This was an action of trespass brought in the Supreme Court of Van Dieman's Land by the Respondent, the Comptroller-General of convicts in that Island, against the Appellants, Fenton, the Speaker, and Fraser, the Serjeant-at-Arms, of the Legislative Council of Van Dieman's Land. The declaration complained that the Appellants unlawfully assaulted, seized, and imprisoned the Respondent. The Appellants served in their defences, but respectively pleaded special pleas of justification, setting forth, in substance, the following material facts; that before and during the alleged wrongs, a Session of the Legislative Council of the Island of Van Dieman's Land was being holden at Hobart Town, in that Island. That the Appellant, Fenton, was a member and the Speaker of that Council. That the Appellant, Fraser, was the Serjeant-at-Arms attending [348] the Council. That on the 14th of August, 1855, it was resolved by the Council, that a Select Committee of certain of its members should, in accordance with the standing Rules and Orders of the Council, be appointed to inquire into and ascertain the truth of certain alleged abuses in the Convict Department, the same being matters within the province of the Council to inquire into and ascertain by means of such Select Committee. That on that day the Select Committee was duly appointed in pursuance of the resolution. That before the wrongs, in the declaration alleged, it was resolved by the Council, that the Select Committee should have leave to send for persons in reference to the inquiry. That Thomas George Gregson, a member of the Council, was duly appointed and elected Chairman of the Select Committee. That the Respondent was a material and necessary witness in the inquiries, and that he had notice of all the premises. That the Chairman duly summoned the Respondent personally to appear before the

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Lord Chief Baron of the Exchequer (The Right Hon. Sir Frederick Pollock), and the Right Hon. The Lord Justice Turner.



Select Committee, at a certain place and time, to be examined as a witness on the subject of the inquiry. That the summons was duly served. That the Respondent wilfully and without reasonable excuse wholly refused and neglected to appear. That, in consequence, the Select Committee was obstructed in the inquiries and the Council prevented obtaining a report thereon. That during the Session, and before the wrongs complained of, the Council were informed of the premises, and thereupon resolved, that the Respondent be desired to attend at the bar of the Council's House, at Hobart Town, on a day and hour named. That in pursuance thereof, the attendance of the Respondent was in due form required accordingly. [349] That the Respondent was duly served with, and had notice of, the summons, but did not nor would obey the summons, and did not nor would appear as required, or at any other time, but wilfully and contemptuously, and without reasonable excuse, wholly neglected and refused to do so, and disregarded the Order. That, thereupon, the Council, before the wrongs complained of, resolved that the Respondent, having failed to appear at the bar of the Council's House, in obedience to the Council's resolution in that behalf, and the Speaker's summons, was guilty of contempt, and that, thereupon, the Speaker issued his warrant for the apprehension of the Respondent, to be held in the custody of the Serjeant-at-Arms during the pleasure of the Council. That, in pursuance of such last-mentioned Resolution and Order, and for the execution thereof, and before the alleged wrongs, the Appellant, Fenton, so being and as such Speaker, did make and issue his warrant, under his hand and name, directed to the Appellant, Fraser, the Serjeant-at-Arms attending the Council, and in and by which warrant recited that the Legislative Council of the Island of Van Dieman's Land did, on the 11th of September, then instant, resolve that the Respondent was on that day guilty of a contempt of the Legislative Council, and that he be committed to the custody of the Serjeant-at-Arms, to whom the warrant was directed; and Fraser was directed to take into his custody the body of the Respondent, and him safely keep during the pleasure of the Legislative Council. That this warrant was delivered to Fraser, and by him duly executed. That the Respondent remained in his custody, as such Serjeant-at-Arms, under the warrant, until the Council was prorogued by the Go-[350]-vernor of the Island; whereupon the Respondent was liberated. That such arrest and imprisonment were the alleged wrongs complained of in the declaration, and that at the times, and during all the time in the pleas mentioned, the Legislative Council was sitting at Hobart Town, in the Island of Van Dieman's Land. To these Pleas of justification, the Respondent demurred on the following grounds: that the Legislative Council had no power by law to adjudicate upon, as a contempt, any act done not in the presence of the Council, in Council assembled, by any person not being a member or officer of the Council, and to punish for the same by imprisonment; that the Appellant, Fenton, was not by law justified, under the circumstances set forth in the pleas, in issuing the warrant therein mentioned for the apprehension and detention of the Respondent during the pleasure of the Council, nor was the Appellant, Fraser, by law, justified in apprehending the Respondent under the warrant, and that such warrant was bad upon the face of it, as it did not set forth facts or circumstances, authorizing the apprehension and detention thereby commanded.

After argument, the Supreme Court, on the 27th of November, 1855, gave judgment on the demurrers for the Respondent, holding that the pleas of justification were not sufficient in law. The judgment (*a*) of the Chief Justice (The Hon. Valentine Fleming, Esq.), after stating the pleadings, proceeded as follows:—"Upon these pleadings, two questions arise: First. Whether the Defendants were justified in doing the [351] acts complained of by virtue of the authority relied upon in the pleas, and, therefore, by consequence, whether that authority is sufficient in point of law; or putting the same proposition in more precise concordance with the fact set forth, whether the Legislative Council of this Colony can commit for contempt a person who has disobeyed their Order to appear at their Bar, such Order having

(*a*) From the importance of this question, affecting the constitution and powers of Legislative Assemblies in the Colonies generally, it has been deemed expedient to set out these judgments at length. [See Pointed Cases in Privy Council Appeals, Colonial, N.S.W., 1847-1859.].

been issued in consequence of the refusal of such person to attend and give evidence before a Select Committee appointed in accordance with the Standing Rules and Orders of the House. Secondly. Assuming the existence and sufficiency of the authority in point of law, whether it has been rightly exercised; in other words, whether the Speaker's warrant, as set forth in the pleadings, is valid, and justifies all that is alleged to have been done by virtue of its authority. Before proceeding to the consideration of these questions, I am desirous to convey how much I feel indebted for the full, careful and able manner in which the case was argued on both sides. We cannot but have derived material assistance from such an elaborate exposition and analysis of the principles and authorities bearing upon the subject. The Defendant's case was presented under a fourfold aspect. First, the relation existing between the Legislative Council and this Court; secondly, the powers inherent in the Council, as part of the Legislature, and whether such powers are derived from grant or necessity; thirdly, the authorities bearing on the question, in the English, Colonial and other Courts; and lastly, subordinate points arising from the form of proceeding adopted by the Council in this instance. On the part of the Plaintiff, everything that was brought forward under these various heads was [352] examined, contested, and denied. The *Magna Charta* was prominently relied upon, and it was insisted that the sacred right of personal freedom, secured by that great Charter of our liberties, could not be taken away, except by the express enactment of an authority of as high a nature; that the Legislative Council of this Colony is a statutory body, having no judicial functions, and possessing only those powers which are conferred by the Act which gave it birth; that the abuses to which the power asserted in this instance would open the door, present the most cogent reasons why such a power should not be inferred; that the same principles which would establish its existence in this Council, would give it to other bodies derived from the same source, and having analogous functions to perform, but in which the law has clearly settled it does not reside; that its assumed necessity for the purposes of either legislation or inquiry will be found to resolve itself into mere expediency or desirableness; that even admitting such a necessity, that alone would be insufficient to sustain the exercise of such a power; and finally, that the question is concluded by express authority. Such being an epitome of the different aspects under which the arguments were advanced on both sides, I shall, before proceeding to discuss the two propositions which I have laid down, and upon which my judgment will be founded, endeavour to clear away some hypotheses put forward, which ought not, in my opinion, to influence that judgment. It is argued that the House of Commons, as a branch of the Imperial Parliament to which belongs the power of enacting laws, is superior to the Courts of Common law, whose duty it is not to make or alter, but to interpret those laws, and that it is also superior in that [353] it possesses a general inquisitorial authority, extending even to those Courts themselves. By parity of reasoning, it is contended, that the Legislative Council here, having functions analogous in these respects to the House of Commons, is superior to this Court; thence it is inferred that the Legislative Council bears the same relation to the Supreme Court, that the House of Commons does to the Superior Courts in England; and from these premises is deduced the conclusion, that this Court should attribute to the Council the same powers which spring from that relation, and construe its acts by the same intentment as the Superior Courts do at home, in the case of the House of Commons. If this argument were to be tested only by abstract reasoning, or mere moral views, it would be difficult to escape its force; the House of Commons and the Council here are both Legislative bodies; both, let it be conceded, for the present purpose, inquisitorial bodies; both ought to have full powers for the effectual exercise of the functions and duties for which they were constituted. But, taking all this for granted, here the parallel will be found to stop, because if you seek to go one step farther, a new element is introduced; for when a case arises in which the practical enforcement of these powers clashes with the personal liberty of the subject secured by law, it becomes at once essential that such an exercise of authority should be capable of being referred to and justified by some other known and recognized law. This, in the case of the House of Commons, is the '*Lex et consuetudo Parliamenti*,' and whether that Assembly be taken to administer that law by virtue of its being, as part of the High Court of Parliament, itself a Court of Judicature, or by [354]



virtue of ancient usage, may be regarded, at this stage, as immaterial, because the Council can rest upon neither of these grounds; it is not a Court, it has no ancient usage, and if the power which it claims in this instance is to be sustained at all, resort must be had to some other foundation than that which warrants the exercise of a like power by the House of Commons. Hence the analogy and relation relied upon in the early part of the Defendants' argument, fail precisely at that point where the real question involved in the present case begins, and all the *dicta* and reasoning of the enlightened Judges which was brought to bear upon this part of the subject fall to the ground, inasmuch as with the failure of the analogy they cease to be applicable. I am not here unmindful that it was urged under this branch of the discussion that necessity was the basis on which the authorities mainly rely in attributing these powers to the House of Commons; I cannot assent to this. The true deduction from all the cases appears to be, that necessity may be taken as the original foundation of the powers, but not that it alone constitutes them; necessity is an essential element to their existence, but it is usage that gives them the sanction of the law. The second head of Defendants' argument will be found to contain the true principle on which this case must turn, and, as I shall have to consider it at large hereafter, I, now, only have to remark that the proposition 'whether the powers of the Council be derived from grant or necessity' is hardly accurately enunciated. There can be no such alternative distinction; the grant is the foundation for the whole, and the power claimed on the footing of necessity, if it exists in law, passes by the grant as much as if it [355] were conveyed by it in express terms. *Pomfret v. Ricraft* (1 Saund. 323). Under the third head I feel compelled to reject the authority of the American Commentator (Story, 'On the American Constitution,' vol. ii. p. 305), and of the American and Canadian Courts, however high it may be, or however apposite the reasoning. Not only is it not binding upon me, but were I to give effect to such authority, I must, I conceive, disregard the law as now settled, and by which it is my duty to be bound. The cases of *Beaumont v. Barrett* (1 Moore's P.C. Cases, 59), and *Keilley v. Carson* (4 Moore's P.C. Cases, 63), I shall carefully criticise, and on the last head of the Defendants' argument, involving the validity of the warrant, I shall also deliver my full opinion. A distinction was sought to be taken between privileges and powers. These, although not convertible terms, have doubtless, both by Judges and Commentators, been used promiscuously. Privilege, I apprehend, in its strict sense and when not improperly confounded with power, implies protection. In the present instance I should rather call what is claimed a power, but I regard it as of no solid importance, the material matter being; does the Council possess it, and from what source is it derived? Reliance was also placed on the 24th section of the 9th Geo. IV., c. 83, the effect of which it was urged was to introduce the '*Lex Parliamenti*' whenever the occasion should arise in which that law would become applicable: and that such occasion did arise when the present Legislative Council was established. That Act appears to me both declaratory and enacting: declaratory in so far as it relates to laws, both Common and Statute, which would, by force of the settled legal rule, be ap-[356]-plicable without its aid; enacting in so far as it introduced laws passed subsequently to the settlement of this Colony, and which would not have been in force but for its provisions. This construction satisfies the enacting portion, which, moreover, it is to be observed, refers not to the Legislature, but to the Courts of Justice, and if the law of Parliament, a law peculiar to the two branches of the British Legislature, and wholly inapplicable to the Council established under that Act, did not attach to this Island as a settled Colony, the declaratory portion would be of no avail. But, I am of opinion, that it did not so attach, and for this purpose at least the case of *Keilley v. Carson* must be taken as conclusive. Newfoundland was a settled Colony, and if the '*Lex Parliamenti*' had been introduced there, as claimed in this instance, and the establishment there of a pure representative Assembly had called it into play, there would have been an end of that case—nothing to discuss, nothing to contest. But the whole purview of that case impliedly, and the judgment expressly, negative such a position. Having so far disposed of the different points to which I have adverted, I pass to the first proposition with which I set out. Were the Defendants justified in doing the acts complained of, by virtue of the authority relied upon in the pleas, and is that authority sufficient in point of law? This

question obviously involves, as matter of preliminary consideration, when and how the present Legislative Council of this Colony was constituted, what is the legal operation of its powers and attributes? The Council was established by an Act of Parliament, the 13th and 14th Vict., c. 59, which incorporates by reference, various enactments of the pre-existing Sta-[357]-tutes, 5th and 6th Vict., c. 76, and the 7th and 8th Vict., c. 74. After repealing the provisions of the 9th Geo. IV., c. 83, so far as they related to the constitution, appointment and powers of the then Legislature, it proceeds to erect a new Legislative body, consisting of members, in part elected by the inhabitants, and in part appointed by the Crown. The Council so constituted has, in conjunction with the Governor, the power to make laws for the peace, welfare and good government of the Colony. But this power is subject to many important restrictions and limitations, the principal of which are, that no laws passed by the Council shall be repugnant to the law of England: shall interfere with the Crown lands or the revenue arising therefrom: nor shall it be competent to the Council to appropriate any money subject to its control to any branch of the public service, except on the prior recommendation of the Governor to make provision for that specific service. Again, Bills embracing particular subjects of legislation are expressly required to be reserved for the signification of the Queen's pleasure, and their operation suspended until that pleasure has been made known. The Governor's assent or dissent is liable to be controlled by instructions from the Queen, to which he is bound to conform, and even measures which have passed the Council and received that assent are liable to be disallowed by Her Majesty. It is to be observed that amongst the provisions contained in the incorporated Act (5th and 6th Vict., c. 76) is one which authorizes the Council to prepare and adopt such standing Rules and Orders as shall appear to be best adapted for 'the orderly conduct of the business of the Council:' and upon such Rules and Orders being laid before and [358] approved by the Governor, they become binding, subject to disallowance by the Queen. Under this provision certain Rules and Orders have been prepared and approved and are in force, and some argument on both sides was founded upon them. It is sufficient for me to say that I have looked into them, and formed a clear opinion, that it was neither the intention of the Act to convey, nor has it conveyed, authority to the Council by any standing Rules or Orders to confer upon itself the power asserted on this record: but even admitting the converse, I am equally of opinion, that the Rules and Orders which are in force rather negative than support the view that such a power was either contemplated or brought into being. Both the authority of the Act, and its exercise in this respect, extend no farther than providing for and regulating the mode of conducting business and forms of procedure, so as to secure method and good order within the House. From the foregoing statement of the origin of the Legislative Council, and of the powers conferred upon it, and I have adverted to as much, as appears to me, to be material to the question before us, it is manifest, that it is a mixed and indeed anomalous body, deriving existence solely from statutory authority, clothed thereby with certain delegated and defined powers and functions, subject thereby in the exercise of those powers and functions to restrictions and limitations subordinate to Parliament, and in important particulars to the control and direction of the Queen. In order, therefore, to test the legality of any act done by or under the Order of the Council, it is indispensable that we should refer to the Statute from which it derives both its being and its powers: and the question which has to be determined in this, [359] as in all similar cases, must be:—is the authority, the exercise of which is complained of, within the scope of that Statute according to the legitimate rules of interpretation? in other words, has it been expressly communicated to the Council by any of its provisions, or what may be taken as equivalent by necessary implication arising therefrom? If it has, then the act done (I speak not here of the mode adopted in carrying it out) is justified by the authority of the Statute; if it have not, then it is an excess of jurisdiction, and illegal. That the power which has been resorted to on the present occasion of imprisoning the Plaintiff, for the alleged contempt of which he has been adjudged guilty, as disclosed by the pleadings, is not expressly given to the Council, must be and indeed is admitted on all hands, and, consequently, the question I am now to decide, is reduced to the consideration of whether that power is communicated by



necessary implication—that is, whether it passes as a legal incident of the powers which are given. The argument on this point was shaped pretty much as follows:— ‘The Council is empowered to pass laws: to enable them to do so, it is essential they should inquire: such inquiry necessarily demands, in some instances, information from witnesses: such attendance must be compulsorily enforced, to prevent the power of legislation being defeated.’ I here observe, that the pleadings in the present instance, show a case of inquiry only, and fail to aver that such inquiry was for the purposes of legislation, or even that that end was in contemplation. Although if such were the object, this omission weakens the force of the foregoing argument, I am yet content to take it, as it was advanced, and then its validity must depend, as my decision must also depend, [360] upon the application of the legal maxim, ‘*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest.*’ It becomes, therefore, all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus:—Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*. Unless this be so, I can neither understand the cases cited in illustration of the maxim, nor the numerous instances where it would have removed all difficulty, if its controlling force had been recognized. The leading authorities cited on this subject are in 12 Coke’s Reports, 131, *Bane v. Methuen* (2 Bingh. 63), and examples in actions for waste under the Statutes, for I shall refer only to those cases which are apposite, as involving the construction of statutory powers. The first decides, that Justices of the Peace may issue warrants to bring before them parties in order to their [361] taking the oath as prescribed by the 7th Jac. I., c. 6, although that authority is not conferred in express terms. But this is a mandatory law, imposing a statutory obligation and duty, for neglect of which the Justices would be punishable. It is not the case of enforcing the attendance of a witness, but analogous to that of bringing up a party amenable to the law, and it ranges under the principle of absolute necessity, to enable, not the exercise of a desirable or beneficial power, but the discharge of a positive duty enjoined by law. But, as though to evidence the strict construction of even mandatory authority, where the liberty of the subject is involved, it was held that, in the execution of the Act, doors could not be broken, even if necessary to insure compliance with its provisions. The second case, which decides that where a Statute gives a Justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence, rests upon the same principle. It is the duty of Justices to enforce Acts, the execution of which is referred to them, and the disregard of such duty will render them liable to a mandamus. *The King v. Benn* (6 Term Rep. 188): it would, therefore, be a paradox that the law should render the performance of a thing obligatory, and yet deny the power to do it. As to the illustration of this legal maxim derived from the Statutory actions of waste, the first is referable to necessity, in conjunction with the personal right of property, for the reversioner cannot in any case be sure of the remedy provided for him, unless by entry to ascertain if the waste have been committed. The second has little bearing upon the point at issue, for it simply establishes, that where an old action is given in a new case for the same [362] cause, it is given in all its entirety, and, consequently, the question was, whether the whole thing passed, and not whether something else passed as an incident. These and all other authorities which I have been enabled to find in elucidation of this maxim, range themselves under the principle of positive duty or general inevitable necessity, the non-compliance with which would deprive the law, whatever it be, of all operation. But to extend our

reasoning further to instances where the application of this maxim, if allowed, would have removed all difficulty to the exercise of powers essential to the carrying out of various laws, how stands the matter? No case has been produced, nor, as I apprehend, can be, which establishes that an enabling Statute however public or beneficial may be the objects which it contemplates, has ever been extended by construction so as to warrant those entrusted with the execution of its powers, and who do not constitute a Court, to issue process of arrest for the enforcement of those powers. In many instances where even a judicial authority is conferred, if the law be silent in that respect, such a power cannot be exerted. As a general rule, Justices of the Peace cannot compel the attendance of witnesses for the purpose of summary trial, unless there be a special provision in the Statute under which they act. Paley, "On Convictions," p. 86 (4th Edit.). Even in cases of felony and misdemeanor, where the course of public justice would be jeopardized by the escape of offenders, prior to the passing of the Statute, 11th and 12th Vict., c. 42, which confers that power generally upon Justices, it was doubtful whether a Justice could issue a warrant to compel the attendance of a witness to give evidence, or commit for refusal to take the oath or be examined. [363] *Cropper v. Horton* (8 Dowl. and Ryl. 166); *Evans v. Rees* (12 Ad. and El. 55). It has indeed been held that they may commit for refusal to enter into recognizances to appear and give evidence at the trial, *Bennet v. Watson* (3 Mau. and Sel. 1); but this, which is not by way of punishment, but to secure attendance, is by virtue of the Acts, 1st and 2nd Phil. and Mar., c. 13, and 2nd and 3rd Phil. and Mar., c. 10, which mandatorily impose that duty upon the Justice, and subject him to a penalty for neglect. Again, Commissioners of Bankrupts were, under the Acts, 34th and 35th Hen. VIII., c. 4, the 13th Eliz., c. 7, and 1st Jac. I., c. 15, empowered to summon and examine all persons with the view to the discovery of the Bankrupt's property, and to commit in case of refusal; and although held clothed with a judicial character for the purpose, it was admitted by the highest authority that prior to the Act, 5th Geo. II., c. 30, which was passed to remedy the defect, they possessed no power to commit, if the party appeared and took the oath, but answered in such a manner as to render the authorized examination a perfect farce. *Doswell v. Impey* (2 Dowl. and Ryl. 350). In short, wherever a new statutory jurisdiction has been erected, although invested as in some instances with judicial functions, I can find no case where the power of compulsorily enforcing the attendance of witnesses has, in the absence of express provision, been implied, much less has a power of committal for contempt for disobedience by witnesses been supplied by intendment. Again, if we take as examples public Commissioners or Boards created by Statute and invested with full powers to inquire and report, we invariably find that the attendance of the necessary parties before them is enforced, or their refusal to attend punished by specific [364] enactment for the purpose. As instances, the Charities and Tithe Commissions, which were referred to. The former was established under the Act, 1st and 2nd Will. IV., c. 34, and the Commissioners were thereby empowered to summon the necessary persons, and call for the production of books, papers and accounts. Now, it is to be observed, that the information required could only, as a general rule, be obtained from particular individuals, such as the trustees of the charities, the clergyman, or parish officers; on their refusal to attend, as the case may be, the inquiry would be brought to a dead lock. Yet was it ever dreamt that the Commissioners could in any such event, as a necessary incident to their powers, issue a warrant to bring the body of the recusant witness before them, and in case of refusal to be sworn and examined, commit him for contempt? Why even the Statute itself does not entrust the authority to the Commissioners; but subjects the disobedient party to be fined by the Court of Queen's Bench or Exchequer, payment to be enforced by attachment as for contempt. Under the Tithe Commission Act, the refusal of witnesses to attend or give evidence is punishable as a misdemeanor. But the nearest analogy will be found in incorporate, municipal, or other bodies invested with legislative authority, their laws being binding upon all within the limits of their jurisdiction—such as the Corporation of the City of London, or the East India Company. Information for such purpose is as essential to them, as to any Local Legislature; yet they cannot enforce the attendance of witnesses by warrant, or commit for contempt for refusal. Now, if the legal maxim under consideration



is to prevail in the case before me, why should not its [365] governing application have been recognized in the several instances to which I have adverted? If it be said that in some, express provision having been made, the necessity for the implied power is superseded, the answer is, that the express provision is made just because the implied power would not be attributed. To confer the incident in terms, where it passes by operation of law, is superfluous and inoperative—a breach of legal rule, ‘*Expressio eorum quae tacite insunt nihil operatur.*’ If it be said that a different rule ought to prevail in consequence of the higher dignity and importance which attach to Legislative bodies, and to the powers and duties entrusted to them, the answer again is, that the question does not hinge upon the constitution of the body, but upon the grant—not on the exalted character of the functions to be performed, but on the extent of the jurisdiction which has been conferred. The more just solution of the problem will be found, as I take it, in this; that in erecting the different statutory bodies, Parliament has assumed that the power to hear and determine, to inquire and report, or to inquire and legislate, will, as a general rule, be effectually carried out, without difficulty and without obstruction; and if in particular instances an impediment should arise from the neglect or contumacy of a witness, it is a safer rule of construction to regard such a *casus omissus*, to be met by other means, than to imply a power of infringing upon the personal liberty of the subject. ‘*Ad ea quae frequentius accidunt jura adaptantur,*’ is equally a maxim of law with that which I am considering; and where the words of the Statute do not reach to an inconvenience, rarely happening, they ought not to be extended to it by construction. *Bole v. Morton* (Vaughan’s Rep. [366] 373). Now, the work of legislation has hitherto been carried on here readily and without impediment: the information on which it is founded is ordinarily of a public character, obtainable without difficulty; the matter notorious; the members conversant with what is transpiring around them generally inform themselves by the evidence of their senses, or by common report. Let it be conceded that occasions may arise in which inquiry by the examination of witnesses ought to precede legislation; how rarely would it happen that any party required to attend would refuse; but even assuming such refusal, rare indeed would be the case, and such is not shown in this instance, where such party constituted the only fountain from which the required information could be drawn. Taking, however, that extreme and exceptional case, it would still be insufficient to let in the application of the maxim that things necessary pass as incident to the grant, to the extent which has been assumed, or to found the power or privilege which has been here exercised; because as regards the former, the legal power to legislate still exists, although its exercise in the particular instance is impeded; and as regards the latter, because necessity alone, is inadequate to sustain such a power. If the House of Commons claimed a new privilege to-morrow, the exercise of which would invade the right of personal freedom beyond their walls, and the matter came before the Superior Courts in a shape in which they could take cognizance of it, I apprehend it would not be enough to establish an unanswerable case of simple necessity; it would be essential to add to that necessity, the evidence of usage. *Burdett v. Abbot* (14 East, 150), *et per Littledale and Coleridge*, in *Stockdale v. Hansard* (9 Ad. and Ell. 1). But I am [367] prepared to test the question by every assumption in favour of the Defendants’ case. Let the maxim be applied, and let it be granted that the power of inquiry, by the evidence of witnesses, is necessary to the Legislative, or, if you please, inquisitorial functions of the Council. No one, I conceive, will be found to contend, that the exercise of that power could legally be carried one iota beyond the necessity which calls it into play. And what would be this limit? That on the Plaintiff’s disregard of the summons of the Committee and of the order of the House, requiring his attendance at the bar, he be ordered to be brought up in custody for the purpose of being examined on the inquiry, and that the warrant be shaped accordingly. But this is not what has been done; the Plaintiff for his refusal to attend, has been adjudged guilty of a contempt, and his arrest and imprisonment are the penalty for that offence; it is not simply the coercive enforcement of his presence, but punishment for his obedience in not being present. *Stockdale v. Hansard* (3 Per. and Dav. 331). In thus acting, the Council has assumed the attributes, not merely of a Court, but of a Court of Record, *Groenvell v. Burwell* (1 Lord Raym. 454);

attributes which there is high authority for saying belong neither to the House of Lords nor Commons, sitting in their legislative capacity. *Rex v. Flower* (8 Term Rep. 314); *Jones v. Randall* (Cowp. 17). Indeed, were the exercise of the power by the Council in this case tried by the rules of the *Lex Parliamenti*, it appears to me that it could not be sustained. The practice as laid down in the Commons' Journals, 1731, by May (Edit. 1855), p. 322 and following pages, and the course adopted in *Howard v. Gosset* (10 Q. Ben. Rep. 359), all con-[368]-spire to establish, that where a witness refuses to attend, he is to be brought up in custody to the Bar, prior to his being punished for the contempt of disobedience. I do not, however, put the case on that footing. I have dealt with it under the only aspect in which I conceive it ought legally to be viewed; it resolves itself into a question of construction, to be governed by the principles of the Common law; and applying those principles and the tests of analogy, the only materials at my command, I am of opinion, that they exclude such an exercise of power as has been resorted to by the Council. It remains with me, before passing to the second question for my determination, to consider the two authorities which have been relied upon on both sides as bearing directly upon the present case. *Beaumont v. Barrett* (1 Moore's P.C. Cases, 59); and *Keilley v. Carson* (4 Moore's P.C. Cases, 63). If the decision in the former stood unaffected and unquestioned, being that of a Tribunal so high, and forming at the same time the appeal Court from this Colony, whatever opinion I might myself have ventured to entertain, I should at once have bowed to its authority; but it so happens that it has been overruled just in that very particular which could render it of governing influence in this case. Acting upon a dictum of Lord Ellenborough in *Burdett v. Abbott*, which the context, as it appears to me, abundantly showed had reference to the House of Commons, their Lordships held, on an appeal from the Court of Error in Jamaica, that the power of punishing for contempt was inherent in every Assembly invested with Supreme Legislative authority, whether such contempt tended directly to obstruct their proceedings or indirectly to produce such ob-[369]-struction. Unless, therefore, some reliable distinction can be founded upon the composition of the Legislative body, that is, between representation and nomination, and there seems little room for it, this position of law would have given to the late Council in Van Dieman's Land the power in question and *à fortiori* would give it to the present Council. But the case of *Keilley v. Carson* expressly ignores it as law; and *Beaumont v. Barrett* is now stripped of all authority, except that of usage and acquiescence, coupled with the adoption of the power in question by virtue of Legislative enactment forming the Act of Settlement of that Island. I come down to the case of *Keilley v. Carson*, the importance and authority of which cannot be overrated, seeing that it was twice argued before, and long deliberated upon by, an array of judicial learning and eminence rarely congregated together. The broad basis on which that case rests is, that the House of Assembly in Newfoundland does not possess, as a legal incident to its functions as a Legislature, the power of arrest with the view to an adjudication upon past misconduct, as a contempt of its authority, such alleged contempt having been committed out of the House. Unless, therefore, it can be shown that the Legislative Council of this Colony, a mixed statutory body, possesses powers which the Assembly of Newfoundland, a pure representative body, does not, or unless that case lays the ground for some solid distinction between the nature and character of the alleged contempt there and in the present instance, the decision of the Privy Council appears to me to be conclusive of the question at issue. Now, the House of Assembly of Newfoundland was established by the authority of the Crown under a Commission and In-[370]-structions, from which alone it was ruled their powers are to be gathered. By the former they are authorized to make laws for that Island, in terms, if anything, ampler than those contained in the Act of Parliament creating the Council here, whilst the Instructions were penned in language which opened the inference that it was intended to confer powers analogous to those of the House of Commons. Their Lordships, however, regarded that language as too vague and general to include the power of commitment for contempt, and if general terms be considered insufficient for that purpose, how much more so must be the absence of all terms. *The King v. Faulkner* (2 Cro. Mee. and Ros. 532). Having regard, therefore, to the constitution of the House of Assembly of Newfoundland and the powers intended to be conferred upon it, *Keilley v. Carson* appears



more favourable for the application of the doctrine of legal incident by analogy than the present case. Then, does that authority warrant the inference that any substantial distinction was put forth or can be taken with regard to the nature of the contempt? I am unable to discover any such. After the first statement of the question, in no part of the judgment is the word 'contempt' individualized, subject to the limitation of being within and without the doors of the house; it is used in its general signification. At page 84, we have the words,—'Adjudication on a complaint of a contempt committed out of its doors;' at page 86, authority 'of committing for a contempt;' at page 87, of 'terms so vague and general could never have been used with the intention of giving the powers of commitment;' again at page 88, 'the power of committing for a contempt;' but lower down in the same page occurs this passage: 'But the [371] power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body irresponsible to the party accused, whatever the real facts may be, is of a very different character and by no means essentially necessary for the exercise of the functions of a local Legislature, whether representative or not,' 'whatever the real facts may be.' What am I to understand by this? If there be force in language, taken with the context, it must mean that whatever may be the nature of the alleged contempt committed out of doors, the facts or circumstances out of which it arises, in no case does the power of committing for such contempt attach as a necessary legal incident to the functions of a local legislature. It seems to me that if their Lordships had intended to establish any distinction between the nature of contempts committed out of the House, so as to imply that in some the power of dealing with them by commitment passed as an incident, whilst in others it did not, it is impossible to conceive that their judgment, designed apparently as a guide for other Colonial Legislatures, would have been couched in such general language, especially as they so carefully guard themselves upon a distinction which might well be urged between contempts committed in the face of the Assembly, and out of doors; not indeed, that they determine, even in the former case, that the House could commit by way of punishment, for it is quite consistent with the decision that their power in such an event is limited to the compulsory removal of the obstruction. A distinction was, however, sought to be established in the Defendants' argument between contempts arising out of facts of which the [372] ordinary Courts could take cognizance, and those in which they could not, and this view was considered to be favoured by the following passage in page 89: 'All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions;' but the sentence immediately preceding conclusively shows that the power of punishing past misconduct as a contempt is in no case considered by their Lordships as essentially necessary to the functions of such bodies: and how, therefore, can it be said that the decision in any degree turns upon whether that misconduct be, or be not, of a nature to be dealt with by the temporal Courts? 'There is a wide margin between removing an obstruction or impediment, and punishing it as an offence: and when the Courts are thus referred to, what I take to be meant is this, that the Council may, as a legal incident to the exercise of its powers and functions, remove any actual active obstruction at the time of its occurrence; but if they afterwards desire to go further, and have the party punished for his past offence, they must resort to the aid of the ordinary Tribunals. That this is the true aspect of the case, I think, is satisfactorily established by that part of the judgment which denies that such Legislative bodies constitute a Court, and that having no ancient usage to fall back upon, like the House of Parliament, it is only as a Court that such power could be exercised. Any other view, I conceive, would be incompatible with the law which we should find propounded by such high authority, for all sorts of inconsistencies would flow from following out this distinction founded on the cognizance, or the contrary, by the ordinary [373] Tribunals. The most contemptuous insults; the grossest contumely; the foulest epithets, might out-of-doors by word of mouth be heaped upon Members; and yet if they steered clear of the category of actionable slander, or thereof of bodily injury, the ordinary Courts could afford no redress. Was it intended by their Lordships that in such cases the House could commit for contempt? On the other hand,

language far less galling and less liable to impair the independent conduct of Members in the House, might out of it be used, of which, by the rules of law, the temporal Courts could take cognizance. But in order not to lose sight, if possible, of anything that was advanced, admitting this distinction, it was strongly argued, that it could not avail in the present instance, for it was said, that if the power to summon witnesses were conferred by necessary implication on the Council, it would be equivalent to express enactments, and then a correlative duty would arise to obey such summons; hence it would follow that a breach of such duty by disobedience would amount to a contempt of the Statute, and be punishable by this Court as such. 3 Inst. 131, 163; Crouther's case (Croke Eliz. 655). If this be so, in whatever way we regard this distinction, it cannot prevail. But the following passage, at page 88, and one of similar import at page 92, are relied upon by the Defendants:— 'Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment.' And again: 'This is the principle which governs [374] all legal incidents: *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.* In conformity to this principle, we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common law.' Now, if this and the brief passage at page 92, of like effect, be isolated and read without the light of the context, they would, doubtless, countenance the favourable view of this case taken by Defendants' counsel. But such a course would be contrary to all rule. The above quotation must be taken with that which immediately precedes and follows it, and then we find before it, the inquiry, whether the power of committing for a contempt not in the presence of the House, is by law incident to Local Legislatures, and after it the emphatic paragraph, at page 88, which is engrafted upon by the exceptive 'but,' and which I have already cited at full length. And what is the effect of all this? To any unprejudiced mind, there is but one conclusion, as it appears to me, to be deduced, and it is this: Whilst we are prepared to ascribe to you every power reasonably necessary for the proper exercise of your functions and duties, the power of punishing any one for a contempt not committed in your presence, whatever may be the circumstances, we hold not to be thus necessary, and you have it not. Upon such a review, therefore, of the case of *Keilley v. Carson*, I am of opinion, that it ignores the assumption by Local Legislatures of the powers and privileges of the House of Commons: [375] that it confines the powers and privileges which they do possess to such as they are invested with by the authority which created them; and it determines that, if such a power as has been exercised in this case be not conveyed in express terms, it shall not be supplied by intendment. I now pass to the second question for my decision. I might, indeed, have rested upon the opinion I have expressed on the first point to be determined, because, having arrived at the conclusion that the Council does not possess the power which it has assumed, it follows, as a corollary, that it could not exercise that power by the mode resorted to, nor, indeed, by any other mode. As, however, both questions are raised by the pleadings, and have been dwelt upon in the argument, I shall briefly declare my opinion on this second proposition. On the hypothesis, then, that the Council does possess the power, it is yet averred that it has been illegally exercised; in other words, that the warrant is informal and bad, inasmuch as it does not set forth facts or circumstances authorizing the apprehension and detention of the Plaintiff. As I think this the principal, and at the same time a decisive, objection to the validity of the warrant, I shall abstain from all comment upon others which were urged during the argument, namely, that the instrument does not specify the time for which the Plaintiff was to be imprisoned, or how he might obtain his liberty. In order then to determine whether the warrant be legal under the head of objection to which I have referred, it becomes essential to ascertain the principle on which it is to be construed; and this principle in its turn depends, not upon the intendment insisted on for the Defendants by erroneous analogy to the House of Commons, but [376] upon the nature and extent of the jurisdiction of that



authority by which the warrant has been issued. If the Council have a general jurisdiction to deal with contempt, according to the course of the Common law, in like manner as such power belongs to the House of Parliament, or Superior Courts at home, then the warrant cannot be impeached on the ground which I am considering. If, on the other hand, the Council have only a limited jurisdiction in this respect, deriving its efficacy solely from Statute, and out of the course of the Common law, as that law has been received and is in force in this Colony, then no principle can be clearer than that the warrant, in order to render it valid, ought on its face to disclose by direct averment, or necessary implication, the facts and circumstances relied upon, to justify, in this instance, the exercise of that jurisdiction. The principle is as obvious as conclusive—concede a general jurisdiction to punish for contempts, and *prima facie* every contempt is within it, nothing shall be intended to be out of it but that which specially appears so. Take a limited statutory jurisdiction; and the converse of this rule prevails. Nothing shall be intended to be within it but such as it expressly alleged. *Peacock v. Bell* (1 Saund. 73). Even in the highest Courts at home, where they exercise special or limited powers created by Act of Parliament, the strict rule prevails, and their warrants or orders must show on their face the justifying authority for their acts. *Christie v. Unwin* (11 Ad. and Ell. 373); *Muskett v. Drummond* (10 Bar. and Cr. 153); *Harrison v. Wright* (13 Mee. and Wels. 816). In the former Mr. Justice Coleridge thus expresses himself: ‘How- ever high the authority may be, where a special statutory power is exer- [377]-cised, the person who acts must take care to bring himself within the terms of the Statute. Whether the order be made by the Lord Chancellor or by a Justice of the Peace, the facts which gave the authority must be stated.’ The case of *Lines v. Russell*, referred to in May’s ‘Parliamentary Practice’ (Edit. 1855), p. 69, would seem, as far as it goes, to militate against this principle; but if the warrant were there viewed as proceeding from part of a Court having general jurisdiction and acting within its scope, under powers superadded by Statute, it may be reconciled perhaps with the previous decisions, which at any rate it cannot be taken to overrule. Assuming, then, and I beg it to be understood only as an hypothesis, that the Council has the power to commit for contempt others than its own members or officers, yet it neither could be nor indeed has it ever been contended, that it possesses a general power such as that exercised by the Houses of Parliament, by virtue of their own peculiar law, or by the Courts of Westminster by virtue of the Common law. Such a position could never be tenable as regards the former, after the decision of *Keilley v. Carson*, or as regards the latter, after *The King v. Clement* (4 Bar. and Ald. 218), and others to the like effect. As, therefore, the Council has not the general jurisdiction in question, it necessarily follows, that it has only a limited one, in which event it as necessarily follows that its warrant must, on its face, disclose that the act which it directs to be done by virtue of its authority, in other words, the arrest and imprisonment, are within the scope of the limited jurisdiction which it does possess. Cases might be readily accumulated to sustain this position, but I consider it unnecessary, as most of them are collected in the arguments and [378] judgment in the Exchequer Chamber, in *Howard v. Gosset* (10 Q. Ben. Rep. 359, 411), which is itself decisive on the point. Hence on this ground alone that the Speaker’s warrant is perfectly general, and does not set forth the nature of the contempt, showing it to be one for which, under the Statute creating the Council, that body has authority to imprison, I am of opinion, that such warrant is invalid; and, as such invalidity does not arise from an imperfect statement of the cause of arrest, but the omission of all statement establishing the jurisdiction to do so, I am equally of opinion that the warrant is no protection to the Serjeant-at-Arms who carried it into execution. Considering the magnitude and importance of the questions involved, as bearing directly upon the powers of the Legislative Council on the one hand, and the invaluable right of personal liberty on the other, I have thought it befitting to express my opinion at large. I have carefully considered every argument that was advanced, examined every principle adduced, and consulted every authority at my command; and under whatever aspect I regard this case, applying to it what I believe to be the law which it is my province to declare, and by which it is my sacred duty to be bound, I can arrive at no other decision than that the judgment on this record must be for the Plaintiff.”

Mr. Justice Horne expressed his judgment as follows:—

“I am of opinion that judgment must be given for the Plaintiff upon this demurrer. I concur with what has fallen from His Honor the Chief Justice with regard to the informality of the warrant, and I wish it were within my power to assent to the whole [379] of his elaborate judgment. But there is one position of His Honor's to which, although I concur in the judgment, I cannot assent: and I feel it my duty as a Judge, to state my opinion upon that in which I have the misfortune to differ from His Honor. I do so, because, if there is a doubt upon a question of such importance as the present, that doubt may be put an end to by the Legislature, whose high province, whose incumbent and bounden duty, it is by some enactment to clear up a doubt. I will now state my reasons for so differing. That which has embarrassed me, and which embarrassment I cannot get over, is the 24th section of the 9th Geo. IV., c. 83. That section of the Act says:—‘All Laws and Statutes in force within the realm of England.’ Who is to limit the terms of this Statute? How is it to be done? Certainly by no argument *ad inferentio*. If a Law of the realm of England is applicable, or can be applied, it must be applied, whosoever may be the object of its application, by no interpretation, except such as the Statute itself affords; and if the Statute gives no rule of interpretation, there is no other by which it may be done, and the applicability or non-applicability of the Law alone remains to be considered, and this Court is directed by the same Act of Parliament in the first instance to decide that question, namely, Is the Law applicable; can it be applied? That the ‘*Lex et consuetudo Parliamenti*’ is a Law in force within the realm of England cannot be denied. It is so laid down by Lord Coke in his First Institute, and is placed second in the list—First, the Law of the Crown; second, the Law of Parliament; third, the Law of nature; fourth, the Common law. But, if it be argued in the present [380] instance that by the words ‘all Laws’ the Common law was only introduced, and by that great declaration of the Common law, Magna Charta, no man shall be imprisoned but by the judgment of his peers, or the law of the land, therefore, no man shall be arrested or imprisoned by the Law of Parliament, I deny the whole proposition, and assert, that it is an assumption incapable of rational proof, that the words ‘all Laws’ mean the Common law only; and I also assert that the words Law of the Land, ‘*Legem terræ*,’ in Magna Charta, are not confined to the Common law, but take in and comprehend all other laws in force within the realm, and amongst the rest the ‘Law of Parliament,’ and so it was expressly decided by all the Judges in the case of *Patey v. Raympage*. Now, the words of our Statute are: ‘All Laws and Statutes in force within the realm of England at the time of the passing of this Act.’ Again, if it be contended, that the 24th section of the Statute, 9th Geo. IV., c. 83, be merely declaratory, this view of the Statute would contain a double absurdity. Declaratory of what? Of the Common law? Why this would assume that the Imperial Parliament was ignorant of the constitutional maxim that the Common law is the birthright of an Englishman, and thought it necessary to declare that the Common law should be in force in New South Wales and Van Dieman's Land, as if there could be a doubt that every Englishman carried his birthright with him to every settled Colony of the realm of England. This is too great an absurdity for me to assume. Secondly, the Imperial Parliament, in order to prevent doubts, ‘for all declaratory enactments are for this sole purpose,’ as to what Statutes were in force in New South Wales and Van Dieman's [381] Land, declared by this section of the Act, 9th Geo. IV., c. 83, that all Statutes in force within the realm of England at the time of the passing of that Act and those now in force in New South Wales and Van Dieman's Land be applied in the administration of justice. This again implies that the Imperial Parliament were equally ignorant of this other constitutional maxim, namely, that no Statutes are in force in any Colony after a settlement, unless such Colony be expressly named in those Statutes. I shall not assume this. The language of the Statute is enacting, its object is to enact, in effect, it does enact and not declare; and in this view of the case it would seem that all laws other than the Common law which was already in force in the Colony should be introduced and applied, so far as they could be applied, in the administration of justice. Now, it is said that the ‘*Ler Parliamenti*’ cannot be applied in the administration of justice in the Courts of this Colony, that it belongs not to this Court to meddle with it. I deny the proposition. Whenever a case



arises which involves in its consideration the '*Lex Parliamenti*,' this Court must meddle with it, must judge of it and by it, where that is necessary. Thus in that memorable case of *Rex and Regina v. Knollys* (2 Salk. 509), it is decided that the '*Lex Parliamenti*' is to be regarded as the law of the realm; but supposing it to be a particular law, yet if a question arises upon it, determinable in the King's Bench, the King's Bench ought to determine it; to the same effect is the case of *Binion v. Eveling*, cited in 2 Salk. 513. Again, if we suppose a case of manslaughter, arising out of obedience or disobedience to the '*Lex Parliamenti*,' that proceeding must be judged of in this Court, and the party accused [382] must be either excused or condemned according to that law which justifies or does not justify the act, and this too by the Common law. Therefore, in this Court the '*Lex Parliamenti*' could be applied in the administration of justice; and what that law is, is to be found in the Rolls and Journals of Parliament. One other argument may be used against the applicability of the '*Lex Parliamenti*' in this Colony, and that is, that the whole law of Parliament must be introduced and applied, or none of it. The answer to such an argument is, that the Statute itself has provided for such a case by enacting that only so far as any law is applicable it shall be applied. The Imperial Legislature evidently intended and had in view to legislate for the growing wants and ever-changing circumstances and condition of a new Colony just entrusted with legislative powers and functions, and, therefore, gave to it a participation and right in all the Laws and Statutes of the nation in the most general terms, leaving to the Colonial Legislature created by the same Statute, and to the Judges of the Court also created by the same Statute, to determine what laws of the realm of England, and how far these laws, could be applied to the administration of justice. I may here remark, that in the year 1823, by the Statute, 4th Geo. IV., c. 96, a Court was established in New South Wales, and legislative powers first granted to the Governor of that Colony (of which Van Dieman's Land was then a dependency) to be exercised with the advice of a Council of five or seven persons; in 1825, by authority of the same Statute, similar powers and forms of legislation were extended to this Colony. A cursory perusal of this Statute will suffice to show, that this Council was not [383] intended to be any check upon a Governor, who could even make laws when the majority or whole of the Council dissented; it is not to be expected, therefore, that it would contain such an enactment as that contained in the 24th section of the 9th Geo. IV., c. 83. And when a Council increased threefold in number, having extended powers, and capable of coercing any Government measure by its majority, and in fact holding the strings of the public purse, was created in 1828, by the 9th Geo. IV., c. 83, then it was natural to expect that such a provision as that to which I have alluded would be made, and accordingly, it was made by the 24th section of that Statute, and in that respect this Statute is made perpetual. Now, the Statute, 13th and 14th Vict., sect. 59, still further extends the principle of legislation, introducing the elective element, and it is under this Statute of the Queen that the Legislative Council of Van Dieman's Land first tested their power under the 24th section of the Statute, 9th Geo. IV., c. 83, to compel the attendance of a witness before a Committee of their House, and for a contemptuous disobedience of their summons to imprison that witness by the warrant of their Speaker, as for a contempt. The view and position I take of this case in giving my judgment upon the demurrer, is this, that it is my duty to say whether the law of Parliament applies to this case, and whether that law has been followed in practice, and to leave to the legislature the settlement of any doubt which may arise on the subject; and my opinion is, that the law of Parliament does not apply to this case, and that that law has not been followed by the Council in this case. The cases so often cited of *Beaumont v. Barrett*, and *Keilley v. Carson* whether [384] the latter overrules the former or not, cease, in my view of the case, to have any other effect than that of showing the mutability of all things, not excepting the opinion and judgment of the highest Tribunals of the realm. The whole list of authorities brought forth to show that powers of commitment for contempts can never be implied, but must be given expressly by Charter or Statute, are admitted by me at once; but admitted as not applicable to the present case, because, by the Statute, 9th Geo. IV., c. 83, sect. 24, I hold, that the law of Parliament was introduced amongst other laws. Here I desire not to be misunderstood, and in order to guard against error, I say that the whole of the law of Parliament is not intro-

duced, because the whole is not applicable to this Colony. None of the privileges, properly so called, of Members of Parliament, as from arrest, civil or other personal privileges, none of the powers of Parliament of determining what are, and adjudicating upon contempts not committed in face of the House, but such powers only as are incident to their high functions of legislation, and upon that to the maintenance and discharge of their office and duty, belong by law to the Legislative Council of this Colony. The examination into whatever belongs or relates to the peace, welfare and good government of this Colony, and the power of conducting such examinations by witnesses, and compelling their attendance by arrest where necessary, are the powers which by the law of Parliament they possess, and are essential to the discharge of those duties committed to them by the Imperial Parliament. In the present instance, let me ask, how has the Council executed this their power! But, I am sensible, that here I may [385] be met by a question, namely, If the law of Parliament be in force in this Colony, how is this Court to inquire or decide whether a contempt has been committed, of which that Council has, if the law of Parliament be in force, the sole cognizance? My answer is, that, as I have before stated, the whole law of Parliament is not applicable and not in force in this Colony; that as the Legislative Council is not transcendant in its powers, but in a sense made inferior to this Court, which can annul its Ordinances when made contrary to law, that is contrary to and exceeding the powers vested in it: in a word, as the Council is of limited power, therefore, the Court can look to its proceedings, and decide when it exceeds its powers and functions. And it by no means follows that because the whole law of Parliament is not in force, and because the Court can look at the Council's proceedings, that none of the law of Parliament is in force or applicable. It has been argued, I should here notice, that from the dignity of the House a respectful intendment should be made in favour of the warrant issued by its Speaker, that it should be viewed by this Court to have issued for some contempt which the House had power to punish. I can only say, as Mr. Justice Coleridge said, in *Howard v. Gosset*, 'I shall presume nothing.' How, I say, has the Council executed their power? The warrant, upon the face of it, is general, and assumes that the whole law of Parliament is in force, that any and every contempt, whatever the Council may resolve to be a contempt, is punishable by the Council: this, indeed is not the law. Contempts in face of the House obstructing the functions of legislation, and impeding its action, are within the law of Parliament, [386] and may be dealt with by the Council by that law. The Council is entrusted with the power, and has the right to inquire into everything which it concerns the peace, welfare, and good government of this Colony, for them to know; and they themselves, I think, are entrusted with the determination of what falls within that category: co-extensive with the right to inquire, must be their authority to call for the attendance of witnesses, and to enforce it by arrest when disobedience makes it necessary, and this by the law of Parliament; but they have not followed that law: instead of ordering a witness to attend in custody at their bar, after disobedience of their summons, and so enforce the witness's attendance, they have at once, in his absence, resolved that he is guilty of contempt, proceeded to punish, and ordered their Speaker to issue his warrant for his imprisonment. This act was contrary to the course of the law of Parliament, and clearly beyond the power enjoyed by that House, and is alone sufficient reason for allowing the demurrer."

The present appeal was brought from this judgment.

Sir Frederic Thesiger, Q.C., and Mr. Streeten. for the Appellants.—The question in this case is not one regarding the privileges of the Legislative Council of Van Dieman's Land, as it has been treated by the Chief Justice of the Supreme Court of that Colony, but regarding the power of the Legislative Council as a Court of inquiry to enforce obedience to its orders. The whole case is upon the record, and the facts disclosed in the pleas amount to a justification of the wrongs [387] mentioned in the declaration, and, we submit, that the judgment allowing the demurrer to such pleas cannot stand. The power to make inquiry being inherent to a Supreme Legislative body, the Court had no jurisdiction to examine the validity of the warrant. The question regards the constitution of the Legislative Council and the authority possessed by that body; and depends on the true construction of the Statute, 13th and 14th Vict., c. 59. Section 7 of that Statute, provides that it shall be lawful for the



Legislature, then by law established, in the Colony of Van Dieman's Land, by Laws or Ordinances to be for that purpose made and enacted in the manner and subject to the conditions then by law required, to establish within the Colony of Van Dieman's Land, a Legislative Council, to consist of such number of members, not exceeding twenty-four, as it shall think fit. In pursuance of this authority the present Legislative Council was established by the Colonial Act, 15th Vict. No. 1, sect. 14. A previous Statute, 5th and 6th Vict., c. 76, sect. 27, empowered the Council to make Rules and Orders for the business of the Council, and by the 13th and 14th Vict., c. 59, sect. 12, those rules were confirmed and made perpetual. The authority and power of the Legislative Council being derived from this Statute, must be construed by its enactment. The power to institute preliminary inquiries before proceeding to legislate must be incident to every Legislative body: such a power is quite distinct from any parliamentary privilege, and must have been intended to be conferred by the Statute, 13th and 14th Vict., c. 59. Then if such power belongs as of course to the Legislative Council, as we submit it unquestionably does, it follows, that that body must [388] have also the power of enforcing the exercise of their authority. Here, therefore, was a case in which, in the exercise of that authority, the Legislative Council thought fit to summon a particular witness, and that witness refused to obey such summons. Can it be argued that the Legislative Council had no power to summon? For to that extent the argument must go, if the witness has the option of attending or not attending to such summons. They cannot proceed either criminally or by civil action against him, and have no redress, if not capable of enforcing their summons by commitment. He, however, refused to attend to the summons, and then the Speaker issued his warrant, and he is arrested; upon which this action is brought. Now, the Chief Justice of the Supreme Court treats this case as a case of privilege, and as governed by the case of *Keilley v. Carson* (4 Moore's P.C. Cases, 63). That case, however, was a question of assumed parliamentary privilege, not of the exercise of power incident to Legislative action. There the House of Assembly in Newfoundland claimed the privilege of Parliament to commit for contempt, and the Judicial Committee held, reversing their previous decision in *Beaumont v. Barrett* (1 Moore's P.C. Cases, 59), that no such power was incident to that Assembly. That case is, therefore, distinguishable from the present. But independent of the wide difference between the question of privilege and power, it must be observed that the House of Assembly in Newfoundland, as well as the House of Assembly in Jamaica, owe their origin to and possess their authority under Letters Patent from the Crown, and were not created by an Act of the Imperial Legislature. It might be questioned whether the [389] Crown *ex mero motu* can confer such a privilege of Parliament as the right to commit for contempt, but it cannot be contended, we submit, that if the Crown can constitute a Legislative Assembly, it cannot give it all necessary powers for the exercise of its authority: and surely this power of enforcing the attendance of witnesses in a preliminary inquiry must be one such. The whole question in *Keilley v. Carson* was one of privilege. The learned Judge, in the judgment, says, p. 88,—“To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common law.” This shows the case to have proceeded entirely on the question of privilege and not of power. Mr. Justice Horne considered that we were asserting a right to Parliamentary privilege, and that not having proceeded to bring the Respondent before the bar of the Legislative Council, we were within the principles laid down in *Howard v. Gosset* (10 Q. Ben. Rep. 359), *The case of the Sheriff of Middlesex* (11 Ad. and Ell. 273), *Burdett v. Abbot* (14 East. 137). But we make no such claim as those cases establish: we rely entirely on the acts done, on this being a power possessed by the Legislative Council as incident to their Legislative authority, a matter within the functions of the Council, which must have power to protect itself from impediments to the due course of inquiry, and such power we claim. It is not necessary to make any claim to their possessing the *Lex et consuetudo Parliamenti*. No indictment could be sustained for non-compliance with the summons of the Legislative Council, for to sustain [390] an indictment the refusal must be in a judicial proceeding, *Gosset v. Howard* (10 Q. Ben. Rep. 452), and the act complained of must be a breach of a public duty.

Sir Fitz-Roy Kelly, Q.C., Mr. Fleming, Q.C., and Mr. F. M. White, for the Re-

spondent.—The authority claimed for the Legislative Council of Van Dieman's Land does not belong to that body in their character of a Legislative body like the House of Commons; as, of course, it cannot claim that power by usage, nor has it any judicial functions. This has been solemnly decided by the Judicial Committee, and there is nothing in this case to take it out of the rule laid down by the Committee in *Keilley v. Carson*. The power, if it exist, must be either inherent in the Legislative Council as a representative Assembly, by the Common law of the Colony, or it must be derived from express enactment of the 13th and 14th Viet., c. 59. Section 14 of that Statute enacts, that the Governors of the several Colonies, with the Legislative Councils, "shall have the authority to make laws for the peace, welfare, and good government of the said Colonies respectively." The Commission for establishing the Legislative Assembly in Newfoundland declares, that "the Governor, with the advice and consent of the Council and Assembly, or the major part of them respectively, shall have full power to make, constitute, and ordain Laws, Statutes and Ordinances for the public peace, welfare, and good government of the Island and its dependencies." The authority conferred is in both cases co-extensive and expressed in *totidum verbis*. The con-[391]struction, therefore, must be the same, and the decision in *Keilley v. Carson* held to be conclusive. But, if the objection to the assumed power is not fatal, on the authority of that case, the possession of such authority by the Legislative Council is not well pleaded. The pleas are bad: they show a case of inquiry before a Select Committee, setting out its nature, but without any averment, that such inquiry was with a view to legislation. The power of the Legislative Council to commit for contempt does not appear on the warrant, which involves of course the power assumed: the contempt complained of is not for not appearing at all, but for not appearing before the Legislative Council, after a report from a Select Committee of that body that the Respondent had neglected to obey a summons requiring him to appear before them, to be examined as a witness, but the pleas assign no cause or reason for his attendance. The resolution of the Legislative Council is, that the Respondent was guilty of a contempt, and the warrant thereupon issued to the Serjeant-at-Arms states no reason for his commitment, or that his refusal to attend at the bar as required was contemptuous. It might have been that the Order in the first instance for his attendance at the bar of the House was to explain his disobedience to the summons: he might have shown that he was exempt from giving the evidence required, had he had notice what the evidence required was; but no instruction or notice is given him throughout all the proceedings, and he is consigned to the custody of the Serjeant-at-Arms in total ignorance, as far as appears on the record, of the cause for which he is incarcerated. The warrant, therefore, is in itself invalid and void. It is scarcely necessary to inquire into the rules regarding [392] the authority of a Court to commit a witness *in poenam*, as it is not within the power of the Court of Justice, *Lamont v. Crook* (6 Mee. and Wels. 615). The Legislative Assembly is not a Court of Justice, it is no part of a High Court of Parliament like the House of Commons. The right of preliminary inquiry, which it is no part of our case to deny, even admitting the argument on the other side, that it is incident to the Council as a Legislative body, gives no authority to insist upon the attendance of witnesses. A Committee of the Council have no authority to administer an oath, and the testimony given before them could never be evidence, but only information. It is quite clear, therefore, that the Respondent's action was well brought, and that the judgment in favour of the demurrer to the pleas of justification pleaded by the Appellants was right, and must be sustained: all the authorities upon this point were fully stated and applied by the learned Judges in the Court below. The Statute, 13th and 14th Viet., c. 59, sect. 14, contains the very words that are found in the Letters Patent creating the Legislative Council in Newfoundland, and which have been interpreted by this Court in *Keilley v. Carson* (4 Moore's P.C. Cases, 83): and that authority is conclusive. The judgment of the Court below treats this head of the case very fully.

Sir Frederic Thesiger in reply.—No answer has been given to the distinction we take between a privilege and a power: all the arguments and the authorities cited either by the Respondent's Counsel here, or referred to in the judgment of the Chief Justice below, omit to notice that distinction. It is upon this ground, however, that we con-[393]tend that the case of *Keilley v. Carson* [4 Moore's P.C., 83],



and the authorities upon which that case is founded, do not apply. We do not impeach that decision. Here there was no question of Parliamentary privilege; the simple question was one of jurisdiction of a Legislative Council to enforce its own orders: that is a question of every day's occurrence; the treating it as one of Parliamentary privilege that has produced all the confusion. We do not impeach the decision of this Court in *Keilley v. Carson* [4 Moo. P.C., 83], or desire to set up the case of *Beaumont v. Barrett* [1 Moo. P.C., 59]: we simply contend that those cases do not apply.

The appeal stood over for consideration.

Their Lordships' judgment was now pronounced by

The Lord Chief Baron Pollock (17th Feb., 1858).—This is an appeal from a judgment of the Supreme Court of Van Dieman's Land, given in favour of the Respondent (the Plaintiff below), who had brought an action against the Appellants, Fenton, the Speaker, and Fraser, the Serjeant-at-Arms, of the Legislative Council of Van Dieman's Land.

The Colony is a part of Her Majesty's dominions, by occupation, and not by conquest. The authority of the Legislative Council is derived from the British Parliament, under the Statute, 13th and 14th Vict., c. 59. The Council consists of thirty-three members, one-third of whom are nominated by the Crown, the other two-thirds are elected by the inhabitants. The Council, no doubt, possess a Legislative authority: they may make Laws or Ordinances, which (on receiving the sanction required by law) become binding within the Colony. In this sense they possess Supreme legislative power.

[394] The action brought by the Respondent in the Supreme Court arose out of the following circumstances:—

During a session of the Legislative Council in the year 1855, the Council appointed (in accordance with their rules and orders) a Committee of their own body, to inquire into certain alleged abuses in the Convict Department, and the Council resolved that the Committee should have leave to send for persons in order to prosecute the inquiry. The Respondent, Hampton, was deemed a material and necessary witness in the prosecution of the inquiries. Thomas George Gregson (who had been duly elected Chairman of the Select Committee) issued a summons to the Respondent to appear personally before the Select Committee, at a certain time and place, to be examined as a witness on the subject of the inquiry. The summons was duly served. The Respondent (it must be assumed for the present purpose) wilfully, and without reasonable excuse, refused and neglected to appear, and in consequence the Select Committee was obstructed (so far as this was an obstruction) in the inquiries, and the Council was prevented from obtaining their report; thereupon the Legislative Council, being informed of these circumstances, resolved that the Respondent be desired to attend at their bar, at the Council's House at Hobart Town, on a day and hour named.

The Respondent was duly served with a summons to attend, but would not obey it, and wilfully and contemptuously, and without reasonable excuse, disregarded the summons and order, and refused to attend. The Council then resolved that the Respondent was guilty of contempt in disobeying the resolution of the Council and the summons of the [395] Speaker; and they further resolved, that the Speaker should issue his warrant for the apprehension of the Respondent, to be kept in the custody of the Serjeant-at-Arms during the pleasure of the Council.

In compliance with that resolution, the Speaker issued his warrant, and the Serjeant-at-Arms executed it, and took the Respondent into custody; and this is the trespass complained of in the Court below.

The defence to the action was founded on the circumstances above stated, which were respectively pleaded by the Speaker and the Serjeant-at-Arms, in due form, each of them professing to justify his interference by the authority of the Council to make the resolutions and to enforce them, by issuing the Speaker's warrant, and apprehending the Respondent.

The Plaintiff below demurred generally to these pleas, and the Supreme Court, probably acting on the authority of the case of *Keilley v. Carson*, decided in this Court in 1842 (4 Moore's P.C. Cases, 63), gave judgment for the Plaintiff, holding

that the facts set forth in the pleas of justification did not constitute a defence at law.

The question was argued before the Committee at considerable length, and many points were raised and discussed, upon which we think it unnecessary to form any opinion in order to decide the present question. The principal point is, undoubtedly, of great importance, involving, as it does, on the one hand, the constitutional rights and authority of the Legislative bodies in various parts of Her Majesty's Colonial territories; and, on the other, the right to personal liberty (unless deprived of it by law), which Her Majesty's subjects take with them, as part of their [396] birthright, to every portion of Her dominions. The subject is not new to this Court; it has been discussed before on more than one occasion. In the case of *Beaumont v. Barrett*, from Jamaica (1 Moore's P.C. Cases, 59), it was decided, that an Assembly possessed of supreme legislative authority had the power of punishing contempts; that the power was inherent in such an Assembly, and incident to its legislative functions; and, according to the judgment in that case, every Colonial Assembly or Council possessed the same authority to punish for contempts which the House of Commons has exercised in this Kingdom for a long series of years.

But, in the year 1842, the same question, in substance, came before this Committee on an appeal from Newfoundland [*Keilley v. Carson*, 4 Moo. P.C. 63], and was twice argued; the second time before the Lord Chancellor, two noble members of the Committee who had formerly held the great seal, the three chiefs of the Common Law Courts in Westminster Hall, two out of the four members of the Court, who were present at the decision of the case of *Beaumont v. Barrett*, the Vice-Chancellor and Dr. Lushington; and, on that occasion (4 Moore's P.C. Cases, 84), their Lordships "were of opinion, that the House of Assembly did not possess the power of arrest, with a view to adjudication, on a complaint of contempt committed out of its doors." They held that the power of the House of Commons in England was part of the "*Lex et consuetudo Parliamenti*"; and the existence of that power in the Commons of Great Britain did not warrant the ascribing it to every Supreme Legislative Council or Assembly in the Colonies. We think we are bound by the decision of the case of *Keilley v. Carson* [4 Moo. P.C. 63], the greater au-[397]-thority of which, as compared with *Beaumont v. Barrett*, it is quite unnecessary to enlarge upon. An attempt was made to distinguish the present case from those cited, the authority of the Legislative bodies in those cases being derived from the Crown; whereas, the Legislative Council of Van Dieman's Land derives its legislative authority from a Statute of the Imperial Parliament. We think there is no foundation for this distinction; and that if the Legislative Council of Van Dieman's Land cannot claim the power they have exercised on the occasion before us, as inherently belonging to the Supreme legislative authority which they undoubtedly possess, they cannot claim it under the Statute as part of the Common law of England (including the "*Lex et consuetudo Parliamenti*"), transferred to the Colony by the 9th Geo. IV., c. 83, sect. 24. The "*Lex et consuetudo Parliamenti*" apply exclusively to the Lords and Commons of this country, and do not apply to the Supreme Legislature of a Colony by the introduction of the Common law there.

It was argued, however, that as the Legislative Council had the power to make the inquiry out of which these proceedings arose, as inherently belonging to their Supreme legislative authority, the Supreme Court had no authority to examine into the validity of the warrant; but, we are of opinion that it sufficiently appeared by the pleas that this was an arrest with a view to punish for an act alleged to be a contempt, but committed away from the House of the Assembly. Their Lordships, therefore, are of opinion, that it was not justified by the pleas, and that the judgment below ought to be affirmed, with costs; and we shall advise Her Majesty accordingly.

[Mews' Dig. tit. COLONY, I. GENERAL PRINCIPLES, 6. *Legislatures*; also tit. PARLIAMENT, A. *Internal Management*, 4. *Other Matters*. S.C. 8 St. Tr. (N.S.), 873. Followed in *Doyle v. Falconer*, 1866, L.R. 1 P.C. 329. See notes to *Beaumont v. Barrett*, 1836, 1 Moo. P.C. 81; and *Keilley v. Carson*, 1842, 4 Moo. P.C. 63; and see also *Fielding v. Thomas* (1896), A.C. 600; 22 Vict. (Tasm.), No. 17: P.C. III.



49 Vict. (Tasman.), No. 25: Printed Cases in Privy Council Appeals, Colonial, N.S.W. 1847-1859.]

[398] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

*IN RE LEMPRIERE* \* [Feb. 2, 1858].

Appellant admitted to appeal *in forma pauperis*.

This was an application for liberty to prosecute an appeal *in forma pauperis* without entering into the usual sureties, and to have Counsel and attorney assigned to the Petitioner. The application was supported by an affidavit made by the Petitioner, that he was not worth £5, save his wearing apparel, and the matter in the cause, and a certificate of an Advocate of the Royal Court of the Island, that the Petitioner had good and sufficient grounds for appealing.

Mr. Buller appeared for the Petitioner.

Upon this affidavit and the certificate their Lordships made the Order as prayed (see upon this point, *Brouard v. Dumaresq*, 6 Moore's P.C. Cases, 412).

No steps have, however, been taken to prosecute the appeal.

[Mews' Dig. tit. COLONY; III. APPEAL TO PRIVY COUNCIL; 6. *Practice*;  
1. *In forma pauperis*.]

[399] ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR  
LOWER CANADA.

JEAN LOUIS BEAUDRY.—*Appellant*: The MAYOR, ALDERMEN and CITIZENS of the City of Montreal,—*Respondents* † [Feb. 4, 5, 1858].

By the Canadian Act, 14th and 15th Vict., c. 128, sec. 66, the Corporation of Montreal are authorized to purchase and acquire, or to take lands for the purpose of public improvements in that City, the value whereof, if disputed, is by section 68, to be ascertained at a Session held by the Justices of the Peace and determined by a jury specially summoned for that purpose.

Held (reversing the judgment of the Court of Queen's Bench for Lower Canada), that the jury were not of themselves qualified to assess the value, without evidence of experts, and that a party claiming compensation for land taken by the Corporation was entitled to produce witnesses as to the value: there being no express words in the Act, or necessary implication, to take away the right to have witnesses sworn and examined, and that the Justices of the Peace were wrong in refusing to take such evidence.

Held further, that the Justices being under the Act competent to swear a jury were competent to swear witnesses on the Claimant's behalf [11 Moo. P.C. 425].

In order to constitute acquiescence, or waiver, it must be shown, that the party said or did something to give the Court a jurisdiction it did not possess. Mere respectful acquiescence, or submission to the ruling of a Court, will

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Lord Chief Baron of the Exchequer (The Right Hon. Sir Frederick Pollock), and the Right Hon. The Lord Justice Turner.

† Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Lord Chief Baron of the Exchequer (the Right Hon. Sir Frederick Pollock), and the Right Hon. The Lord Justice Turner.

not amount to a waiver of a right to complain of an illegal decision [11 Moo. P.C. 426].

This appeal was brought from a judgment of the Court of Queen's Bench for Lower Canada, which [400] confirmed a previous judgment of the Superior Court for Lower Canada, in a petitory action brought by the Appellant, the owner of a small piece of land which had been taken possession of by the Respondents, the Corporation of the City of Montreal, under the powers of the Canadian Act, 14th and 15th Viet., c. 128, which authorized them to purchase and acquire, or to take land, or real property, of any description within that City, as might be deemed necessary, for opening new streets, etc., for the purpose of public improvements in the City of Montreal.

The Act in question, the 14th and 15th Viet., c. 128, entitled, "An Act to amend and consolidate the provisions of the Ordinances to incorporate the City and Town of Montreal, and of a certain Ordinance and certain Acts amending the same, and to vest certain other powers in the Corporation of the City of Montreal." Section 66 enacted, "That the Council of the City of Montreal should have full power and authority, notwithstanding any law to the contrary, to purchase and acquire, or to take and enter into, after paying, tendering or depositing the value thereof, to be ascertained as hereinafter provided, possession of such land, ground, or real property of any description [401] within the said City, as might by the said Council be deemed necessary, for opening new streets, squares, market places, or other public highways or places, for continuing, enlarging, or otherwise improving those streets, squares, market places or other public highways or places, now made, or the neighbourhood thereof, or as a site for any public building to be erected by the said Council, and to pay to or for the use of the proprietor or proprietors of such ground or real property, and out of the funds of the said City now in, or which shall hereafter come into their hands, such sum or sums of money, as may be agreed upon, as the value of such ground or other property by the proprietor thereof and the said Council respectively, as may be ascertained in the manner hereinafter mentioned, in case they shall not so agree upon the same." Section 68 enacted, "That, in all cases where the said Council, and the persons seised or possessed of, or interested in, the said pieces or parcels of ground or other real property, or any of them, or any part thereof, should be absent, or should not be known, or should not by voluntary agreement, settle and determine the price or prices, compensation or compensations, to be paid for the said premises, or any part thereof, such price and prices, compensation and compensations, should be ascertained, fixed and determined in manner following: (that is to say). The Justices of the Peace resident within the said City and Town of Montreal, in a Special Session to be for that purpose holden, upon a petition to them addressed, and upon proof that notice in writing was given one month previously to the party seised, possessed of, or interested in, such pieces or parcels of ground or real property, or his or her or their tutor, curator, adminis-[402]-trator, attorney, agent, or curator *ad hoc*, or in the event of the said party being absent from the District of Montreal, and there being no curator, administrator, attorney, agent or curator *ad hoc* to the said party, then upon proof that public notice was given and published at least twice a week for two months in at least one newspaper published in the English, and in at least one newspaper published in the French, language in the said City, of the intention of the said Council to present such petition to the said Justices of the Peace, for the purpose of taking possession of, entering into and appropriating to the use of the said Corporation, such pieces or parcels of ground or other real property, should summon a jury of twelve disinterested persons taken from among the persons resident within the said City, qualified to be special jurors, or jurors in civil cases: and the said jury should determine upon their oaths, the amount of the price or compensation which they should deem reasonable to be paid by the said Corporation, for such pieces or parcels of ground or real property as aforesaid. Provided always, that any determination as aforesaid, in which any nine of the jurors should agree, should, for the purposes of this Act, have the same effect as if all the jurors had agreed therein: and provided further, the said jurors should



not, as theretofore, be taken irregularly from the list of persons qualified to be such jurors in civil cases, but a sufficient list of jurors should be made out in rotation, in the order in which the names may stand on the said general list of persons residing in the said City of Montreal, qualified to be such jurors in civil cases, beginning therein from where the names have been last taken for a trial by jury; and the jury or panel of jurors to determine [403] the price or compensation of the land, or other fact in which the said Corporation is interested, should be selected or struck from the said list of jurors so made or taken from the said general list as aforesaid in the same way that lists of special jurors or jurors in civil cases were then or might thereafter be selected or struck for the trial of any issue between individuals in civil cases; and jurors empanelled to determine as aforesaid the price or compensation to be made for real estate, required by the Corporation, were thereby required not to award, in the manner theretofore done, the actual and abstract value of the property taken or to be taken by the said Corporation, but on the contrary to determine and award what may be the damage to, or deterioration in value (if any) of, the residue of the property, by the separation from it of the part required by the said Corporation, and the application of the said part to the purposes or improvement for which the same is so required; and when no damage might be occasioned to the residue of the said property by the said separation from it of the part required as aforesaid, or when on the contrary the said residue of property was increased in value by the improvement, then that the said jury should not award any price or compensation for the part as required, taken or to be taken by the said Corporation as aforesaid." Section 69 enacted, "That on payment of the price or prices, compensation or compensations, to be fixed and determined as aforesaid, or in case of refusal or neglect to accept the same, or in case it should be doubtful to what person or party the same should of right belong, on the deposit thereof in the hands of the Prothonotary of the Superior Court sitting for the District of Montreal for [404] the use of the person or persons or party entitled to the same, the right of property, title and interest in and to such pieces or parcels of ground or other real property respectively for such price or prices, compensation or compensations, should be payable, should be divested out of the person or persons or party seised and possessed thereof, or entitled to the same, and should become and be vested in the Corporation of the Mayor, Aldermen and Citizens of the City of Montreal; and the Council of the said City might, after fifteen days' notice in that behalf to the proprietor, possessor or occupant of the piece or parcel of land to which such award should relate, enter upon, take possession of and use such piece or parcels of land for any of the purposes authorized by this Act; any law, Statute or usage to the contrary notwithstanding." Section 74 enacted, "That in all cases where the proprietors of the majority, that is to say, of the largest part in value of the real estate in any street, square, or section of the City, might apply to the said Council for any specific local improvement in or to the said street, square or section, other than the repairing of the streets thereof, it should be competent for the said Council to allow the same; and for the purpose of defraying and covering the cost of the said specific improvement or any part thereof, which the said Council might determine to be borne by the parties interested in the same, the said Council was thereby empowered to impose and levy by Bye-law a special rate, tax or assessment on all real estate in the said street, square or section of the City benefitted or to be benefitted by the said improvement, according to the assessed value thereof, sufficient to cover the expense of the said improvement, in whole [405] or in part, as the said Council might decide, which said rate, tax or assessment, it should also be in the power of the said Council, if the said Council saw fit, to regulate and apply to and upon such real estate to be rated, taxed or assessed, and in proportion to the amount of benefit which shall be conferred thereon by the said improvement."

The Appellant, in January, 1855, commenced an action against the Respondents, in the Superior Court sitting for Montreal, to recover the land of which the Respondents had dispossessed him, under the provisions of the above Act. The declaration stated, that the Appellant had become possessed of and well entitled to two plots of land in the City of Montreal, which had been united into one lot of the following dimensions, viz., 32½ feet in width, and 78 feet 3 inches, French measure, in length, bounded in front by St. Paul Street, in rear by the representatives of

James Dunlop, that is to say, by John Gordon McKenzie, on one side by Joseph Street, and on the other partly by the representatives of Busby, and partly by the representatives of Dunlop; that whilst the Appellant was proprietor in possession of the land, to the knowledge of the Respondents, they, on the 18th of December then last past, against the Appellant's will, seized and took possession, by an act of trespass, of a part of the Appellant's lands, to wit, a part adjoining laterally St. Joseph Street, measuring 9 feet in width, by all the length of the land; that upon the strip of land whereof the Respondents had thus seized and possessed themselves, there was a stone wall incomplete, which the Appellant had caused to be constructed, of the value of £100; that after the Respondents seized upon the strip of land they con-[406]structed a footpath, and had refused to restore the land to the Appellant, who was unable to continue the building he had commenced to erect upon it, to the damage of £1000, and the Appellant concluded that he might be declared proprietor of the strip of land which the Respondents had seized, and that the Respondents might be condemned to restore it to him, and to pay him, as damages and for the issues and profits of the land, the sum of £1000.

The Respondents pleaded, that by virtue of different Ordinances and Provincial Acts, and particularly of the Act, 14th and 15th Vict., c. 128, they had authority to acquire land in the manner stated in the Act and set forth in the plea; that pursuant to that Act, they had determined to enlarge St. Joseph Street, on the west side, according to a plan submitted, by increasing it 36 feet in breadth; that they had instructed their Advocate, Pelletier, to adopt the requisite proceedings to acquire such portions of the land as were necessary for the enlargement of the street, according to the formalities prescribed by the above-quoted law; that amongst the lands situate on the west side of St. Joseph Street, was that of the Appellant, of which it was necessary to acquire a slip of 65 feet 9 inches in length along the line of St. Joseph Street, and 8 feet 9 inches along the line of St. Paul Street; that the Respondents had given the Appellant notice pursuant to the Act requiring the land for public purposes, and that after the time fixed by the notice they had presented to the Justices of the Peace for the district of the City of Montreal, in Sessions, a requisition calling upon them to summon a jury, duly qualified to assess the amount of compensation to be paid to the Appellant for the land [407] required; that the compensation was duly assessed in the presence of the attorneys of the Appellant, at £650; that the Respondents duly tendered that amount to the Appellant, and on his refusing to accept it they deposited it in the hands of the officer of the Superior Court sitting for the district of Montreal, and that thereupon the Respondents took possession of the land in question, and appropriated it to the enlargement of the street, and therefore the Respondents claimed to be maintained in possession, and to have the action dismissed with costs.

The Appellant replied, denying that the Respondents became possessed of the land by means of the expropriation thereof alleged in the plea, and further insisted that the notice given to him by the Respondents' advocate was not such as the law required, and that such notice was illegal; that the Appellant, on receipt of the notice, made known to the Respondents the nullity of it; that when the Respondents presented their petition to the Justices of the Peace, the Appellant protested against the want of a sufficient notice, and excepted to the proceedings, but the Justices dismissed his exceptions, and that in the absence of a proper notice the Justices' proceedings were illegal; that the Respondents had not shown in their petition to the Justices that the improvements were duly demanded by the proprietors of land in the locality; that the verdict of the jury was null because not preceded by the requisite formalities, and because the jury did not render a verdict according to law; that the Respondents should have tendered the amount of the verdict at once, and not have delayed doing so for more than four months, and that the tender was then insufficient, as interest should have been added [408] to the capital amount; that the land claimed by the Appellant in the action was not only the portion of land required by the Respondents in their demand for expropriation, but also a small strip of ground which the Appellant had purchased, and which the Respondents had taken possession of and unjustly detained from the Appellant.

The Respondents answered the Appellant's replication, first, by a general denial of all the allegations contained in it, and secondly, by a general assertion of the truth of their plea.



Witnesses were examined, and from the evidence produced on the part of the Appellant and Respondents respectively, the following facts were established:— That on the 1st of May, 1854, the Appellant duly acquired from the Sheriff of Montreal, a piece of land, situate in the City of Montreal, containing  $32\frac{1}{2}$  feet in front, by  $74\frac{1}{2}$  feet in depth, French measure, bounded in front by St. Paul Street, and in rear by James Dunlop, on one side by St. Joseph Street, and on the other by the representatives of Busby, and partly by the representatives of Dunlop, with the ruins of a building thereon, and with the right of *Mitoyenneté* in the stone wall erected upon the rear of this ground; on which day Pelletier, as the Advocate and Attorney *ad lites* of the Respondents, gave in that quality a written notice to the Appellant, informing him that the Respondents, availing themselves of the Act, 14th and 15th Vict., c. 128, intended to acquire from him, for the purpose of enlarging St. Joseph Street, a strip of his land of the following dimensions, 8 feet 8 inches in width upon the front of the lot of land in St. Paul Street, 9 feet in width upon the rear of the lot, and 75 feet 9 inches in [409] length, the whole English measure. And it was declared in the notice, that such improvement had been demanded from the Council of the City on the 23rd of August, 1852, by a majority of the proprietors of St. Joseph Street, and that in order to obtain it the Respondents would present a petition on the 5th of June, 1854, to the Justices of the Peace assembled in Session, to summon a jury to determine the value of the strip of land. It appeared from a resolution of the Council, that Pelletier had been appointed on the 5th of February, 1855, Attorney and Counsel of the Corporation, with authority to appear in all cases wherein the Corporation might be interested, but no special authority to Pelletier to give the notice to the Appellant was proved. The Appellant, on the 13th of May, 1854, by deed passed before notaries, informed the Respondents that he did not intend to be dispossessed upon the notice given him by Pelletier, in his quality of Advocate of the Respondents; that he considered that the notice was null in law, inasmuch as Pelletier had no power to give it, and none of the formalities required by law had been complied with. Notwithstanding this protest, the Respondents, on the 3rd of June, 1854, presented a petition to the Justices of the Peace, assembled in Session at Montreal, declaring that on the demand of certain interested parties, conformably to the 74th section of the Act, they wished to acquire the before-mentioned strip of land, and concluding that a jury might be summoned and sworn to value the same; and in support of their petition, they produced the notice given to the Appellant by Pelletier. On the same day the Appellant appeared before the Justices of the Peace, and produced a declinatory exception, by which he [410] alleged that the Justices of the Peace could not take cognizance of the petition of the Respondents, inasmuch as the Respondents had not given him the month's notice, required by the 68th section of the Act, of their intention to present a petition to dispossess him, and because the Court of Sessions had no proof that the improvement had been demanded by a majority of the proprietors of the street or section of the City to be benefitted; that the Respondents had not made any offer to the Appellant to acquire by consent his land; and that none of the conditions required by law for the purpose of an expropriation had been observed, and the same reasons, together with others, were pleaded by a peremptory exception or plea. The Justices of the Peace were of opinion, that the notice of a month which had been given to him by Pelletier was legal, and that all the formalities had been observed; and, in consequence, they dismissed the Appellant's exceptions, and thereupon summoned a jury to determine the value of the land. The jury was chosen under protest on the part of the Appellant, who also desired to produce witnesses before the jury, to establish certain facts relative to the value of the property, and to establish his damage in consequence of the intended expropriation; but the Court declared, that they had no power to administer an oath to such witnesses, and that the jury would not hear witnesses, as they are satisfied. A verdict was returned by nine of the jurors appraising the land at £650. The proceedings were removed by Certiorari, by the Appellant, into the Superior Court, by whom the writ of Certiorari was quashed. It further appeared from the evidence, that the Appellant in October, 1854, acquired from [411] one of the representatives of Dunlop named McKenzie, a strip of land adjoining that before described, by means of which acquisition the land originally purchased by the

Appellant from the Sheriff was enlarged to the following dimensions, viz., 32½ feet in width, by 78 feet 3 inches in length, French measurement, and as the Respondents did not tender the amount of the verdict, the Appellant, in October, laid the foundations of a building extending over both parcels of land. The Respondents, however, on the 31st of October, 1854, tendered to the Appellant the sum of £650, and on his refusal to accept it they deposited the amount in the office of the Superior Court, and on the 14th of December, 1854, began to appropriate the strip of land claimed by their notice of expropriation by making thereon a footpath which they completed on the 19th of the same month, when they took possession not only of that strip of land, but also of a strip in addition, 19 inches in length by 9 feet in width, part of that purchased by the Appellant in October, 1854, from McKenzie, and upon which the foundations had been laid.

The Superior Court (Mr. Justice Mondelet dissenting) delivered judgment on the 19th of April, 1855, in favour of the Respondents, declaring that they had acquired the land claimed by means of the expropriation, and dismissed the Appellant's action with costs.

The Appellant appealed against this judgment, to the Court of Queen's Bench for Lower Canada, relying upon the following grounds:—First, that the judgment should have been rendered in his favour and against the Respondents. Second, that all the allegations contained in the declaration were well founded, both in fact and in law, and that all the facts alleged [412] by the Appellant in his action had been legally proved. Third, that all the allegations in the exception and defence of the Respondents were unfounded in law and in fact, and that the Respondents had not proved the facts alleged in their exception. Fourth, that the judgment had been rendered contrary to law and justice, and the facts proved in the cause. And fifth, that the Appellant had established that he was the owner of the realty in question, and that the Respondents had illegally possessed themselves of it, and that they had not justified the taking possession.

The Court, consisting of the Chief Justice, Sir L. H. Lafontaine, and the Puisne Judges, Aylwyn, Duval and Caron, were divided in opinion. Mr. Justice Aylwyn was of opinion, that the Court ought to enter into an examination of the question of the validity or invalidity of the proceedings before the Justices of the Peace, but the other Judges were of a contrary opinion. The material part of the judgment pronounced by the Chief Justice on the 2nd of July, 1856, was as follows:—"We think that these proceedings, even if they were supposed to be irregular or defective, are exempt from any criticism on our part, for the law has not given jurisdiction to this Court to examine them. If, notwithstanding the silence of the Act of 1851, on the subject, the proceedings of the Justices of the Peace were subject to the revision of another Tribunal, it appears to me that a proceeding by Certiorari was the only remedy open to Beaudry, and that was, in fact, the one which he adopted on the occasion, prior to the Respondents' taking possession of the land. Mention of this fact is made in the *Procès Verbal* of the proceedings of the Justices of the Peace, in their [413] Special Session of the 6th of June, 1854, as well as in the Exhibit No. 16 of the Respondents. This proceeding by Certiorari was instituted before the Superior Court, the only Tribunal before which it could have been brought. In fact, besides the following general provisions of the Judicature Act of 1849, c. 28, sec. 7,—That, excepting the Court of Queen's Bench, all Courts and Magistrates, and all other persons, and bodies politic and corporate, within Lower Canada, shall be subject to the superintending and reforming power, order and control of the said Superior Court and of the Judges thereof, etc., etc.—another Act, of the same year, c. 41, which has special reference to Prerogative Writs, expressly enacts, sec. 16,—'That all Writs of Certiorari shall issue out of the Superior Court.' It appears that the judgment of the Superior Court was adverse to the pretensions of the Appellant, Beaudry. From that judgment there is no appeal. The proceedings before the Justices of the Peace, and the verdict of the jury, are, therefore, excluded from our examination. They are beyond our jurisdiction. Moreover, by means of the Certiorari, the Superior Court had before it the Record of the proceedings of the Justices of the Peace, and could, therefore, decide upon the knowledge of the facts, *en connaissance de cause*. Its decision upon the Certiorari has now, to all intents and purposes, the effect of a final judgment,



*chose jugée, rei judicatae.* The case is not the same with this Court. We sit here as a Court of appeal from certain judgments rendered by the 'Superior Court;' and which the law allows to be appealed from, within a specified delay. It must be remarked, that there has been no appeal from the judgment rendered by the Superior Court, [414] on the Certiorari of Beaudry, even supposing for a moment that an appeal would lie from that judgment. We have not before us the Record of the proceedings had before the Justices of the Peace; and we have no means of causing that Record to be brought before us. All we can find in the Record of the present case, are only copies of certain proceedings, which took place before another Tribunal; which copies have been produced by the parties to the proceedings before us, either in support of, or in opposition to, Beaudry's petitory action (according to whichever interpretation they are susceptible of), only as matter of proof, and not as matter subject to revision, as being the judgment of a Court of Justice, to be reversed or affirmed, on the appeal instituted before us. It is not, therefore, under this latter character that we are called upon to regard them. Among the number of these copies is to be found the verdict of the jury. This copy being duly certified, the Respondents have authentic evidence, that the indemnity to be paid to Beaudry was fixed, according to law, by a jury, at the sum of £650, and that the verdict of the jury is in full force, and has become inassailable, having acquired the force of a final judgment, *chose jugée*. That is sufficient to justify the deposit made by the Corporation of the said sum of money, and their taking possession of the land. It must not be inferred from what I have just said, that if we were called upon to decide upon the validity or invalidity of the proceedings before the Justices of the Peace, that I would concur in the opinion of my learned colleague, on the different points in his explanations. First. The objection drawn from the fact, that the notice of one month, dated the 1st of May, 1854, was [415] given, not by the Mayor and Clerk of the City Council, but merely by Pelletier, as 'Advocate and Attorney of the Corporation of the City of Montreal,' does not appear to me to be tenable. That notice being the commencement of a judicial proceeding, namely, of a compulsory expropriation, Pelletier did not require, under our laws, to have a special power of attorney to give it. His commission (*sa qualité*), as Advocate and Attorney, was sufficient to cause him to be considered, *prima facie*, as duly authorized by the Corporation to act in its name, so long as he was not disavowed by that body. According to our laws, Beaudry had no right to call his authority in question. The Statute of 1851 does not exact that the notice of one month should be signed by the Mayor, or by any other person in particular; it might, therefore, have been signed by 'the Advocate and Attorney of the Corporation,' subject, nevertheless, to his responsibility for damage towards Beaudry, if it afterwards occurred that he was rightly disavowed by the Corporation. Even supposing a written power of attorney was necessary, that which had been given to Pelletier, by the resolution of the City Council, on the 11th of June, 1851, authorizing him 'to appear in all cases in which the Corporation was interested,' and which Beaudry admitted to be in force during the whole of the year 1854, ought to be sufficient to have authorized him to give the notice in question. But there exists other reasons for maintaining the legality of Pelletier's act. The act has since been approved and ratified by the Corporation itself. This results from the proceedings of the City Council on the 13th of June, 1854: from the offer and deposit of the sum of £650; and from the taking possession of the [416] land. Beaudry has consequently no grounds ever to fear a disavowal by the Corporation of the acts of Pelletier. Second. The Statute does not require that an offer should be made previous to the notice in question. The object of the notice of one month, is principally to advise the proprietor, in a regular and legal manner, of the intention and wish of the Corporation to acquire his property. In such cases, sound reason more naturally requires that it should be incumbent on the vendor to state the price he expects to receive. The notice gives the parties a month's delay, for the purpose of enabling them to effect an amicable settlement. The initiative, to effect this settlement, may be taken by either of the parties, as the Statute contains no provision on the subject. Beaudry, himself, by his protest of the 13th of May, 1854, demanded the sum of £2000 currency, from the Corporation, as being, in his opinion, a reasonable compensation for the ground which the Corporation desired to acquire from him, as

stated in the notice of the 1st of May, 1854. As he no doubt must have foreseen, his offer was not accepted. Hence, the necessity of continuing to proceed to the compulsory expropriation, in due course of law. Third. As to the question of interest on the amount of the compensation, none could have been offered, because none was owing. The Corporation did not acquire the property, and could not take possession of it, till after deposit made of the compensation; until then, the proprietor remained in the possession and enjoyment of his land. By what right, therefore, could he claim interest? Fourth. With respect to the time when the offer should have been made to pay the amount of the compensation, the Statute does not fix the time. I [417] think, however, that if the Corporation were unjustly *in mora*, the proprietor ought to have his remedy. It would be by means of an action, to cause the time to be fixed by a judgment, within which the payment of the compensation ought to be made, under pain of forfeiture of the rights acquired by the Corporation up to that period. It is the sole remedy that, owing to the silence of the Statute on the subject, the Common law can offer to the proprietor, so long as we have no better Legislative provisions in matters of compulsory expropriation. But, in the present case, the delay of which the Appellant complains, ought to be imputed to himself, and not to the Corporation, on account of the *Certiorari* which was the cause of it. That appeal by *Certiorari* had, necessarily, the effect of suspending all action on the part of the Respondents. Fifth. The neglect or absence of an assessment specially made, on the real estate of all proprietors, who, in 1852, may have petitioned the City Council to obtain an order to widen that part of St. Joseph Street, where the property in question is situated, cannot be a legal objection. It is true that, in the terms of the Statute of 1851, sec. 74, the City Council might impose such a special assessment for the purpose of the proposed improvement, if it saw fit. But the Council was not obliged to do so, and the Appellant had no right to exact that it should have been done, inasmuch as his interests could not be affected in the least either by the existence or non-existence of such a special assessment. He had only to deal, and could only deal, with the Corporation, and not with the proprietors of the real estate above mentioned. In point of fact, provided the amount of compensation were paid to him, [418] or actually offered to be paid to him, and afterwards, upon his refusal to accept it, deposited in the hands of the Prothonotary of the Superior Court, it was indifferent to him if the amount were taken out of the general funds, or out of any special fund at the disposal of the Corporation. Besides, the latter had the power to make the acquisition in question, independently of any demand on the part of the neighbouring proprietors. Sixth. With regard to the last objection—that drawn from the allegation that the jurors had not heard witnesses on the part of the Appellant, but had even refused to hear such witnesses—I admit that this objection may appear plausible, at first sight, and that it may appear to afford room to the Appellant, to complain of an injustice having been done him; an injustice, however, which exists only in appearance. This Court cannot judge of the fact from personal knowledge, *en connaissance de cause*, because it has not, and cannot have, before it, the record of the proceedings of the Justices of the Peace. If we could have had this record legally before us, especially in the state in which it was returned to the special jurisdiction of the Justices of the Peace of Montreal, after it had been sent up by *Certiorari* to the Superior Court, it may be that the Respondents could have explained this pretended refusal to hear witnesses in a satisfactory manner. They might have maintained that, according to circumstances, Experts most frequently take upon themselves the duties of witnesses, in consequence of the special knowledge they have of the facts; and that, when it is a question of jurors to value properties, these jurors, being nothing other than Experts, they might, if they possessed themselves a sufficient knowledge of the value of the property, [419] faithfully fulfil the object of their appointment, without any examination of witnesses; an examination, upon which, be it remembered, *en passant*, the Statute of 1851 is altogether silent. But, once more, it must be observed, we are not called upon, and cannot be called upon, in this appeal, to examine the question of the validity or the invalidity of the proceedings which took place within the special jurisdiction of the Justices of the Peace, or of the award or verdict of the jury empanelled by them."

The appeal was from this judgment.



Sir Frederick Thesiger, Q.C., and Mr. Ayrton, for the Appellant.—It was not established before the Justices of the Peace at the Sessions, that the improvement was demanded by a majority of the proprietors of the largest part in value of the real estate in the proposed new street, as required by the 74th section of the Canadian Act, 14th and 15th Vict., c. 128, or, that the Appellant had been invited to an amicable and voluntary settlement of the value of the land, as provided by sections 66 and 68 of that Act. That being so, the whole proceedings must be considered as irregular. Being under an Act of the Canadian Legislature, the Corporation must strictly pursue the course directed by the Act, or the proceedings are void, *Taylor v. Clemson* (2 Q. Ben. Rep. 978; S.C. 2 Gall. and Dav. 11; and upon appeal, 11 Clk. and Fin. 610). So it has been held upon a construction of clause in a private agreement, *Tripp v. Armitage* (4 Mee. and Wels. 687)—[Mr. T. Pemberton Leigh: It may be a question whether the French or English law is to govern this [420] case.]—The Court below treated this case as one of English law. The next objection is, that Pelletier had no authority to give notice to the Appellant that the land in question was required for public purposes; he was merely the attorney, *ad lites*, of the Corporation, and had no special authority to act for them in this particular matter. Moreover, the notice was not under seal. The Appellant, therefore, was fully justified in refusing to recognize such notice, it being invalid, and the subsequent recognition of the authority by the Corporation will not make the notice good, *Doe d. Mann v. Walters* (10 Barn. and Cr. 626. S.C. 5 M. and R. 357). But the chief, and, as we submit, fatal objection is, that the Court of Sessions of the Justice of the Peace refused to swear and examine the Appellant's witnesses. He tendered witnesses to depose to the value of the land in question, for the purpose of estimating the amount to be awarded him for compensation. The Court below held, that as the Tribunal was created by the Canadian Act, 14th and 15th Vict., c. 128, and as no express authority was given by section 68 to swear witnesses, they had no power to administer an oath to the witnesses. Nothing can be more unfounded or fallacious. The Court consists of Justices of the Peace, who decide with the assistance of a jury. Such jury must be sworn. By and before whom? Why, the very Justices who say they have no power to administer an oath. But for what purpose is the Court constituted? Why, to estimate the compensation and assess the damages. How can they do that, and how can either the Justices or jury arrive at any conclusion without hearing witnesses? If witnesses are tendered they must be sworn. The refusal to hear witnesses was a [421] denial of justice. Again, the Respondents did not, within a reasonable time after the verdict, proceed to take the benefit of it, by tendering the amount assessed for compensation, or deposit the same with interest, from the finding of the jury till the tender into Court.

Mr. Hugh Hill, Q.C., and Mr. Unthank, for the Respondents.—None of the objections urged against the judgment of the Court below can prevail. The 78th section of the Canadian Act, 14th and 15th Vict., c. 128, does not require that the jury notice should be preceded by any offer of a sum for compensation, by either party. It is quite sufficient if no voluntary agreement has taken place. Neither is the objection that the notice is insufficient as being signed by Pelletier alone of any force. The Act does not require that a jury notice should be signed or sealed by the Corporation. Such notice was, therefore, sufficiently given by him as their attorney, and that act has been since recognized and confirmed by them. But supposing there was any defect in the preliminary proceedings, it was cured by the appearance of the Appellant at the Sessions, and by his proceeding with the case. The question as to the regularity of the proceedings before the Justices cannot be reviewed in this action; it could only be so by means of a *Certiorari*. *The Queen v. Bolton* (1 Q. Ben. Rep. 66), *Taylor v. Clemson* (11 Clk. and Fin. 649), *The Queen v. The Committeemen for the South Holland Drainage* (8 Ad. and Ell. 429). If there was any defect it was only one of procedure, which is not fatal, *The London and North Western Railway Company v. Smith* (1 Mac. and Gor. 221). The other objection, that the [422] compensation money was not tendered, is also untenable. The Act in question does not fix any time within which the price assessed by the jury must be tendered, or paid into Court, nor does it direct that interest shall be paid for the period between the assessment of damages by the jury and the payment into Court. Lastly, the objection, now for the first time raised, to the refusal to hear the witnesses tendered by the Appellant at the Special Sessions, we submit, can-

not be entertained upon this appeal, as that question was not raised by the pleadings, nor is it at issue in any of the proceedings.

Judgment was reserved, and now delivered by

The Lord Chief Baron Pollock (17th Feb., 1858).—This was an action of trespass for taking possession of the land of the Plaintiff. The defence was, that the Mayor, Aldermen, and Citizens of Montreal had acquired a right to it under the provisions of an Act passed by the Local Legislature of Canada, the 14th and 15th Vict., c. 128, secs. 66, 68, 69.

The Plaintiff bought the property at a public auction for between £100 and £200. On the very day the conveyance was executed, he was served with a notice that the Corporation would take steps to acquire the part of the property they wanted for some public improvement; and at the end of a month, they petitioned the Justices, under the 68th section of the Act, to summon a jury. The Plaintiff protested then, and objects now, that the Mayor, Aldermen, and Citizens of Montreal ought to have endeavoured to make a voluntary agreement before he presented a petition to the Justices. The Plaintiff [423] also objected that Pelletier, their attorney, who gave the notice to the Appellant on behalf of the Corporation, had no sufficient authority to give the notice; that he was only their agent for suits; that a special authority was necessary for this purpose; and that the notice ought to have been under seal.

The Justices, under the 69th section, assembled a jury: the Plaintiff attended under protest: Counsel were heard: some evidence was given of the deeds of conveyance to the Plaintiff below, but whether by consent, or how, does not appear: when, however, the Plaintiff proposed to call witnesses to prove the amount of his claim, the Justices said they had no power to administer an oath to them, which we think must be understood to be a refusal to hear them, as they could not be sworn, and the jury said they did not require, and would not hear, witnesses. The jury returned a verdict for £650. The Mayor, Aldermen, and Citizens of Montreal, allowed the matter to rest for five months, and then tendered the money: paid it under the provisions of the Act, and took possession, which is the trespass complained of.

The Plaintiff then obtained a *Certiorari* to bring up the proceedings of the Justices. The Superior Court held, that what took place before the Justices was not a "judicial proceeding," that a *Certiorari* did not lie, and they quashed the writ.

The Plaintiff, thereupon, brought the present action in the Superior Court. In the proceedings in that action, evidence was given of what the Justices had decided, and what the jury had said and done. The Court (there being four members) was divided; three decided against the Plaintiff altogether (though part of his complaint was for taking a small portion of the [424] property not included in the notice), one member of the Court was in favour of the Plaintiff. We have no statement before us of the grounds of the decision of the majority of the Court, or of the reasons of the dissenting Judge for not concurring with the rest of the Court.

The Plaintiff appealed to the Court of appeal. In his statement of facts he mentions the points of the refusal to swear the witnesses by the Court, and the refusal to hear them by the jury: but he does not specially mention this in the grounds, or reasons, of the appeal, but he alleges a general ground that the proceedings were illegal.

The members of the Court of appeal differed: they all concurred in rectifying the error of the Court below, as to the small portion of land taken which was not included in the notice: but three of the Judges gave judgment against the Plaintiff, and the remaining Judge assigned his reasons for dissenting, and these judgments are before us. On this the Plaintiff appealed to Her Majesty in Council. We think it is not necessary to decide, and we express no opinion, on any of the objections which have been argued before us, except that which relates to the proceeding before the Justices under the Canadian Act in question.

That Act had recently passed, and probably this was the first time it was resorted to by the Corporation to acquire property in land.

The first question is, whether the meaning of the Act was, that the jury should be assembled by the Justices and sworn, and then should decide, with or without evidence, at their pleasure, acting as Experts and arbitrators, and not as a jury.



Now, by the 70th [425] section (*a*), which has not been alluded to either here, or by the Court below, the same mode of proceeding is made applicable to various cases of damage to real property requiring compensation; and, among others, to the removal of any establishment by virtue of any bye-law. It seems impossible that the privilege of having witnesses sworn and examined could be intended to be taken away, in all cases, under the 70th section; and, if not under the 70th section, then not under the 68th section; and, indeed, in any case, where a jury is summoned and sworn to determine and award the amount of compensation, it would, in our judgment, require express words, or an implication of absolute necessity, to take away the Claimant's right to have his witnesses sworn and examined. We think the Act did not take this right away. If the Justices were competent to swear the jury, so were they to swear the witnesses; and, in our judgment, the witnesses might have been, and ought to have been, sworn and examined.

[426] There are then only two remaining questions:—Has this objection been waived? And, can we take notice of it? It seems to us, that when the Justices decided that they had no power to administer an oath, and, therefore (as we consider), declined to swear the witnesses and receive their testimony, the Claimant could do nothing more than he did; it was not his business to protest in Court, but respectfully to submit to a legal decision. In order to prove that he acquiesced, and waived his right to complain of an illegal decision, it ought to be shown that he said or did something to give the Court a jurisdiction which the Act in question did not give them. Mere respectful acquiescence, or submission to the ruling of the Justices, will not, we think, amount to a waiver.

Then, lastly, can we notice this objection? It is certainly before us as a fact; and as the Act does not direct any judgment to be given, or make the proceedings conclusive and final, we think any manifest failure of observing the fundamental forms and principles of the administration of justice would vitiate the proceeding before the Justices, and render it null and void; and we shall advise Her Majesty, to reverse the judgment, and, in as far as the same has been appealed against, give judgment for the Plaintiff, remitting the case back to the Court below to assess the damages, each party paying his own costs in this appeal.

[Mews' Dig. tit. APPEAL, II. To HOUSE OF LORDS, 1. *When appeal lies*; tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America*; tit. WAIVER AND ACQUIESCENCE, 1. GENERAL PRINCIPLES, c. *Waiver*. S.C. 6 W.R. 346.]

(*a*) This section enacted "that all the provisions and enactments of the two sections immediately preceding this section, with regard to the mode in which the value of any real property taken by the said Council shall be ascertained, and the amount thereof paid or deposited in certain cases, shall be and are hereby extended to all cases in which it shall become requisite to ascertain the amount of compensation to be paid by the Council, to any proprietor of real property, for any damage by him sustained, by reason of any alteration made, by order of the said Council, in the level of any footpath or side walk, or by reason of the removal of any establishment, subject to be removed by any bye-law that may be passed under the 56th, or other sections of this Act, or to any party, by reason of any other act of the said Council, for which they are bound to make compensation, and with respect to the amount of compensation for which damage the party sustaining the same, and the said Council, shall not agree."

## [427] ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

JOSEPH EMANUEL ALLEN,—*Appellant*: Sir THOMAS HERBERT MADDOCK.—*Respondent* \* [Feb. 19, 1858].

Incorporation of an imperfectly attested testamentary paper, intended as a Will, in a subsequent duly-attested Codicil.

An unattested paper, which would have been incorporated in an attested Will or Codicil, executed according to the Statute of Frauds, is now in the same manner incorporated, if the Will or Codicil is executed according to the requirements of the Wills Act, 1 Vict., c. 26, sec. 9 [11 Moo. P.C. 455].

Where there is a reference in a duly-executed testamentary instrument, to another testamentary instrument, imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by the 1st Vict., c. 26 [11 Moo. P.C. 454, 455].

If the parol evidence satisfactorily prove that, in the existing circumstances, there is no doubt as to the instrument referred to, it is no answer, that by possibility, circumstances might have existed in which the instrument could not have been identified.

A married woman, having power under a settlement to make a Will, in the year 1851 made a testamentary instrument, in her own hand-writing, which she intended to operate as a Will, but which was not attested according to the requirements of the 1st Vict., c. 26, sec. 9. In 1856, she duly executed a Codicil, which was headed, "This is a Codicil to my last Will and Testament." This Codicil contained no reference to the testamentary paper of 1851, which was not produced at the time the Codicil was executed, but was found at her death in a trunk in a room in the deceased's residence, enclosed in a sealed envelope, on which was endorsed "Mrs. Anne Foote's Will." The Codicil was found in a drawer in her bed-room. No other Will or testamentary paper was found. Held (affirming the decree of the Prerogative Court):

First, that as there was a distinct reference in the Codicil to a "last Will and Testament," and as no other Will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the "last Will" referred to by the Codicil of 1856.

Secondly, that, though informally executed, the testamentary paper of 1851 was incorporated with, and made valid by, the duly-executed Codicil of 1856, and probate granted to both papers as together containing the last Will and Codicil of the Testatrix.

The question in this appeal was, whether by the following words in a Codicil, made in 1856, "This is [428] a Codicil to my last Will and Testament," and the circumstances of the case, a testamentary paper made in 1851, and intended by the Testatrix as her Will, but which was informal, not being attested as required by the Wills Act, 1st Vict., c. 26, sec. 9, was sufficiently referred to and identified, as to become incorporated, and acquire validity from the duly attested Codicil.

The appeal arose out of a cause instituted in the Prerogative Court of Canterbury, of proving in solemn form of law the last Will and Testament, with a Codicil thereto, of Anne Allen (formerly Foote, widow), the wife of the Appellant, promoted by the Respondent, one of the executors named in the Will, against the Appellant. The Will, which was in the hand-writing of the deceased, was dated the 1st of December, 1851, and was attested by one witness only. It was made by the deceased, while under coverture, in virtue of a power conferred upon her by a settlement made on her marriage. By this instrument the deceased left pecuniary legacies to certain persons of the name of "Drew," her brothers and nephews, and her jewellery to some

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Cresswell Cresswell.



friends, and appointed the Rev. — Wood, Curate of Christ Church, Bath, and Sir Thomas Herbert Maddock, executors.

The Codicil was dated the 13th of September, 1856, the day previous to the deceased's death, and was as follows:—"This is a Codicil to my last Will and Testament. I bequeath to my faithful servant, Eliza Baker, now residing with me at No. 29, New King Street, in the City of Bath, the sum of one hundred pounds, with as much of my furniture as in the opinion of my Executor will be sufficient to furnish a sitting-room and a bed-room. This legacy is to be duty free. I bequeath the sum of one hundred [429] pounds to Nicholas Drew, residing in the City of Worcester, tailor. This legacy is to be duty free. I bequeath one hundred pounds to Edward Drew, of the City of Bristol, Brightsmith. This legacy is to be duty free. I bequeath my best service of china and my cheffonier to John Taylor, of No. 34, New King Street, in the City of Bath. I bequeath my red cashmere shawl, dark blue silk dress, and toilet glass, to Mary Ann Taylor, of 34, New King Street, in the City of Bath. I also bequeath to her my black dress cap, half a dozen slips and half a dozen night gowns." This Codicil was signed and attested by two witnesses.

The testamentary paper of 1851, and the Codicil of 1856, were propounded in an allegation given in by the Respondent, which pleaded the fact of the settlement made in the year 1840, on the marriage of the deceased with the Appellant, under which she was empowered to dispose of her property by Will, notwithstanding her coverture; and alleged that the Will was written by the deceased herself on the day it bore date, and signed by her in the presence of one Hoare, who attested the same. That the Codicil was prepared by her directions and instructions, and duly executed and attested. That since the year 1846, she had lived apart from the Appellant, and had assumed the name of "Foote," and from the time of her separation until her death had been generally known by such name and no other. That after separating herself from the Appellant, she had frequently declared her intention to benefit her relations and others by her Will, and in allusion to such Will frequently spoke of the Respondent, with whom she was in the habit of corresponding, as her friend, who would manage [430] her affairs in case of her death; that shortly after the date of the Will, in the year 1851, and subsequently, she declared she had made her Will, and had appointed the Respondent an executor thereof. That the Testatrix, in executing the aforesaid Codicil to her Will, meant and intended to confirm and give effect thereto, and that by the words, "This is a Codicil to my last Will and Testament," appearing written at the beginning of the Codicil, the Testatrix meant and intended to refer to her aforesaid Will as being such Will. That the Testatrix, having been in a state of ill health for some short time before her death, became seriously ill on the 8th of September, 1856, and on the following day was attended at her residence in New King Street, Bath, by Frederick Field, a surgeon, who visited her daily from that time until her death, which took place on the 14th of the same month; that on the morning of the previous day, the Testatrix, being desirous to make a Codicil to her Will, spoke to Field on the subject, and in direct allusion to such Will, addressing him, said, "I wish you to do something for me in respect to my Will," or to that very effect; and Field, having consented to comply with her desire, proposed visiting her again in the course of the same day. That in the course of the afternoon of such day he accordingly again attended the Testatrix, when she entered on the subject of her wishes, and stated that she desired to leave something to her servant, and also some other trifling legacies to friends; and added, "I wish to do this by a Codicil to my Will," or "in addition to my Will." That from the dictation of the Testatrix, she being confined to her bed, Field then proceeded to write the Codicil, and on reaching that part in which the [431] Testatrix desired that her servant, Baker, should have as much furniture as her executor might deem sufficient for furnishing a sitting-room and bed-room, he inquired of the Testatrix who was the executor of her Will; when she immediately replied, "Sir Herbert Maddock," and at the same time said there was another executor, but did not mention his name, and added, that Sir Herbert Maddock would be the acting person. That the Codicil, having been completed and executed by the Testatrix, the Testatrix, on being asked by Field where the Will was deposited, said, "Oh! my Will is in my safe keeping," and then, by her direction, the Codicil was placed in a drawer in a chest of drawers, in the Testatrix's bedroom, and locked up therein.

That on this occasion the Testatrix was very ill, and was fully aware that her life was in danger, and that her death might occur in a very short time. That in allusion thereto, she requested Field immediately on her death to write to her friend Sir Thomas Herbert Maddock, her executor, whose address she mentioned, and inform him of the event, and she at the same time directed her servant, Baker, to take charge of her keys, and desired her not to give them up to any person, except to Sir Thomas Herbert Maddock. That the Testatrix had in her possession, at her residence in New King Street, several Indian trunks, two of which, having an inscription on a brass plate "No. 1, Mrs. A. Foote," and "No. 2, Mrs. A. Foote," were exactly similar in size and appearance, and were always kept locked in the Testatrix's bedchamber. That during the last illness of the Testatrix, and about a week before her death, the trunk bearing the inscription "No. 2," was removed from such chamber into a chamber ad-[432]-joining, and communicating therewith, and was so removed to make room for a sofa for the use of the Testatrix. That the Testatrix died on the 14th of September, 1856, and immediately afterwards Field, in compliance with her desire, communicated the fact of her death to Sir Thomas Herbert Maddock, who shortly afterwards arrived in Bath and repaired to the Testatrix's residence, and caused a search to be made for the Will and Codicil. That in a small box in the Indian trunk, marked No. 2, was found, with other papers, the Will in question, enclosed in a sealed envelope with an endorsement, in the handwriting of the Testatrix, "Mrs. Anne Foote's Will;" and that in a drawer in the chest of drawers, in the bedchamber of the Testatrix, was found the Codicil. That diligent search had been made, as well in the Indian trunks, marked No. 1 and No. 2, as in all other depositories belonging to the Testatrix, and all due inquiry made in regard to testamentary papers, but that no other paper of a testamentary character of the Testatrix, save the Will and Codicil aforesaid, had been discovered. That the Testatrix, when she alluded to her Will, and declared that Sir Thomas Herbert Maddock was an executor thereof, and that such Will was in her safe keeping, meant and intended the Will found in her Indian trunk, and with the Codicil respectively, as the last Will and Testament and Codicil thereto of the Testatrix.

The Appellant by his personal answers to this allegation, admitted generally the facts pleaded, but denied that the deceased intended that the Codicil of 1856, was to be a Codicil to the testamentary paper of 1851.

Seven witnesses were examined upon the allegation, [433] consisting of Baker, the servant of the deceased, who gave evidence to the fact of the deceased being separated from her husband for many years; and that from the time of such separation she had dropped the name of her husband, and went by the name of "Foote," her first husband's name; that the deceased had expressed her intention of making a Will and appointing the Respondent her executor; that the witness saw her writing the Will of 1851, and that afterwards the deceased told her she had made a Will and appointed the Respondent her executor, and that she had deposited the Will in a chest in her room; that the chest she alluded to was kept in the room of the deceased until about a week before her death, when it was moved to the witness's room; and she further deposed to the finding of the Will in that chest, and the Codicil in the drawers in the deceased's room. She also deposed that she knew of no other Will that the Testatrix had made, except an earlier one which the Testatrix had destroyed in her presence long before the date of the execution of the Will in question. The Respondent himself was also examined as to the fact of the finding of the Will in the chest, and that it was inclosed in an envelope, with the indorsement "Mrs. Anne Foote's Will," and also of the finding of the Codicil, and of his acquaintance with the deceased; and further he deposed that complete search had been made, but that no other Will or Codicil had been found except the papers propounded. Field, the Surgeon in attendance on the deceased, who took her instructions for the Codicil, and was one of the attesting witnesses to the Codicil, deposed that the deceased, in answer to his question, "who was her executor?" answered, "Sir Thomas Herbert Maddock," whom she [434] desired should be written to on her death, and his evidence on this point was corroborated by Mr. and Mrs. Taylor, two other witnesses; and he further deposed to the depositing the Codicil in the drawer where it was found. Hoare, the attesting witness to the testamentary paper of 1851, proved the paper propounded, as the one he had attested. Mrs. Taylor also gave evidence, that after the Codicil was signed, the deceased was asked where the Will was, and



that she said in reply, "that is in safe keeping." The witnesses were not cross-examined.

On the 9th of July, 1857, the Judge of the Prerogative Court (The Right Hon. Sir John Dodson) by his judgment (see case reported, nom. "*Maddock v. Allen*," 1 Deane's Ecc. Rep. 325), held, that although the Will of 1851 was not executed according to the requirements of the Wills Act, 7th Will. IV. and 1st Vict., c. 26, sec. 9, he was satisfied from the evidence and the place where the Will and Codicil were found, that the instrument of 1851 was the Will which the Testatrix referred to in the Codicil; and he decreed probate of the two papers, as together containing the Will of the Testatrix.

The present appeal was brought from this decree, so far as it related to the testamentary paper of 1851.

Sir Fitz-Roy Kelly, Q.C., and Dr. Jenner, for the Appellant.—It is not in dispute that the paper of 1851, propounded as a Will, being attested by one witness only, is invalid by the Wills Act, 7th Will. IV. and 1st Vict., c. 26, sec. 9, and is consequently inoperative *per se*. The Codicil being properly executed, the [435] question for decision is, whether the former informal testamentary paper is rendered effective and operative by the latter. We submit that the paper of 1851 is not sufficiently identified by the Codicil, as to be necessarily incorporated with it, and thus form a complete Will. It cannot be successfully contended by the other side, that the description of "This is a Codicil to my last Will," is a sufficient identification of the Will of 1851, so as to incorporate it with the Codicil. The contrary was held in *Croker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 339), *Ferraris v. The Marquis of Hertford* (3 Curteis's Ecc. Rep. 468). In that case the Testator in a duly-executed Codicil, ratified and confirmed his Will and "Codicils," but there was an imperfectly-executed Codicil as well as others duly executed, and the Court held that the word "Codicils" meant duly-executed Codicils, and refused probate to the imperfectly-executed Codicil, as an imperfect Codicil did not satisfy the meaning of the word "Codicils," there being duly-executed Codicils to answer such reference. In order to incorporate an unattested testamentary paper in a duly-executed Will or Codicil it must be so clearly identified that there can be no mistake, *Smart v. Prujean* (6 Ves. 560, 565), *Utterton v. Robins* (1 Ad. and Ell. 423), *In the goods of the Countess of Durham* (3 Curteis's Ecc. Rep. 57), *In the goods of Dickins* (3 Curteis's Ecc. Rep. 60), *Sheldon v. Sheldon* (1 Robert. Ecc. Rep. 81). It is not identified by the description of a "Will" when in fact the paper of 1851 is not a Will. Neither is it susceptible of being identified by other means: there is no reference to its date, nor can it be identified by any internal evidence, [436] or by its contents; or by its annexation to the Codicil, as in *Hitchings v. Wood* (2 Moore's P.C. Cases, 355), so as to distinguish it from other papers of a similar description, if more than one existed or were found. Here there may be other Wills which might answer the description. If the testamentary paper of 1851 be admitted to probate on the ground that no other paper is produced to satisfy the description in the Codicil, the effect will be to incorporate the paper of 1851 with the Codicil, and to make it a valid Will, merely by parol evidence and not by the effect of the reference contained in the Codicil itself. We submit that parol evidence cannot be received in order to identify the paper called a "Will." If the Codicil had identified the paper by describing it as containing certain specific bequests, such reference, we admit, would have been sufficient to let in the proof. Since the passing of the Wills Act, 7th Will. IV. and 1st Vict., c. 26, a Court of Probate cannot admit parol evidence to supply the want of formal execution required by the 9th section of that Act. Neither is parol evidence admissible to show the deceased's intention to incorporate the paper in question with the Codicil of 1856, for there is no reference in the Codicil sufficiently distinct to justify the Court's receiving parol proof. The effect would be to incorporate the paper of 1851, by parol evidence only, and not by the effect of the reference in the Codicil itself.

Dr. Phillimore, and Dr. Deane, for the Respondent.—No other testamentary paper has been found than that of 1851. There is nothing, in fact, to answer [437] what the Codicil refers to as a "last Will," except the imperfectly attested Will of 1851. No question is made but that it was in existence when the Codicil was executed, and reasonable negative proof has been given that no other Will is in

existence to answer the description in the Codicil. Those requirements of the law having then been discharged, the sole question arises; whether the reference is sufficiently distinct as to leave no reasonable doubt as to the identity of the testamentary paper of 1851, being the "last Will" referred to in the Codicil of 1856. We submit that it does, and that the Codicil sufficiently refers to the Will of 1851, so as to make it a part of the Codicil, and that being so, though the paper of 1851 is in itself an imperfectly attested testamentary instrument, such instrument is incorporated in and made a valid Will by the subsequent duly-executed Codicil. *Habergham v. Vincent* (2 Ves. J. 228), *Wilkinson v. Adam* (2 Ves. and Bea. 422, 445), *Doe d. Williams v. Evans* (1 Crompt. and Mees. 42), *Smart v. Prujean* (6 Ves. 560), *Barnes v. Crowe* (1 Ves. 485, 497), *Hitchings v. Wood* (2 Moore's P.C. Cases, 355), *In the goods of the Countess of Durham* (3 Curteis's Ecc. Rep. 57), *Crocker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 339), *Ingoldby v. Ingoldby* (4 Notes of Cases, 493). Upon the second point, the admission of parol evidence, we contend, that this is such a case as to admit extrinsic evidence to show intention of deceased. Jarman "On Wills," p. 349 (Edit. 1844), Wigram's "Extrinsic evidence in aid of the interpretation of Wills," pp. 7-76 (3rd Edit.). *Doe d. Templeman v. Martin* (1 Nev. and Man. 576), *Quincey v. Quincey* (11 Jurist, 111).

[438] Their Lordships' judgment was delivered by

The Right Hon. T. Pemberton Leigh (July 8, 1858).—On the 1st of December, 1851, Anne, the wife of Joseph Emanuel Allen, but who was separated from her husband, and who had assumed, and was known by, the name of "Foote," drew up in her own handwriting, and signed and sealed, a paper of that date, described in its commencement as the "last Will and Testament of me, Anne Foote, of Bath, which I make and publish for all my worldly substance." By this instrument she gave several legacies, and appointed executors, but made no disposition of the remainder of her property.

She had a power, under the settlement made on her marriage, to make a Will, but the paper in question was attested by only one witness, and was, therefore, not valid.

On the 13th of September, 1856, being then on her death-bed, she duly executed a Codicil, thus headed: "This is a Codicil of my last Will and Testament." By this Codicil, she gives to her servant, Eliza Baker, the sum of £100, "with as much of my furniture as, in the opinion of my executor, will be sufficient to furnish a sitting-room and a bed-room." The Codicil appoints no executor, and contains no other reference to the Will.

On the following day, the 14th of September, the Testatrix died. On her death, search was made for her testamentary papers by Sir Thomas Herbert Maddock, who was one of the executors appointed by the paper described as her Will, and to whom, in pursuance of the Testatrix's direction, a letter announcing the event had been sent immediately upon her death. The Codicil was found in a chest in her [439] bed-room, and the disputed paper was found in another chest which had been, shortly before her death, removed from her bed-room into an adjoining room. This paper was inclosed in a sealed envelope, on which are written the words—"Mrs. Anne Foote's Will."

No other testamentary paper of any description was found.

Under these circumstances, these two papers have been admitted to probate by the Judge of the Prerogative Court: and against this decree the present appeal is brought as regards the Will.

The objection relied on is, that there is no such distinct reference to this paper in the Codicil, as to enable the Court to receive parol evidence in order to identify it; that it is not identified by the description of a "Will," for that, in truth, it is not a Will; that it is not identified either by date or by any reference to its contents, or by annexation to the Codicil, so as to distinguish it from other papers of a like description, if more than one were found: and that to admit this paper to probate on the ground that no other is produced to satisfy the description, would be to incorporate the Will in the Codicil, merely by parol evidence, and not by the effect of the reference contained in the Codicil itself.

It becomes necessary to examine, with some minuteness, the rules of law and the decided cases applicable to this subject.



Before the "Act for the Amendment of the Laws with respect to Wills," 7 Will. IV., and 1 Vict., c. 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a Will or Codicil as to personal estate, the effect of a well-executed testamentary instrument upon one not well [440] executed could hardly come before a Court of Probate. But such questions arose very frequently in the Temporal Courts, with respect to the disposition of real estate; and the Statute alluded to having placed Wills, as to real and personal property, on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the Statute, in the Courts of Law, are now equally applicable to the Court of Probate, with regard to personalty. In considering them, however, it is necessary to bear in mind this distinction between cases before the Statute, and subsequent cases, namely, that, before the Statute, a testamentary paper not executed so as to affect real estate, was valid as to personalty; was really a Will or Codicil, and might, therefore, strictly answer that description in a subsequent reference to it by that name; whereas since the Statute came into operation, no paper not properly executed and attested can, in strictness, be for any purpose a Will or Codicil.

It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, declarations of the Testator by word, or in writing, and other testimony of a similar character, are admissible, when the Will is disputed, but that no such evidence can be received in order to explain the expressions which he has used. Still, in construing his Will, the Court is entitled, and is bound, to place itself in the situation of the Testator with respect to his property, the objects of his bounty, and every other circumstance material to the construction of the Will, and for this purpose to receive, if occasion require it, parol evidence of those [441] circumstances, and to expound his meaning with reference to them.

In the celebrated treatise of Sir James Wigram, cited at the Bar, these rules are stated, discussed, and explained in a manner which has excited the admiration of every Judge who has had to consult it. After collecting and stating the effect of the several authorities, Sir James Wigram sums up (as it appears to us with perfect accuracy) the result in these terms: "Every claimant under a Will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the Testator, the meaning of whose language it is called upon to declare. It follows that—with the light which that situation alone affords—the Testator's meaning can be determined by a Court: the Court which so determines does, in effect, declare that the Testator has expressed his intention with certainty, or, in other words, that his Will is free from ambiguity." —(Prop. v. par. 96.)

It may be said that, on the present occasion, the Court of Probate is, to a certain extent, a Court of construction; for it has to determine what is the meaning of the reference made by the Testatrix in her Codicil, to her last Will and Testament (the executor under which is to determine upon one of the gifts in the Codicil), and whether any, and, if any, what, instrument found at her death is thereby referred to.

This question is one of fact which obviously must be explained, and can only be explained by parol evidence. At first sight there is no difficulty; there is no ambiguity whatever in the expression by which the reference is made. Parol evidence must necessarily be received to prove whether there is or is not in [442] existence at the Testatrix's death any such instrument as is referred to by the Codicil. For this purpose, inquiry must be made and evidence must be offered to show what papers there were at the date of the Codicil, which could answer the description contained in the Codicil; and the Court having by these means placed itself in the situation of the Testatrix, and acquired, as far as possible, all the knowledge which the Testatrix possessed, must say, upon a consideration of those extrinsic circumstances, whether the paper is identified or not. If the Will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the Codicil; yet it must, in that case, have been proved, or assumed, that there was no later Will revoking it. This last fact is one which is in truth a necessary foundation of the establishment of every testamentary paper.

That a description in a Will may be applied to a subject inaccurately described in it, if it should be shown by parol evidence that there is no subject to which it applies with accuracy, can admit of no doubt. "If the description in the Will is

incorrect. evidence, that a subject—having such and such marks upon it—exists, must be admissible, that the Court may determine whether such subject, though incorrectly described in the Will, be that which the Testator intended." (Wigram's "Entrinsic evidence in aid of the interpretation of Wills," Prop. v. par. 64.)

Is, then, the evidence in this case sufficient to identify the paper propounded as the Will? No other paper has been found to which the description can apply: here is a paper kept by the Testatrix up to the time of her death in her own possession, to [443] which, according to her view of that paper, it does apply with the strictest accuracy.

If we are to read the Codicil with the knowledge of what the Testatrix knew, namely, that she had this testamentary paper, and that she had no other, can it be doubted that this is the paper referred to?

It is said, however, that this is merely the effect of parol evidence: and that there may be other Wills, and that if there were two there is nothing in this Codicil to distinguish which was the Will referred to. Unless there were two, both imperfectly executed, and both of the same date (not a very probable event), the question could not arise. As we have already observed, the efficacy of every Will, as a last Will, depends upon the fact that there is none later. The proof of this must, in all cases, be negative, and necessarily of very different weight, sometimes amounting almost to certainty, as when the Will is made on the death-bed: sometimes open to great doubt, as when the Will has been made many years before the death: but in every case the Court admitting the instrument to probate, must be satisfied that it is the last Will.

Supposing the paper propounded as a Will in this case had been executed a few hours before the Codicil, and that there was positive proof that the Testatrix signed no other paper until she signed the Codicil, the objection which is now made would, in law, be precisely of the same force.

It has not been disputed that, if the Codicil had identified the paper, by describing it as containing certain bequests, such reference would have been sufficient to let in the proof, yet in such case the proof would equally depend on the assumption that [444] there was no later Will which contained similar bequests.

No doubt the rule of law is as stated by Lord Eldon in *Smart v. Prujean* (6 Ves. 565), that, "an instrument, properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated." For this purpose it is necessary that it should be so described as to leave no doubt in the mind of the Judge, in the circumstances as they actually existed and are proved before him, that the paper referred to is the paper propounded.

In the case of *Smart v. Prujean* [6 Ves. 565], the Testator by his Will directed the proceeds of his real estate to be applied to such purposes as he should, by a private letter, which he stated in his Will that he intended to leave with the Abbess of a Convent named, or her successor, appoint. This Will, according to the statement of it in the report, does not seem necessarily to have referred to any particular paper then in existence. The letter which he declared his intention to leave might be either one which he had already written or one which he intended to write. In point of fact the Testator never deposited any letter in the custody mentioned in his Will, but at his death two papers were found in an envelope, which inclosed also his Will, one being a letter addressed to his executors, and another a letter addressed to the Abbess in question, both documents bearing date some months before his Will, and one of them mentioning that he had devised his worldly estate and effects to trustees upon the uses mentioned in the letter. The letter, therefore, in [445] terms, referred to a Will already made, and could hardly be construed to refer to the Will actually produced, which was dated many months afterwards. Nor had the letter been delivered over to the Abbess, which Lord Eldon thought, by the terms of the Will, was an essential part of the condition to give it validity. He, therefore, very naturally asked, if other letters had been proved, how could these be distinguished from them? He did not on that occasion express any doubt that parol evidence might be received, provided the reference in the Will was to a paper already existing and sufficiently identified.

In a subsequent case, however, if Lord Eldon's observations are accurately reported, he appears to have intimated some doubt whether a paper antecedently



existing, and clearly and undeniably referred to, could be made part of the Will, *Wilkinson v. Adam* (1 Ves. and Bea. 445); but, if any such doubt was ever thrown out, later decisions removed it, and completely established the rule that, before the late Wills Act, a paper distinctly referred to by a Will might be incorporated in it.

A reference by a Testator to his last Will, is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument. It is not like a general reference to Codicils, of which there may be several.

In the numerous cases to be found on the subject of republication of a Will by a Codicil duly executed, and which, in effect, is equivalent to a re-execution of the former instrument, it has never been held necessary that the Codicil should refer to the particular paper containing the Will, so as to distinguish it from all other Wills.

[446] In *Barnes v. Crowe* (1 Ves. J. 497), Lord Commissioner Eyre observes:—"The Testator's acknowledgment of his former Will, considered as his Will at the execution of the Codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as, by the nature of it, it supposes a former Will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three." It was decided in that case, that the republication of a Will by a Codicil was not only a recognition of the Will, but had the effect of a re-execution, so as to make it speak as from the date of the Codicil, and to give a different meaning to a general devise of lands from that which it previously had.

To this doctrine Sir William Grant, though he felt himself obliged to yield to authority, was much opposed, and when he had to consider the case of *Barnes v. Crowe*, [1 Ves. Jun. 497], in the case of *Pigott v. Waller* (7 Ves. 118), he urged very strong reasons against the principle of that decision; but that a Codicil to a Will, though not referring to it, recognizes a preceding Will, and amounts to a republication, he does not intimate any doubt. His words are—"A direct republication, or re-execution, is an unequivocal act, making the Will operate precisely as if it was executed on the day of the republication. But a reference to the Will proves only, that the deviser recognizes the existence of the Will; which the act of making a Codicil necessarily implies; not that he means to give it any new operation, or do more by speaking of it than he had already done by executing it." He afterwards observes, p. 120—"The Lords Commissioners, in *Barnes v. Crowe* [1 Ves. Jun. 497], appear to have [447] determined "that every Codicil, duly attested, ought to be held a republication. Their opinion seems to be, that the Codicil was incorporated with the Will. The general proposition referred to by Lord Commissioner Eyre, is, that the execution of a Codicil should in all cases be an implied republication."

In the case of *Doe d. Williams v. Evans* (1 Crompt. and Mees. 42), a Testator prepared a Will which he did not sign, and about a fortnight afterwards duly executed a Codicil on the same sheet of paper, commencing with these words: "Codicil.—I, David Evans, make a Codicil to the foregoing Will;" and it was held that the Codicil operated to incorporate and establish the Will. Mr. Baron Bayley in giving judgment, observes, "The Will was written on part of a sheet of foolscap paper, and the Codicil was written on the same sheet. Now, if the Codicil had not referred to the Will, I should have thought that it did not set up that instrument; but if the Codicil do refer to the Will, then I am of opinion that it does set it up. The language is, 'Codicil—I, David Evans, make a Codicil,' which word implies an addition to a former instrument. It proceeds, a Codicil to the foregoing Will;" and the learned Judge then observes, "The Testator, by executing this Codicil, appears to me, at that time, in as plain terms as possible, to have set up, not only the Codicil, but the Will."

In this case there was a distinct reference to the particular paper referred to in such a manner as to exclude all doubt of the instrument intended; but in the case of *Guest v. Willasey* (2 Bingh. 429. S.C. 3 Bingh. 614), this circumstance was wanting. A Testator there made his Will, duly attested. On the back of this Will he wrote three Codicils, two unattested, [448] and the last attested. The last Codicil revoked the appointment of an executor made by the second Codicil, but did not otherwise refer either to the Will or Codicil. The Court was of opinion that

the last Codicil operated as a republication, not only of the Will and of the second Codicil, but also of the first.

It is true that in both these cases the several writings were all upon the same sheet of paper, but when the difficulty arises from an absence of the ceremonies required by the Statute of Frauds, this circumstance does not seem of much importance. It may greatly facilitate the identification—it may make the evidence more conclusive, but it can hardly make it more admissible.

Accordingly, it does not seem to have been thought necessary in subsequent cases.

In the case of *Gordon v. Lord Reay* (5 Sim. 274), a Testator made his Will, dated the 17th of August 1812, duly executed and attested, by which he devised £10,000 to the Plaintiff, charged on certain estates. He afterwards made a Codicil, unattested, dated the 8th of April 1814, by which, after reciting that he had sold the estates so charged, he directed that the legacies should be paid out of and charged on his other real estates. On the 13th of August 1818, he made a second Codicil, duly executed and attested, by which he confirmed the provisions made by his Will on the 17th of August 1812, in favour of the Plaintiff, but took no notice of the Codicil of the 8th of April 1814: yet it was held, that a Codicil being in law a part of a Will, the second Codicil, by confirming the Will, established the first Codicil so as to charge the £10,000 legacy on the real estates.

That case was decided in 1832. In the subsequent [449] case of *Utterton v. Robins* (1 Ad. and Ell. 423), which was argued before the Court of King's Bench on a case sent from the Court of Chancery in 1834, a question of the same kind arose. In that case the Testator made a Will, dated the 12th of September 1823, duly executed and attested, and after devising a house in Brompton Terrace to his daughter, Mrs. Utterton, gave the residue of his real and personal estate to trustees. By a memorandum in pencil in the margin of his Will, dated the 6th of August 1825, signed, but not attested, the Testator recited that he had sold the house given by the Will to his daughter, and gave her instead of it a house in Portugal Street. He afterwards signed another unattested Codicil, dated the 29th of August 1825, to the same effect, and afterwards made several Codicils properly executed and attested, for the purpose of including in the operation of his Will, after-purchased estates. The last of these Codicils was dated the 5th of February 1830, and was in these words:—"I, John Robins, do make this further Codicil to my Will, which bears date the 12th day of September 1823. I give and devise all real estates and hereditaments purchased by me since the date and execution of my said Will, to the trustees therein named, their heirs and assigns, to the uses and upon the trusts in my said Will expressed and declared of and concerning the residue of my real estates."

The house in Portugal Street had been purchased between the date of the Will and of the Codicil of the 29th of August 1825, and the question for the consideration of the Court was, to whom the house in Portugal Street passed; it being contended on the part of Mrs. Utterton, that the last Codicil, though [450] not referring to any instrument but the Will, operated as a republication of all the Codicils, whether attested or unattested, and that the house in Portugal Street passed to Mrs. Utterton. The case of *Gordon v. Lord Reay* [5 Sim. 274] was not cited, and the Court did not decide whether such Codicil would or would not establish the unattested Codicils not referred to; though Mr. Baron Parke may be considered to have intimated an opinion against giving to the Codicil what he terms "that immense effect in republication which Mrs. Utterton's Counsel ascribe to it:" but the Court held, that supposing the Codicils in favour of Mrs. Utterton to have been duly attested, the last Codicil would have revoked them, and devised the estate in question to the trustees under the Will. The learned Judges had no doubt that any testamentary paper unattested, sufficiently referred to a duly executed and attested Codicil, would be established by such Codicil, though the two instruments were not only not on the same paper, but were not even in the same country.

This is the result which we collect from the observations which fell from the Judges in the course of the argument, though they contented themselves with sending a certificate of their opinion to the Court of Chancery as to the effect of the devise, without assigning any reasons.

In the case of *Radburn v. Jervis* (3 Beav. 450), decided by Lord Langdale; the cases of *Guest v. Willasey* [2 Bing. 429; 3 Bing. 614], *Gordon v. Lord Reay* [5 Sim.



274], and *Utterton v. Robins* [1 Ad. and E. 423], were all cited; and his Lordship was of opinion, that a Codicil duly executed and attested, though referring only to the Will, operated to establish and republish all previous Codicils, whether duly executed or not.

[451] The Testator there made a Will giving various legacies, and charging his real estates with all legacies thereby given. He made many Codicils, some duly executed and attested, and some not; and by one of the latter class he gave a legacy to Mr. Brundrett. His eleventh Codicil was duly executed and attested, and began in these words: "This is a further Codicil to the last Will and Testament of me, Sir Thomas Clarges, Bart., made this 10th day of April 1828." The Codicil was confined to revoking the appointment of two gentlemen named in the Will as trustees, and the legacies given to them, and to appointing Brundrett an executor and trustee in their stead. Lord Langdale held, that the legacy to Brundrett was not charged on the real estates, because the Codicil did not so charge it, and the Will charged only the legacies thereby given; but he was clearly of opinion, that the last Codicil operated as a republication of all the preceding Codicils, as well as of the Will, though none of the Codicils were referred to. His language is—"The object of the last Codicil, which was duly executed and attested, was to revoke the appointment of trustees and executors named in the Will, and the bequests given to these trustees, and to appoint Mr. Brundrett to be executor and trustee; and though, in effect, it operated as a republication of the Will and former Codicils, and might have extended any prior general devise to lands subsequently acquired before the date of the last Codicil, and have subjected such subsequently acquired lands to a general charge contained in the Will; yet, considering it as a republication of the Will and all the preceding Codicils, I do not think the effect is to charge on the land, legacies which by those Codicils were not so charged."

[452] *Aaron v. Aaron* (3 De Gex. and Sm. 475), before Lord Justice Knight Bruce, recognizes the rule of law as established in *Gordon v. Lord Reay* [5 Sim. 274], and treats it as not inconsistent with the decision in *Utterton v. Robins* [1 Ad. and E. 423]; and his Lordship observes "that it can make no difference whether the Codicil be written on the same paper with the Will, or written at a subsequent period, or not."

The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they show that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the Court to identify the document: that a Codicil would operate as a republication of the Will, and that a republication of a Will would amount to a republication of whatever antecedent papers might answer the description of Codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either Will or Codicil.

This doctrine was very much discussed in the case of *Hitchings v. Wood*, before the Judicial Committee of 1841, reported in 2 Moore's P.C. Cases, 355; and many valuable observations bearing upon this question were made by Lord Lyndhurst, though, as the case arose before the Wills Act of 1837, and related only to personal estate, it has not the authority of a decision on the point in controversy.

As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a Will and any other instrument. [453] In either case it is necessary, and it is sufficient, that the description should be such as to enable the Court, when the evidence is produced, to say what is the instrument intended.

In the case of *Shortrede v. Cheek* (1 Ad. and Ell. 57), a guarantee in writing referred to "the promissory note," and evidence was offered of a particular promissory note, alleged to be the one in question. It was objected that the writing did not specify what promissory note was meant; that there might be more than one. But the opinion of the Court was, that, although if there had been more than one, there would have been difficulty in admitting parole evidence to prove which note was meant, yet as only one was proved, and there was no evidence of any other, the description was sufficient. Mr. Baron Parke observed, in answer to the argument that there might be other notes, "Even if the note had been fully described,

you might say that it was possible there might have been another note, and that the contrary should have been shown."

The same doctrine was carried still further by Lord Lyndhurst in the case of *Hodges v. Horsfall* (1 Russ. and Myl. 116). A contract in writing was made, one of the terms of which related to the execution of certain buildings, "as per plan agreed upon." In that case several plans had been drawn out, and discussed at different times, and it was doubtful which was the plan meant. Lord Lyndhurst, in a Bill for a specific performance of the contract, held, on the authority of *Clinan v. Cook* (1 Sch. and Lef. 22), that parol evidence was admissible to prove which of the plans was intended, but he thought that the evidence [454] was insufficient to identify the one insisted on, and on that ground dismissed the Bill.

It has been supposed that this case is open to criticism, on the ground that the contract did not of necessity refer to any writing, and that to ascertain, by parol evidence, which, of several documents, all answering the description, was intended, is going further than any former case, and is contrary to the opinion, or inclination of the opinion, of the Judges in *Shortrede v. Cheek* (Wigram's "Extrinsic evidence in aid of the interpretation of Wills," Prop. vii. par. 165, p. 127, in note).

For the present purpose it is quite immaterial to consider the value of these objections. In this case it is clear, that the thing referred to is a writing; that it is in its nature a single instrument; and that only one document is found to answer the description.

The cases of *Shortrede v. Cheek* [1 Ad. and E. 57], and *Hodges v. Horsfall* [1 Russ. and Myl. 116], are referred to by Lord Cottenham, in *Squire v. Campbell* (1 Myl. and Cr. 480), as only establishing a principle which he seems to consider as settled, that when an agreement refers to some other document, the identity of the thing referred to may be established by parol evidence.

A reference in a Will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question [455] then is, whether the evidence is sufficient for the purpose.

Supposing the evidence to be admissible as the case would have stood under the Statute of Frauds, has the Wills Act of 1837, altered the general law upon the subject? There are no words in the Act by which any such intention is declared. It has altered the mode in which the instrument containing the Will is to be executed, but it has left untouched, as it appears to us, the question what papers are to be held included in the instrument so executed. The Statute of Frauds enacted, that all devises of lands shall be in writing, and signed by the devisor, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in his presence by three or four credible witnesses, or else they shall be void.

The Wills Act, 7th Will. IV., and 1 Vict., sec. 9, provides, that no Will shall be valid unless it be in writing, and signed at the foot or end thereof by the Testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the Testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary.

The ceremonies necessary to authenticate the instrument are altered, but no alteration is here made in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a Will executed according to the Statute of Frauds must now be incorporated in a Will executed according to the new Act.

[456] In those instances in which the Legislature was of opinion that the construction put by decided cases upon the Statute of Frauds, as to the execution of Wills, or the rules applied to devises contained in them, required alteration, provisions for that purpose were introduced into the Act.

The incorporation of unattested documents by reference in an attested Will,



was a subject of very great importance, and had excited much attention, the propriety of which had been sometimes doubted, at least to the extent to which it had been carried. It can hardly be supposed that if it had been intended to introduce so great an alteration in the law, it would not have been introduced by express declaration. But to have introduced any such declaration would have occasioned, in many cases, great inconvenience and injustice.

The only circumstance of which we are aware from which any colour can be given to the argument that the Statute had the operation now suggested, is the construction put upon it by this Committee, in *Smee v. Bryer* (6 Moore's P.C. Cases, 404), by which it was held that the signature must be so affixed at the end of the Will as to leave no blank space for any interpolation between the end of the Will and the signature; and it might be said that such a security against fraud could not be afforded if a paper only referred to in the Will could be admitted as part of it. But this construction was found to produce such extensive injustice that, by the Statute, 15th and 16th Vict., c. 24, the Legislature interfered to alter the law so established, and this Act passed before the Codicil in this case was executed. It was not contended in this case, nor, as far as we are aware, has it been con-<sup>[457]</sup>tended in any case since the Wills Act of 1837, that no reference, however distinct, is now sufficient to incorporate another testamentary paper in the paper duly executed as a Will or Codicil, but the question has always been, what reference in the valid paper is sufficient to let in evidence to identify the invalid paper.

Upon this point an important distinction has been introduced by the Act, to which we have already alluded, namely, that whereas before the Act a paper not duly executed might be a Codicil as to personal estate, and might, therefore, be referred to by that description, no such paper can now be properly so designated.

That, with this exception, the law on this subject remains as it was before the Act, appears from an examination of the authorities, although in deciding on the question what is or is not a sufficient description to let in evidence, cases of great nicety are to be found.

In April, 1841, the question now raised came before the Prerogative Court in Smith's case (2 Curt. 796). In that case the Testator, in May, 1838, made a Codicil to his Will, signed but not attested. In August, 1840, he made a further Codicil, signed and duly attested. This was written on the second side of the paper on which the former Codicil was written, and the deceased described it as "a second Codicil to my last Will and Testament." Sir Herbert Jenner Fust decreed probate of both Codicils, observing: "The latter Codicil being duly executed, referring to the former, is an execution of the former Codicil also."

In the case of the goods of Sotheron (2 Curt. 831), <sup>[458]</sup>the same learned Judge recognized the rule as laid down in Smith's case [2 Curt. 796], but held the reference in the Will not to be sufficient to let in evidence of the paper propounded.

In January, 1843, in the case of Claringbull (3 Notes of Cases, 1), Sir Herbert Jenner Fust again acted on the rule laid down in Smith's case, referring to it as the interpretation which this Court has put upon the Statute of Wills.

In the course of the same year he had to determine the important case of Lord Hertford's Will (3 Curt. 468). The Testator had there made a Will and twenty-nine Codicils. Some of the Codicils were made before the Act of 1837, and required no attestation; others were made after the Act, some of which were attested, and others not. One Codicil, made at Milan in October, 1838, was unattested. He made a further Codicil dated in April, 1839, duly executed and attested, and thereby declared that he ratified and confirmed his Will and Codicils. The question was whether the Milan Codicil was thereby established, and it was decided by Sir Herbert Jenner Fust that it was not, and upon this principle, that it was not a Codicil; that it was not distinctly referred to as such; that there were other papers which were Codicils, and which would satisfy the words of the instrument referring to them; and that the Court could not, therefore, extend the words of reference to an instrument not answering the description.

In June, 1844, the case on Lord Hertford's testamentary papers came before the Judicial Committee by way of appeal from the decision of Sir Herbert Jenner Fust, and the decision was affirmed (4 Moore's P.C. Cases, 339). Dr. Lushington, in delivering the <sup>[459]</sup> judgment of the Committee, observed very strongly upon the

inconvenience which might result from admitting papers to probate neither properly executed nor distinctly identified: but he also relied on the ground of the judgment in the Court below, namely, that there being no reference to the particular paper, except under a general description of "Codicils," and there being instruments which properly answered the description of Codicils, the words could not be extended to an instrument not properly answering the description.

This was the case mainly relied on by the Appellant in the argument before us. It is a decision on every ground entitled to the utmost respect, and we not only hold ourselves bound by its authority, but entirely assent to its principle. We can find, however, nothing in its inconsistent with the rule adopted in the cases of *Smith* [2 Curt. 796] and *Claringbull* [3 N. of C. 1], which applied under the new Act the principles adopted under the old.

The question came again before Sir Herbert Jenner Fust in the case of *Ingoldby v. Ingoldby* (4 Notes of Cases, 493), in 1846. In that case, the Testator made an unattested Codicil to his Will; he afterwards made a second, properly attested, with the words, "This is another Codicil to my Will." On his death, these two Codicils only were found, and Sir Herbert Jenner Fust admitted them to probate. The learned Judge observes: "I think the circumstances of this case are sufficient to distinguish it materially from the *Marquis of Hertford's* case. There is only one paper here which comes under the description of a Codicil. It is not, indeed, a Codicil, because it is not duly executed: but it is clear that the Testator intended it to be a [460] Codicil, not only from the paper itself, but from the indorsement; and it was attached to the Will by sealing-wax, without a seal. He describes the second paper as 'another Codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a Testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So here, there being no duly-executed Codicil, the words may have reference to an unexecuted Codicil." The learned Judge then adverts to the circumstance that there was a reference in the second Codicil to a bequest contained in the first, and adverts to it as a not immaterial circumstance, but does not make it the *ratio decidendi*.

The same question again came before the Court in 1849, in the case of *Phelps* (6 Notes of Cases, 695). There the Testator made his Will, duly executed, and afterwards made a first Codicil on the same sheet of paper, attested by only one witness. He then executed a second Codicil, duly attested, by which he referred to and confirmed the Will, but took no notice of the first Codicil. Sir Herbert Jenner Fust held, that the first Codicil was not established by the second, for the instrument in question was not a Codicil: and, therefore, the confirmation of the Will did not amount to a confirmation of the Codicil.

In the case of *Haynes v. Hill* (7 Notes of Cases, 256), the point once more arose in August, 1849. In that case, a Testator made his Will and several Codicils, the last of which only was attested. The last Codicil confirmed the Will, but said nothing of the Codicils. The question was in truth the same as had arisen in *Phelps's* case, and the same decision [461] was pronounced. Sir Herbert Jenner Fust went very fully into the doctrine, and held, as it seems on the most satisfactory grounds, that the case was governed by *Lord Hertford's*, there being no reference to anything but the Will, and the unattested Codicils not being part of it.

These cases, when compared with *Gordon v. Lord Reay*, clearly illustrate the distinction introduced by the Wills Act, to which we have already adverted.

In the case of *The Countess Dowager of Pembroke* (1 Deane's Ecc. Rep. 182), Sir John Dodson, from whose decision the present appeal is brought, followed the decision of Sir Herbert Jenner Fust in *Sotheron's* case [24 Curt. 831], but his subsequent decision in the present case shows that he did not mean to infringe upon the rules to which we have referred.

The result of the authorities both before and since the late Act, appears to be, that when there is a reference in a duly-executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instru-



ment, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.

As in this case the only question is whether there is sufficient evidence to identify the paper propounded as the Will, it is not necessary to consider whether any evidence was received in this case, to which objection might be made. The facts on which we rely are, beyond all question, admissible in evidence, [462] namely, that the paper in question was written by the Testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an endorsement describing it as her Will; and that after diligent search no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence, is the proof of an earlier Will, which the Testatrix destroyed.

Their Lordships, therefore, are of opinion, that the decree complained of must be affirmed, and they think that the costs of all parties must come out of the estate. They cannot properly refer to the extra-judicial opinion of any individual, however eminent, as an authority for their decision: but it is satisfactory to them to observe that (in a work which, though it professes to be written only for the unlearned, may often be consulted by the most learned with advantage) Lord St. Leonards treats as clear, a point which, from its extreme importance, their Lordships have thought it advisable to examine at so great a length. In the "Handy Book on property law" (Sixth Ed. 151), we find the following passage:—"So a Will or Codicil not duly executed, may be rendered valid by a later Codicil duly executed and referring clearly to it, or in such a manner as to show the intention. Therefore, if you were to begin your Codicil, 'This is a Codicil to my last Will,' and there was only one Will, those words would set up the Will, although not duly executed." That very learned author then points out the distinction, where there are several Wills and Codicils, and refers to the decision in *Lord Hertford's* case, which he understands as we do.

[Mews' Dig. tit. WILL; II. TESTAMENTARY INSTRUMENTS; h. 3. *Codicils and Wills*. S.C. 6 W.R. 825. See *In the Goods of Sunderland*, 1866, L.R. 1 P. and D. 200; *Anderson v. Anderson*, 1872, L.R. 13 Eq. 385; *In the Goods of Heathcote*, 1881, 6 P.D. 32.]

#### [463] ON APPEAL FROM THE COURT OF ERROR AND APPEAL OF UPPER CANADA.

JOHN GEORGE BOWES,—*Appellant*; THE CITY OF TORONTO,—*Respondents* \*  
[Feb. 5, 6, 8, and 15, 1858].

The Mayor and Corporation of the City of Toronto, in Canada, were authorised by the Canadian Act, 13th and 14th Vict., c. 84, to issue debentures to a certain amount, to assist in the construction of The Toronto, Simcoe, and Lake Huron Union Railway.

At that period B. was the Mayor and a member of the Finance Committee, and took an active part in passing a bye-law which authorized the issue by the Corporation of debentures for the completion of the Railway. B. at that time was engaged in co-partnership with H., and B. and H.'s firm purchased of S. and Co., contractors for the Railway Company, some of the debentures so issued, which had been assigned to S. and Co. by the Corporation. B. and his partner afterwards sold the debentures, and thereby realized a large profit. This transaction was without the knowledge of the Corporation. Held (affirming the decree of the Court of Chancery in Canada), that B. must, in the circumstances of his being a member of the Corporation, and the manner in

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. The Lord Justice Turner.

which he acted throughout the transaction, be treated as the trustee of the Corporation, and was not entitled to any benefit received from the sale of the debentures, and was liable to account to the Corporation for the ascertained and unquestioned amount of profit made and received by him in the transaction in which he had engaged in respect of the sale of the Corporation debentures.

Held, further, that it made no difference that the profit from the sale of the debentures was made by B. and his partner H. jointly, and not by B. alone.

An objection for want of parties to a Bill ought to be made in the Court below. A Court of appeal will not treat the suit as defective when no such objection was taken in the Colonial Court.

This suit was instituted in the Court of Chancery of the Province of Upper Canada, by certain inhabitants of the City of Toronto (for whom afterwards was substituted the City of Toronto itself, a corporate body) against the Appellant, to recover from him the sum of £4115 17s. 3d., the amount of profit [464] received by him from the sale of certain debentures issued on behalf of the City of Toronto, on the ground that the Appellant at the time of the transaction was Mayor of that City, and one of the Council thereof, and a member of the Finance Committee, and as such, the trustee and agent of that City, and, therefore, incapacitated from deriving a personal profit from those transactions.

The Appellant was Mayor of the City of Toronto, in the years 1851 and 1852. In the latter year, the Common Council, in conformity with the provisions of certain Acts of the Provincial Legislature, issued to The Toronto, Simcoe, and Huron Union Railway Company, in discharge of existing obligations of the City to the Railway Company, certain debentures to a large amount, payable to bearer, and transferable by delivery. By arrangement between the Railway Company and the Contractors, Messrs. Story and Co., the debentures became the property of the latter, who sold the same at a discount of 20 per cent. to the Appellant's co-partnership firm of Bowes and Hall, and to the Hon. Francis Hincks, who provided the funds to complete the purchase. The Appellant and his partner ultimately realized by the transaction the sum of £8200 and upwards, one moiety of which was received by the Appellant, and by him credited to his firm in the books of the co-partnership. The Appellant presided as Mayor at the meetings of a Common Council which passed the bye-laws under which the debentures were issued. The question which arose in the appeal was, whether the Appellant was liable to account for and pay to the Respondents, as representing the City of Toronto, the moiety of the profit received and carried by him to the credit of the co-[465]-partnership firm. The Court of Chancery of Upper Canada decided that the Appellant was to be considered as a trustee for the Corporation, and was liable to account for the same, and that decision was affirmed by the Court of Error and appeal of the Colony.

The Bill was originally filed by one Paterson, and four other persons, inhabitants of the City of Toronto, on behalf of themselves and all other the inhabitants of that City, against the Appellant and the City of Toronto, as Defendants. To this Bill the Appellant put in his answer, and a replication having been filed thereto, and witnesses examined, the Plaintiffs, by leave of the Court, amended their Bill, to which the Appellant put in his answer, and witnesses, and evidence in the cause, were afterwards examined and taken. The City Council having subsequently consented to allow the name of the Corporation to be substituted as Plaintiffs, an Order to amend the Bill in that behalf was obtained, by which Order the answers of the Appellant to the Bill of the original Plaintiffs were directed to stand as answers to the Bill as amended, and the replication already filed, and the depositions and other proceedings already taken were ordered to be taken as the replication, depositions, and proceedings under the amended Bill. The facts of the case and the evidence taken are so fully referred to and commented upon in the judgment of their Lordships that any further statement here is unnecessary.

On the 9th of October, 1854, the cause came on to be heard before the Chancellors and one of the Vice-chancellors, and thereupon the Court gave judgment and decreed as follows:—"This Court doth declare John G. Bowes to have been, and to be, a trustee for the City of Toronto, of the profit received by him [466] from the sale of the debentures, in question, in this cause. And this Court doth further declare, that



John G. Bowes, being such trustee as aforesaid, was incapable of acquiring, and did not in fact acquire, any personal interest in the said debentures. And this Court doth find and declare that the amount of profit derived by the John G. Bowes, as aforesaid, consists of the following particulars, that is to say: of certain sums of money amounting together to the sum of £4115 17s. 3d., together with interest on the same sums from the respective times when they were received by John G. Bowes, until the day of payment, and which interest up to the day of the date of this decree amounts to the sum of £406 6s. 7d., such profit altogether to the day of the date hereof being the sum of £4522 3s. 10d. And this Court doth order that John G. Bowes do, within ten days after service upon him of this decree, pay to the said Plaintiffs, or as they shall appoint, the said sum of £4522 3s. 10d., together with interest on the said sum of £4115 17s. 3d. from the day of the date hereof until the day of payment. And this Court doth further order, that John G. Bowes do pay to the Plaintiffs their costs of this suit, immediately after service upon him of this decree, and the Master's certificate of taxation of the costs."

The Defendant appealed from this decree to the Court of Error and appeal of Upper Canada, and the appeal came on to be heard on the 23rd and 25th days of August, 1855, before that Court, consisting of the Hon. The Chief Justice of Upper Canada (Sir J. B. Robinson, Bart.), the Hon. The Chancellor, the Chief Justice of the Common Pleas, and six other Judges then constituting the Court of appeal; and on the 1st [467] of March, 1856, a decree was made by that Court, whereby the decree of the Court of Chancery was affirmed with costs (the case is reported, vol. vi. of "Reports of Cases adjudged in the Court of Chancery of Upper Canada," p. 1). The Court were not unanimous; the Chief Justice and Mr. Justice McLean dissenting from the majority of the other Judges.

The present appeal was from this decree of affirmance. The Appellant contended, that the same was unjust and erroneous, for the following reasons:—

First. Because the Court below, which pronounced and affirmed the decree, found the same on an assumption that the Appellant, as a member of the Common Council of the City of Toronto, was incapacitated from purchasing from Messrs. Story and Co. the debentures of the City of Toronto, which were issued to Messrs. Story and Co., whereas there was no rule of law or equity which justified any such conclusion.

Second. Because it was erroneously supposed in the Court below that the case fell under the operation of the general rule, that parties invested with a trust cannot deal with it so as to benefit themselves, but that such rule had no application to the facts of the present case. The debentures in question being *bona fide* issued to Messrs. Story and Co., and when received by them became and were their absolute property. There being no trust or duty, with respect to such debentures, that remained to be performed or fulfilled by the Appellant. That they were issued with full knowledge on the part of the City of Toronto that they would be sold and disposed of by Messrs. Story and Co., and might be the subject of numerous transactions before they were paid; and that there is no principle that should control the Messrs. Story and Co., [468] or any subsequent holder, in their dealings with such debentures, or render it incompetent to them to enter into any contract for sale thereof to persons who were members of the Council at the time they were issued.

Third. Because it was idle to suppose that any rule of law or equity, or public safety, required that the individual members of a deliberative body, such as the Common Council of a Municipal Corporation, who, in the performance of a public duty, have been parties to the issuing of Bonds or engagements by such Corporation, for a lawful purpose, and in a manner prescribed by Statute, should be personally disqualified from dealing with such Bonds and engagements when issued, in like manner as the rest of the public might do. A member of the House of Commons might concur in a resolution authorizing the issue of Exchequer Bills, and afterwards buy some of such bills at a considerable discount; but it would be singular if the Court of Chancery should hold that he must account to the public Exchequer for the profit made on the transaction.

Fourth. Because the decree was based upon an assumption wholly unwarranted by any evidence, and contrary to the fact; namely, that the transactions in respect of which the debentures of the City of Toronto, issued to the Messrs. Story and Co.,

were so issued to them, were merely illusory and collusive, to cover a supposed sale, by the Common Council, of debentures of the City of Toronto to the Appellant, being one of the members of the Common Council.

Fifth. Because the resolutions of the Common Council of the City of Toronto, in the pleadings mentioned, of the dates of the 25th of November, 1850, [469] and the 18th of August, 1851, imposed a duty upon the Common Council of the City of Toronto of 1852, to give full legal effect, by a good and valid bye-law, to the objects of those resolutions; and no alleged informality or defect in passing the bye-law of the 28th of June, 1852, could, under the circumstances appearing on the pleadings and evidence in relation thereto, operate to invalidate the purchase made by the Appellant and the other persons, who, by the evidence, appeared to have been the purchasers, from Messrs. Story and Co., of the debentures of the City of Toronto, authorized to be issued to them, in the manner on the pleadings and evidence in that behalf appearing.

Sixth. Because any informality in the original issuing of the debentures to Messrs. Story and Co. had been removed by the Act of the Canadian Legislature, the 16th Vict., c. 5, whereby the transactions in respect of which the debentures were, by the Common Council of the City of Toronto, ordered to be issued to Messrs. Story and Co., were confirmed by the Legislature; and the transaction forming the consideration for the issuing of the debentures to the Messrs. Story and Co. not being impugned, or capable of being impugned, the City of Toronto could make no claim to the debentures, for the reason of the Appellant having been a party to the purchase of the same from Messrs. Story and Co.

Seventh. Because the purchase made by the Appellant, and others, from Messrs. Story and Co. of the debentures of the City of Toronto, so as aforesaid to be issued to them, was a legitimate *bona fide* purchase, in which the City of Toronto had no interest.

Eighth. Because the decree affected the interests of Hall, one of the parties to the purchase of the debentures from Messrs. Story and Co., although Hall was not made a party to the suit in the Court of Chancery, and the decree ordered the Appellant to pay a sum of money, a portion of which was in fact received by, and became the property of, Hall.

Ninth. Because it appeared by the pleadings and evidence, that if any persons other than the purchasers of the debentures from Messrs. Story and Co. were entitled to the proceeds of the sale of the debentures which appeared to have been substituted for the debentures so issued to Messrs. Story and Co., such persons were Messrs. Story and Co. themselves, and not the City of Toronto.

The Respondents, in support of the decree appealed from, relied upon the following reasons:—

First. Because throughout the various proceedings in which the City of Toronto was engaged relative to the issuing of debentures to the Railway Company, in and subsequently to the month of June, 1852, and until the 18th of October in the same year, the Common Council of the City and the standing Committee of Finance were engaged in deliberations and had to determine in what manner and upon what terms such debentures should be granted and issued; and the Appellant being the Mayor of the City and a member of the Common Council and standing Committee of Finance, was throughout this period under a personal incompetency to enter into any negotiation or engage in any dealings relative to such debentures on his own account, or for his own benefit, or otherwise than for the account and benefit of the City of Toronto, whose trustee and agent he was.

Second. Because the debentures in question, though [471] issued nominally to the Railway Company, were in fact issued to a trustee for the Appellant, and the Appellant must, therefore, be regarded in the light of a trustee selling the trust estate to himself, and so accountable for the profit made.

Third. Because a Corporation can only transact business through the medium of a governing body, and if the members of such governing body are allowed to deal prospectively for the purchase of the Corporation assets, the Corporation might be governed by persons all of whom are under personal bias adverse to the interests of the Corporation.

The Attorney-General (Sir Richard Bethell), and Mr. Osborne, for the Appellant.



---The decree appealed from declares the Appellant to have received the profits derived from the sale of the debentures as a trustee for the Corporation of the City of Toronto, and not for his own use, and, therefore, that he is accountable to them for his share of the profits made by him and Hall, his partner, from the sale of the debentures purchased from Messrs. Story and Co. Such a decree is not founded upon equitable principles. The Corporation being a deliberative body is out of the operation of the principles applicable to agents and trustees. The Appellant did not stand in the relation of agent or trustee of the Corporation, and, therefore, the familiar principle of a Court of Equity treating an act of the agent or trustee, and the profit derived, as being for the benefit of the shareholders in a public Company, and not for his own personal benefit, as in the case of *The York and North Midland Railway Company v. Hudson* (16 Beav. 485), [472] does not apply. He acted in the unbiassed performance of his duties as Mayor, and is not and cannot be charged with giving wrong advice in passing the bye-law authorizing the issue of the debentures, and the allegations in the Bill of fraud and loss to the Corporation is not established by evidence. The decree being based upon an illusion that the issuing of the debentures to Story and Co. was collusive, to cover a supposed sale from the Corporation to the Appellant, cannot be maintained, as it is contrary to fact. It is not the unanimous judgment of the Court, and is contrary to authority. *Simpson v. Lord Howden* (3 Myl. and Cr. 97. S.C. 1 Keen, 583; 10 Ad. and Ell. 793). *Lord Petre v. The Eastern Counties Railway* (1 Railway Cases, 462), *The Vauxhall Bridge Company v. The Earl of Spencer* (2 Mad. 356. S.C. Jacob, 64). The case of *The Aberdeen Railway Company v. Blakie* (1 Macqueen, Sc. Reps. 461) is distinguishable from the present; there the party was a director of a Railway Company, and, as such, a trustee for the shareholders. The Imperial Statutes, 5th and 6th Vict., c. 104, secs. 1 and 2; 5th and 6th Will. IV., c. 76; and 3rd and 4th Vict., c. 108, show that a purchase by members of a Municipal Corporation of the securities issued by a Corporation is not regarded as illegal or incompatible with the position of members of the Common Council. Again, the bye-law passed by the Corporation, authorizing the issuing of the debentures, is illegal, as the formalities required to be observed by the Canadian Municipal Corporation Acts of 1847, 1850, and 1851, were not complied with. Lastly, the Bill is defective for want of parties. *The Colombian Government v. Rothschild* (1 Sim. 94). The Appellant's [473] partner, Hall, whose interests the decree affects, is no party to the Bill. He received a moiety of the profits. How are they to be ascertained, and how can the decree stand in his absence?

Mr. Rolt, Q.C., Mr. E. J. Lloyd, Q.C., and Mr. Lewin, appeared for the Respondents, but were not called upon to address their Lordships.

Judgment was delivered by

The Lord Justice Knight Bruce (Feb. 15, 1858).—Their Lordships have deliberated upon the case since it has been last before them, and they do not think it necessary to trouble the Respondents' Counsel.

This appeal originates in a suit which, in the year 1853, was instituted in the Court of Chancery of Upper Canada, by certain inhabitants of the City of Toronto, on behalf of themselves and all other inhabitants of that City, against Bowes, the Appellant here, and the Corporation of the City of Toronto, the Respondents here. In the course of it, after Bowes had answered, the Corporation was, by an Order, substituted as Plaintiffs for the original Plaintiffs, and ceased accordingly to be Defendants. Witnesses having been examined on each side, the Court, at the hearing, pronounced a decree in favour of the Respondents, which, affirmed on appeal in the Court of Error and Appeal of Upper Canada by the opinions of the majority of the Judges, has been brought for final review hither. The appeal has been fully and ably argued before us, on the part of the Appellant.

The object of the suit was to charge the Appellant in favour of the Corporation of the City of Toronto, [474] the Respondents, with the amount of profit made by the Appellant, or the firm of Bowes and Hall (of which the Appellant was the principal member), by means of the acquisition and subsequent disposal of certain debentures issued by the Corporation. The claim was grounded on the connection of the Appellant with the Corporation, he having been, in the year 1850, one of the

Aldermen, and throughout the years 1851, 1852, and 1853, the Mayor of Toronto, and so a leading member of the Corporate body.

The important facts of the case are these:—

In the year 1850, a Railroad, now called "The Ontario, Simcoe, and Huron Union Railroad," had been authorized, and was contemplated and intended, if not begun to be constructed, which was generally supposed likely to be useful and advantageous to the trade and inhabitants of Toronto. The leading members of the Corporation, therefore, seem to have thought that the project might with propriety be assisted from their municipal funds. Accordingly, an Act of the Canadian Legislature was obtained (13th and 14th Vict., c. 81), of which this is the substance, so far as is now material: that it shall and may be lawful for the Mayor, Aldermen, and commonalty of the City of Toronto, in pursuance of any bye-law of the said Municipal Corporation, in the name or on the credit and behalf of the said Municipal Corporation, to issue debentures to an amount not exceeding £100,000, nor in sums less than £5 each, for and towards assisting in the construction of the proposed Railroad of the said Company, and to provide for or secure the payment thereof in such manner and way as to the said Municipal Corporation shall seem proper and desirable; and further, that it shall and may be lawful for the said [475] Municipal Corporation of the City of Toronto, and any other Municipal Corporation within or through whose jurisdiction the proposed Railroad of the said Company may pass, to assist otherwise in the construction and forwarding of the said proposed Railroad in such manner as to any such Municipal Corporation may seem proper and desirable on grounds of public utility. Then it is enacted—"That any other Municipal Corporation within or through whose jurisdiction the proposed Railroad of the said Company may pass, shall and may, for and towards assisting in the construction of the said proposed Railroad, issue debentures to an amount not exceeding £50,000, in the same manner and upon the same terms as the said Municipal Corporation of Toronto are hereby authorized to do." There is a third section, which is not now material.

It became law on the 10th of August, 1850. And on the 25th of November, 1850, the Common Council, the governing body of the Corporation, came to a resolution to this effect: "Resolved—That the sum of £25,000, in debentures, payable twenty years after date, with interest at 6 per cent per annum, payable half-yearly, be granted in aid of 'The Ontario, Simcoe, and Huron Union Railroad Company,' on the conditions set forth in the second clause of the Report, No. 21 of the standing Committee on finance and assessment; and in order to extend the benefits of the said Railroad to all parts of the City, it be another condition of the above grant that the terminus for passenger trains shall be erected on a portion of the market block property, now vacant, such portion to be leased to the company at a nominal rent for ninety-nine years, and that the line of Railroad shall be car-[476]-ried along Palace and Front-streets, to the full extent of the City water lots."

And, in the next year, 1851, on the 18th of August, the Common Council adopted by resolution the report of a select Committee of that body (made in consequence of a reference to the Committee), which report was as follows:—"That upon the most attentive consideration given by your Committee to the propositions signed by Mr. Arnold, as Chairman, and after frequent interviews with the manager, as well as with one of the Contractors of the Company, your Committee would recommend that in lieu of the propositions (or either of them) the Council loan to the said Company their debentures to an amount not exceeding £35,000, payable in twenty years, with interest on the same payable half-yearly, issuable in the same ratio as the bonus of £25,000, taking as security for such debentures the Bonds of the said Company to same amount, payable in ten years, with interest half-yearly, secured on the road, to the satisfaction of this Corporation, upon the recommendation of the City Solicitor. And further, that it be a condition to this loan, that the road from this City to Lake Simcoe, or the Holland River, be completed in two years from the 1st of January next. And further, that as long as the loan of £35,000 continues, the Mayor of this City, for the time being (if he be not a Director in any other Company), be a Director in the above-mentioned Company; if he be a Director in any other Company, then any Alderman of the City, for the time being, to be nominated by his Council to be a Director in said Company."



On the 28th of June, 1852, the Corporation made a bye-law, by which, after reciting what had taken [477] place on the 25th of November, and after certain other recitals, it is "enacted" (such is the term they use) "by the Mayor, Aldermen, and commonalty of the City of Toronto. First. That it shall and may be lawful for the Mayor of the City of Toronto to cause any number of debentures to be made out, not exceeding in the whole the sum of £60,000, and to cause such debentures to be issued to 'The Ontario, Simcoe, and Huron Union Railroad Company,' in the proportion specified in the before-recited resolution, as the work on the said road progresses.

"Secondly. That of the said sum of £60,000, the sum of £25,000 shall be as a gift to aid in the construction of the said road, and the remaining £35,000 shall be as a loan to 'The Ontario, Simcoe, and Huron Union Railroad Company'; and for the securing of the said payment of the said loan in ten years, with interest at the rate of 6 per cent per annum, payable half-yearly, the said Company shall give to the City of Toronto their Bonds, secured upon the said road, to the amount of such debentures from time to time issued to the said Company on account of the said loan.

"Thirdly. That all such debentures shall be under the common seal of the said City, signed by the Mayor for the time being, and countersigned by the Chamberlain for the time being of the City of Toronto, and shall bear interest at the rate of 6 per cent per annum, payable half-yearly at the Bank of Upper Canada; and all such debentures shall be redeemable at the Bank of Upper Canada; provided always that none of the said debentures shall be for a less sum than £25, nor payable at a more remote period than twenty years from the issuing thereof.

[478] "Fourthly. That the interest on the said debentures shall be and the same is hereby charged and chargeable, and shall be paid and borne out of the moneys which shall come into the hands of the Chamberlain of the said City for the time being, to and for the uses of the said City.

"Fifthly. That for the payment and redemption of the principal sum secured by the said debentures, there shall be raised, levied, and collected, in the year next before such debentures respectively fall due, an equal rate in the pound upon the assessed value of all rateable property in the said City of Toronto and liberties thereof, over and above all other rates and taxes whatsoever, sufficient to pay the principal sum secured by such debentures respectively falling due as aforesaid, unless otherwise provided for the re-payment of the said loan, or any part thereof, by 'The Ontario, Simcoe, and Huron Union Railway Company,' or by Act of the Mayor, Aldermen, and commonalty of the City of Toronto, authorizing the issue of other debentures in lieu thereof in that behalf duly made and enacted."

This is signed by the Appellant as Mayor.

Much doubt, to say the least, was entertained and expressed as to the legal validity of this bye-law, and it is very possible that the doubt was not without foundation. It is to be collected, however, from the materials in the cause, that before the 28th of June—before, in fact, the 24th of that month—by arrangements and an agreement made between the managing body of the Railroad Company, and Messrs. Story and Co., who had contracted with the Company for the construction of the Railroad, Messrs. Story and Co. were to receive, and had, as between them and the Railroad [479] Company, become entitled to the debentures to be issued under the resolutions of November, 1850, and August, 1851, respectively. The expression "to be issued" is used, because until a time subsequent to the 28th of June, 1852, none, as we believe, were in fact issued, and on that 28th of June, before the making of the bye-law so dated, the Finance Committee of the Corporation received from Mr. Berczy, acting on behalf of the contractors as well as of the Railroad Company, this letter, addressed to the Chairman of the Committee:—

"Toronto, June 28, 1852.

"Mr. Alderman Thompson, Chairman, Finance Committee:

"Sir,—On the part of the Directors of the Ontario, Simcoe, and Huron Union Railroad Company, and the contractors of the said Company, I beg to intimate to you that we are prepared to take the debentures of the Corporation under a bye-law,

without the form of advertising for three months, and to assume the entire responsibility of so receiving them.

"The contractors, acting under legal advice, agree to this course as the best that can be adopted under the peculiar circumstances in which they are placed.

"Should the above mode not be adopted, I submit, as the next best course, that a resolution should be passed by the Council similar to the draft enclosed.

(Signed) "Charles Berczy, President."

What took place in the following month, on the 29th and 30th of July, 1852, appears from the following resolution of the Common Council of the 29th of July, 1852:—

"On the 29th of July, 1852, the Mayor communicated to the Council the expediency of confirming an [480] offer which he had made to the contractors of The Ontario, Simcoe, and Huron Union Railroad, in consequence of some difficulty which had presented itself in the matter of the Directors giving the City security upon the road for the amount proposed to be advanced to the Directors by way of loan, and which offer the Mayor stated to have been in substance as follows:—That the contractors should agree to relinquish the grant of £25,000, made by the Council in aid of the Railroad, which said grant has been transferred by the Directors to the contractors, and that the Directors should relieve the Council from the agreement to loan the Company the sum of £35,000, upon certain security, upon condition that the Council should take stock in the said road to the extent of £50,000, paying, therefore, in debentures, at the same times and in the same proportions as the work progresses, as it was agreed the said grant and loan should be advanced—to which said contractors had assented."

Upon this communication, the Council adopted the following resolution:—

"Whereas, his Worship the Mayor has informed this Council, that the contractors of The Ontario, Simcoe, and Huron Union Railroad Company have accepted a proposition made by him, subject to the approbation of this Council, in view of the difficulties which have existed in the execution of a mortgage bond, by way of security for the loan of £35,000, formerly voted by this Council, to the effect that the contractors shall surrender the grant of £25,000 made by the Council and transferred to such contractors in part payment of their contract, and also that the Directors shall waive the aforesaid loan of £35,000 altogether, on condition that, in lieu thereof, the Council [481] will take stock to the amount of £50,000, to be paid by the issue of City debentures in the same proportions as the debentures for the above loan and grant were authorized to be issued.

"Be it, therefore, resolved, that the standing Committee on finance and assessment be authorized to complete such arrangement, provided that no legal difficulty shall occur in carrying out this resolution: and provided also, that no alteration shall take place in the conditions upon which a portion of the Market block was granted to the said Company, particularly with regard to carrying the Railroad to the eastern limits of the City water lots."

This resolution was communicated to the Board of Directors of The Ontario, Simcoe, and Huron Union Railroad Company, and to which the following reply was received:—

"Office of The Ontario, Simcoe, and Huron Union Railroad Company.

"Toronto, 30th of July, 1852.

"To the Worshipful, the Mayor of Toronto.

"Sir,—The Board of Directors have under consideration a resolution of the Council, passed on the 29th instant, relating to a proposed new arrangement for the issue of debentures to the contractors, a minute of the Finance Committee thereon, and a letter from M. C. Story and Co., stating their willingness to accept the propositions embodied in the resolution of the City Council first mentioned. I now beg to send you a copy of a minute made by the Directors of this Company in relation to the documents referred to: And the Common Council then resolved—That the Board of Directors agree to the proposed arrangement [482] between the City Council and M. C. Story and Co., submitted in the resolution of the City Council



of the 29th instant, without prejudice to the existing agreements between the Council, and the Board and the contractors, in the event of the one proposed not being accomplished; and, further, without prejudice to the other parts of the said existing agreements, which are not to be affected in any way by the substitution proposed for certain parts of those agreements.”

On the 7th of October in the same year, an Act passed the Canadian Legislature (16th Vict., c. 5), which after certain recitals, enacted, “That it shall and may be lawful to and for the City of Toronto to raise by way of loan upon the credit of the debentures hereinafter mentioned from any person or persons, body or bodies corporate, either in this Province, in Great Britain, or elsewhere, who may be willing to lend the same, a sum not exceeding the sum of £100,000 of lawful money of Canada.”

Section 3 enacted “That the sum of £50,000, part of the said loan so to be raised as aforesaid, shall be applied by the said City of Toronto in the payment of the promissory notes of the said City now current in this Province, and in the redemption of such of the debentures of the said City of Toronto as were issued prior to the passing of the Act passed in the twelfth year of Her Majesty’s reign, and intituled, an Act to provide by one general law for the erection of Municipal corporations, and the establishment of regulations of police in and for the several counties, cities, towns, townships, and villages in Upper Canada, and may fall due within the ten years next after the passing of this Act.”

[483] Section 4 enacted “That the funds derived from the negotiation of the said debentures so to be appropriated as aforesaid shall, when received, be deposited by the Chamberlain of the said City for the time being in the Bank of Upper Canada, at Toronto, and only be withdrawn therefrom as they may, from time to time, be required for the payment and redemption of the said promissory notes and debentures in the next preceding section of the Act mentioned.”

Section 5 enacted “That the sum of £50,000, the remainder of the said loan so to be raised as aforesaid, shall be applied in payment of 10,000 shares of the capital stock of ‘The Ontario, Simcoe, and Huron Union Railroad Company,’ lately purchased by the said City of Toronto, under resolution of the Common Council, passed on the 29th of July, 1852, in manner herein provided; and it shall be the duty of the Chamberlain of the said City for the time being (and he is hereby authorized and empowered so to do) forthwith, with the consent of the holders thereof, to call in such debentures of the said City of Toronto as may have heretofore been issued under any bye-law of the Common Council of the said City, and taken in payment of such stock, and to substitute therefor so much of the funds received on account of the debentures to be issued under this Act as may be necessary for that purpose.”

Soon afterwards, on the 18th of October and the 1st of November, in the same year, 1852, the Corporation made two bye-laws, thus expressed:—That of 18th of October recites the bye-law of the 28th of June, the Act of the 13th and 14th Vict., c. 81, and much or all of the subsequent arrangements; and enacts:—[484] “That it shall and may be lawful for the Mayor of the said City of Toronto to subscribe for, take, receive, and hold stock in the said Ontario, Simcoe, and Huron Union Railroad Company, to the amount of £50,000, for and on behalf of the said City of Toronto; and for the payment of the same it shall and may be lawful, and it shall be the duty of the said Mayor, for the time being, of the said City, to appropriate so much and so many of the said debentures, authorized to be issued under the provisions of the bye-law hereinbefore recited, as may be requisite and necessary for that purpose, and that the said debentures shall be issued by him for that purpose at the times and in the same proportions as is provided by the bye-law hereinbefore recited, subject, however, to the same conditions relative to the passenger terminus of the said Railroad, and the continuance of the said Railroad along Front and Palace Streets, as are contained in the recital of the said bye-law and the resolutions of Common Council of the 29th of July last.

“That the dividends from time to time paid and payable upon the stock so held by the said Mayor, on behalf of the said City of Toronto, in the said Ontario, Simcoe, and Huron Union Railroad Company, shall be applied by the Chamberlain

of the said City in such manner as, by resolution of the Common Council of the City of Toronto, may from time to time be directed."

Then comes the bye-law of the 1st of November, which is termed "An Act to provide for the issue of £100,000 debentures, to consolidate a part of the existing debt." It recites a sufficient part of what had gone before, and then enacts:—

"1st. That it shall and may be lawful for the [485] Mayor of the City of Toronto to raise by way of loan, from any persons, body or bodies corporate or politic, who may be willing to advance the same upon the credit of the debentures hereinafter mentioned, and the special rate hereinafter imposed, a sum of money not exceeding in the whole the sum of £100,000; and to cause the same to be paid and applied in the manner prescribed by the Act of the Provincial Legislature authorizing the negotiation of the said loan.

"2ndly. That it shall and may be lawful for the Mayor of the City of Toronto to cause or direct any number of debentures to be made out for such sum or sums not exceeding in the whole the said sum of £100,000, as any person or persons, body or bodies corporate or politic, shall agree to advance upon the credit of such debentures and the special rate hereinafter imposed; such debentures to be under the common seal of the said City, signed by the Mayor and countersigned by the Chamberlain of the City, for the time being, and made out in such manner and form as the Mayor shall think fit.

"3rdly. That the interest on such debentures shall be payable half-yearly, on the 1st of April and 1st of October in each year, at such banking house or place in London, or elsewhere, as may be agreed upon between the Mayor of the said City and the party or parties who may advance the said loan, or any part thereof.

"4thly. That the said principal sum of £100,000 shall be made payable at twenty years from the 1st of October, 1852, at the banking house or place in London, or elsewhere, as may be agreed upon as aforesaid.

[486] "5thly. That a special rate of tenpence in the pound upon the assessed value of all rateable property in the City and liberties, over and above all other rates and taxes, shall be raised, levied, and collected annually for the purpose of paying the interest and creating a sinking fund of two per cent. for the payment of the principal of the said loan of £100,000, from the year 1852 until the year 1873, or until the said debentures shall be fully redeemed or provided for.

"6thly. That if in any of the years during which the sum of tenpence in the pound special rate by this Act authorized to be levied there shall be any surplus, after paying the interest on the said loan and providing for the sinking fund hereinafter mentioned, the said surplus shall be invested with and added to the said sinking fund for the purpose of paying the said loan of £100,000 secured by the said hereinbefore mentioned debentures."

It is now necessary to revert to the month of June, 1852.

It appears that the Appellant, who was at Toronto certainly on the 12th, was at Quebec on the 24th of that month, and had then and there, with a gentleman named Hincks, a member of the Canadian Legislature, certain communications, the nature of which may be collected from the evidence given in the cause by Hincks himself, as a witness on the Appellant's behalf. It will be sufficient to read some extracts from Hincks' testimony in chief and on cross-examination. He says: "Some time at the latter end of June, 1852, soon after my return from England, Bowes proposed to me to join him in purchasing certain debentures of the City of Toronto, then about to be issued. Bowes told [487] me that the contractors had been trying to sell them, but without success; that they would, he thought, take 80 per cent. for them; the amount about to be issued was about £25,000. I agreed to join him in the purchase at that price; the highest value of such bonds at the time was 85. I mean that purchases in small sums might be made at that price. Bowes and I had some conversation as to the mode of raising the money to pay for them, in case he succeeded in effecting the purchase; he told me that he had sounded the cashier of one of the Banks, who had given him encouragement. I told him that if I were concerned in the operation, it would be on the express condition that the money should be raised in England; that I had no doubt of getting it for twelve months at 5 per cent. per annum, which would give us plenty of time to dispose of the bonds; and that if he could secure the purchase, I would undertake the entire



management of the transaction. This conversation occurred on the 24th of June. My reason for being pretty positive as to the exact day, is, that I examined the Registry book at Sword's Hotel, where Bowes usually stopped, and find by it that he arrived in Quebec on that day, and does not appear to have remained in town over night. In this way I am enabled to state the exact day on which the conversation occurred; but, independently of this, I can state, from my own recollection, that it must have been about that time. In reference to what I have said as to 85 per cent. being obtainable for these debentures, when sold in small sums, I wish to add that I do not believe that more than 80 could be got for them, when sold in large sums."

In answer to the question, "In the passing of an [488] Act authorizing the City of Toronto to raise £100,000 to consolidate a part of the City debt, did you take any, and, if any, what part; or did you exercise any, and, if any, what influence upon any other person in procuring that Act to be passed; or had you or the said Bowes any object in procuring such Act because of your interest in the said debentures purchased by you and him from the contractors of the said Railway?"—he says: "I was present when the Bill passed one of its stages, and may have been at all of them. I took no part and used no influence to carry it through the House of Assembly. I am not aware of any influence being used by any one to carry it. It was of a similar character to Bills passed for the same object for the Cities of Kingston and Hamilton, and, I think, Montreal. There was no opposition to any of these Bills, the object of all was the same; simply to require a less oppressive sinking fund than that required by the Upper Canada Municipal Act. The City of Toronto would have had to borrow whether the new Act passed or not. So far as the Act legalized the debentures issued to the Railroad contractors, or provided for the substitution of other debentures for them, it was in consequence of a distinct understanding before the conclusion of the purchase of the said debentures by us, and at the time of the passing of the bye-law under which they issued, that the City would take the necessary steps to remove doubts as to the legality of the issue of the debentures. I have no doubt that the City could have been compelled to do so in some way. After the passing of the Act in question, and after comments had been as to the propriety of legalizing debentures which were already in circulation, the Legis[489]-lature on its re-assembling in 1853 confirmed the validity of debentures issued to the same parties by the County of Simcoe, and which were objected to as illegal, and this even though a motion to quash the bye-law on the ground of illegality was then pending before the Courts."

Again, he is asked: "Did you or did you not transmit to Bowes any part of his share of the proceeds of the sale of the said debentures purchased by you and him in bills of exchange upon England; and did you or not purchase such bills in the ordinary course of business; and where did you purchase the same; and why did you transmit to Bowes his share or any part of his share in the profits of the said transaction by Bills on England?" He answers: "I did remit Bowes a portion of the profit realized by the transaction on Bills of exchange on London drawn by the Receiver-General; that exchange was sold, without any intervention of mine, at the highest price that could be obtained, and in the usual way. It was drawn against balances of special funds, by the Receiver-General, and it was only when the bills were brought to me to be countersigned that I became aware of the sale. They were sold to the Bank of Upper Canada, and drawn in favour of the manager of the Branch of that Bank at Quebec. When I saw them, it occurred to me that they would be a convenient mode of remitting to Bowes, as exchange is usually higher in Toronto than at Quebec, and I knew that Bowes required exchange in his business. I sent to the Bank of Upper Canada to buy the exchange. I had no interest in the matter; I charged Bowes just what I paid, and gave him either a bank cheque or bank notes for the balance, on his next visit to [490] Quebec. The exchange was endorsed by Bradshaw, the manager of the Quebec branch of the Bank of Upper Canada, in the usual way." And after it, there is this—"Q. What amount of debentures did Bowes first propose to you to purchase; and was such proposal made in writing or verbally, and when and where? A. The proposal was made verbally to me at Quebec. I think the amount spoken of was either £24,000 or £25,000. I think that we must have had conversation at the time with reference to the

remainder of the debentures, as it was expected that the Railroad company would get in all £60,000, which, under the terms of their agreement with the contractor, were to be taken by them in payment. The proposal was made to me on the 24th of June, 1852. Q. Had you any other and how many conversations with Bowes subsequent to the said 24th of June, on the subject of these debentures, previous to your finally agreeing to purchase them? A. No; I may have had two or more conversations with him on the 24th of June, but he left Quebec either on that day or the next. I did not see him again for several weeks. I told him then (that is, on the 24th of June), that if the owners of the debentures would sell them at the price which he told me he thought they would, that I would join him in the purchase. Q. After agreeing to the purchase of the debentures in question, did you enjoin secrecy on Bowes of his or your connection with the purchase, and when, and from what motive; and was it in writing or orally? A. I have no distinct recollection of the time or mode of communicating with Bowes on the subject of secrecy, but I have no doubt that at some time in the early stage of the transaction I did impress upon him the [491] importance of keeping the transaction as a most confidential one. My belief is that any prudent person engaged in such a transaction would adopt such a course; but I am ready to admit that the course pursued towards me by the press did influence me in wishing to prevent their obtaining any knowledge of my private transactions. I was not influenced by any feeling that the transaction was an improper one, either on the part of Bowes or myself. I mentioned the circumstance confidentially to some of my friends, and I was aware that Bowes gave the same confidence to at least one of his friends. It is the custom of all persons who engage in transactions of this nature to keep them as secret as possible, and this is one reason why the intervention of brokers is generally sought. Q. Are you aware that after Bowes had purchased the debentures in question, he declared in a meeting of the City Council at Toronto, that he was not interested in them, or in their negotiation? Had he your sanction for making such a declaration in his place, as Mayor of the City, to the City Council? A. I have seen by the newspapers that Bowes is reported to have made such a declaration. He had not my sanction for making it. So soon as I became aware that Cotton and Bowes had quarrelled, which was about the latter end of November, 1852, I was perfectly aware that the transaction could not be kept secret, and I either directly, or through a friend in Toronto, or in both ways, authorized Bowes and advised him to state every fact connected with it. My belief is, that this must have been some time before the declaration of Bowes in the City Council, alluded to in the question. I should say, in conversations with Bowes on the subject, he invariably de-[492]-clared that, so far as he was concerned, he had no objection to the transaction being made public, but that he knew that my enemies would make it a subject of attack to me, and it was for this reason that I was particular in communicating my desire that he should state the whole matter. Q. How many letters did you receive on the subject of these debentures from Bowes, from first to last of this transaction? Please produce them, or account for not doing so; and if you have destroyed them, state particularly when and why. A. I received a great number of letters from Bowes during the latter part of the year 1852; they were on a variety of subjects, and Bowes was in the habit of writing on all such subjects, and in the same letter. They were principally on the subject of The Toronto Esplanade, The Toronto and Guelph Railway; for which he wanted the provincial guarantee, a separate Division Court for Toronto, and other matters which I do not particularly recollect. I have not, to my knowledge, any of Bowes' letters in my possession. I cannot recollect the precise time when they were destroyed; but I recollect having some of them in my possession in the autumn of 1852, because Bowes happened to be at my house where these, with other letters, were lying in an open desk, and he made a remark upon the loose way in which I kept my letters, and said that he thought they ought to be destroyed, and, I think, said that he was in the habit of destroying mine. I told him then that I would destroy any that I had; and I subsequently destroyed them when destroying other letters. I treated them just as I do all my private correspondence, unless where some special reason requires their retention. Bowes' letters contained very little on the subject of this transac-[493]-tion, as he took no part whatever in the management of it beyond obtaining the offer of sale from the contractors. It is very



probable that Bowes may have written to me on the subject of the Bill for the Consolidation of the City Debt, though I have no recollection that he did so. I think that he principally communicated on that subject with Mr. Attorney-General Richards, and that any communications on that subject with Richards or with me were verbal. Bowes seemed anxious that the City should not be required to provide a sinking fund. The Government had fully considered the subject of a sinking fund with reference to the Consolidated Municipal Loan Fund Act for Upper Canada, and determined to insist on a sinking fund of a similar amount being provided in all the Corporation Loan Acts, and this course was followed in the cases of Montreal, Toronto, Kingston, and Hamilton. Among the letters from Bowes which have been destroyed, must have been included any containing references to the transaction in the Toronto debentures. I cannot possibly say how many of these letters had reference to the debentures. Q. Were the letters having reference to the debentures written to you by Bowes, or in the name of Bowes and Hall? A. They were all in the name of Bowes himself; but in the letter acknowledging the receipt of the exchange, he told me that the firm had used it. Q. Was that the first occasion upon which the name of the firm appeared in connection with this transaction? A. Yes. Q. Did you write to Bowes on the same subject, and how often, and were your communications addressed to Bowes, or to Bowes and Hall? Produce copies of all the letters you so wrote on the subject of these debentures. A. I [494] wrote frequently to Bowes on the subject of this debenture transaction, as well as on other matters, respecting which he addressed me. I always addressed Bowes, and not the firm of Bowes and Hall. I have no means of judging how many letters I addressed to Bowes. I was not in the habit of keeping copies of them, and I very seldom keep a copy of any unofficial letters. I have a private letter-book, which is at present mislaid, but I am certain it contains no letter to Bowes; and I have asked the gentleman who copied the letters which are in that book, and he also is certain that it contains no such letter. I am, therefore, convinced that I have no copy of any letter which I have addressed to Bowes. I have not had any letter copied in that private letter-book for the last twelve months. The book, I have no doubt, was mislaid when I changed my residence last summer. Q. How many letters had you written to and received from Bowes, on the subject of the debentures, previous to your letter of the 5th of July, 1852, to Mr. Ridout? A. I had received one, and I think had written none. Q. Did you write by the same mail to Bowes, that is, by the mail of the 5th of July? A. Yes, I have no doubt that I did so. I have no copy of that letter. Q. In your conversation with Bowes at Quebec, was it agreed that you should purchase £24,000 or £50,000 of debentures? A. My recollection is that the sum was £25,000. I afterwards learned that the amount at the disposal of the contractors was £24,000. Q. When were you first informed that instead of £24,000 there was to be issued to the Railway Company £50,000 of debentures, being the amount subscribed by the City of Toronto, and by whom? A. I have no doubt that I was informed by [495] Bowes immediately after the arrangement was effected, but I do not recollect the precise time, but it must have been about the beginning of August. Q. Are you aware whether this change was suggested by Bowes, and strenuously advocated and promoted by him in the City Council of Toronto? A. I am not aware that such is the fact. I have heard that the change was suggested by Berczy, President of the Railroad Company. The arrangement was most beneficial to the City, and I am convinced that the City will benefit to the extent of £20,000 by the change. Q. On what day did you definitely agree with Bowes to purchase the debentures? On the 24th day of June, a conditional agreement was made which depended on the contractors being willing to sell on the terms stated, and on our being able to obtain the necessary funds. The final purchase I consider to have been made when Bowes accepted the offer which he had received about the 30th of June, and which, I believe, was on the 8th day of July, 1852, after having heard from me." He is again asked: "Was it distinctly understood by Bowes, at the time you agreed to join him in the purchase of the debentures you afterwards purchased together, that you expected to get the money to pay for them from parties in England, and that you would communicate forthwith with these parties? A. It was so distinctly understood. Q. Was there not a discussion in the City Council upon the legality of these debentures, in which reference was made to there being high legal opinions

against the validity of the bye-law for the issue of the debentures, which discussions were made public? A. Yes; I believe such discussions took place, and were made public. Q. Is it not true, that with such [496] doubts upon the legality of these debentures, it would have been hardly possible for you, or Bowes, to have disposed of them without having them legalized; and did not Bowes come to Quebec as Mayor, at the desire, or, at all events, with the sanction, of the City Council, to get an Act passed legalizing them? A. I consider that, under the circumstances, it was necessary that the debentures should be legalized. I would never have engaged in the transaction, had I not been perfectly satisfied that the Corporation of the City of Toronto would be incapable of so gross an act of fraud, as to have omitted taking the proper steps to have the said debentures legalized. I am aware that Bowes, when in Quebec, interested himself about the passing of the Bill, and I have no doubt that he had the sanction of the City Council in so doing; but I believe that he had other business for the City, which more especially required his personal attendance at Quebec. I refer particularly to the Toronto Esplanade." He is further asked: "What was the exact profit made by you and Bowes upon the purchase of the £50,000 of debentures from the contractors? And produce the account. A. I have no account to produce: the result of the operation was, that I drew a Bill of exchange on Messrs. Glyn, Mills and Co. for the balance of my credit with them, the proceeds of which amounted to £8,237 8s. 6d. currency, one-half of which I paid to Bowes, as already stated. Q. Is that not the profit upon the sale by you of the £100,000, issued by the City of Toronto, under the Toronto Loan Act? A. I consider that there was a loss on the sale of the £100,000, no portion of such loan having realized par, whereas the City was paid par. Q. Had you taken £50,000 only of debentures [497] issued under the Toronto Loan Act in payment of the debentures which you purchased from the contractors, what then would have been your profit upon the purchase of debentures by you and Bowes? A. Had I received sterling debentures in exchange for the amount of the debentures which were purchased from the contractors by Bowes and myself, our profit would have been enhanced by the amount of the loss sustained on the debentures for which we gave par to the City; but as we should not have received sterling debentures at all, unless we had purchased from the City at par, our profit would have depended on the price at which we could have sold our currency debentures in Canada; and as there was a rapid advance in the value of such debentures, my belief now is, founded on information received from the brokers in Montreal with whom I correspond, and from other sources of information, that our profit would probably have been greater had we never interfered with the purchase of the new City loan of £50,000."

Their Lordships do not see any reason for not trusting Hincks as a witness.

Cotton, more than once mentioned in Hincks' evidence, was examined in the cause as a witness against the Appellant, and cross-examined for him, deposed thus:—"I know Bowes, also Hincks. Bowes mentioned to me that debentures were to be issued to the directors of the Northern Road, and that a speculation could be made in them. I think this was in February, 1852. Bowes proposed that we should purchase the debentures on joint account. This was before any issue. Conversation took place from time to time to the effect, that when issued we should make the purchase. It was suggested that Hincks should [498] be employed to negotiate them. I think the proposition came from Bowes, but am not sure. I had a conversation with Bowes, in reference to a proposition from the contractors, or a negotiation with them: we partly agreed that the debentures should be purchased from the contractors on joint account, at 20 per cent. discount. Bowes was the medium of communication. There was no definite amount fixed between Bowes and myself at first. I left that to Bowes. I had communication with Hincks before the final arrangement with Bowes. I cannot tell when my first conversation with Hincks was. It was verbal, and may have been a month or six weeks before the first debenture was deposited. My first interview was at Quebec. I had a conversation with Bowes previous to my first communication with Hincks relating to our purchase of the debentures, but I cannot distinctly state its purport. Bowes said he had already communicated with Hincks. When I first spoke to Hincks he had knowledge of the matter, or appeared to have. I will not be positive that I had more than two interviews with Hincks. I may have. The last one was immediately preceding the first



issue of debentures. I informed Bowes, on my return, of my conversations with Hincks. I had conversations with Bowes as to the illegality of the bye-law on the 28th of June. We proposed to get over the difficulty by having the debt of £100,000 consolidated; and that by changing them into sterling they would be more valuable. This was some time in the beginning of June. I cannot be certain. I cannot be positive whether I stated this to Hincks. I never applied to Hincks for the purpose of having an Act passed. It was said by Bowes that Hincks' name would have the effect of getting a better price for the [499] debentures than any other person, and that it would be necessary to give him an interest in the debentures, as it would be necessary to have his assistance to procure an Act to consolidate them. I saw the letter from the contractors of the 30th of June. I think this was a day or two after its date. Bowes showed it to me in his own office. Bowes told me some time prior to the date of that letter that he would propose the offer of the contractors to the Finance Committee. He said, at the same time, that they could not accept it, because they were not in a position to raise the money to buy them. He said that he would make the proposition in order that they might not find fault with him hereafter. This was the only reason that I recollected. I, on one occasion, took a letter from Bowes to Hincks. Hincks is resident at Quebec. I read that letter. It was written by Bowes. It had reference to the purchase of debentures. I conversed with Bowes on the subject-matter of the letter. My conversation was with reference to the mode of raising the money for the purchase of the debentures. The letter had reference to the same subject. It was delivered to me open. I sealed it in Bowes' office. Bowes directed it to be delivered to Hincks. My communications were with Bowes alone. The name of the firm was never mentioned. I understood that his interest was individual." Upon his cross-examination he says—"I do not think I was one of the first to originate the charge against Bowes. I never did speak of it. I was in Quebec in December, 1852, and when I came up here there were placards about, charging Bowes with chiselling the City out of £10,000. I was no party to them, or any other placards on the subject. I have stated some parts of my evidence, but I don't recollect what part. I did state that Bowes and I were to purchase on joint accounts. I mentioned it to Meudell and others, but I can't say to whom. I did not state that I could give evidence before the Committee of Council. I do not know how my evidence became known. I was called on to give evidence before the Committee of Council. I can't say how I came to be so called on. If I did not state before that I was chiselled out of my shares, I state it now. I took great umbrage at my being so chiselled, but I stated nothing about it. I may have stated that I carried a letter from Bowes to Hincks. The loss of the Guelph contract was not the cause of my umbrage. It was one amongst many others. I brought an action of slander against Bowes, but that action had no reference to the loss of the contract. I have a strong feeling against Bowes. I cannot tell exactly the period of my first interview with Bowes about the debentures, but I think it was six months prior to the 30th of June. I am certain it was three months prior to that date. I cannot tell when we agreed to purchase on joint account. I cannot tell how long prior to the 30th of June that was. I have not the slightest idea. It was definitely agreed that Bowes and I should purchase on joint account, and that we should get Hincks' assistance. Bowes told me he had written to Dunn and Wilson, and showed me the letter. We had agreed to buy them, if, as the work went along, we should think it prudent. I never spoke to the contractors on the subject. I saw the contractors at Bowes' office about the day the letter of the 30th of June was written. It was thought better that I should not speak to the contractors. It was thought better to leave the [501] matter in Bowes' hands. I did not think it wrong then that the Mayor should make the purchase. The object of applying to the Finance Committee was to avoid any blame being attached to Bowes thereafter. I was then in negotiation with the contractors of the Northern Road about some of the matters, and it was thought better not to meddle in this. It was finally agreed that Bowes and I should purchase when we learned that the contractors would sell at 20 per cent. discount. This was a month prior to the 30th of June. This was after I had seen Hincks. When I saw Hincks, Bowes and I were the only parties interested. I do not know how far I stated this to Hincks; but so far as I know, Hincks had no reason of any kind to form any other opinion than that Bowes and myself were exclusively interested. After

the contractors agreed to take 80 cents on the dollar, Bowes requested me to take a letter to Quebec, to get Hincks to give directions to the Bank to advance the money for me and Bowes, on the debentures being deposited in the Bank. I delivered the letter to Hincks. He read it, and told me that he would telegraph and write to Ridout to make the matter all right. It was understood that Hincks was to have a share for negotiating the debentures, the nett proceeds after that were to be divided between Bowes and myself. I made no arrangement with Hincks. Bowes did that. I do not know when the arrangement was made with Hincks. I do not know that any such arrangement was ever made. I only heard it from Bowes. He never stated to me the amount to be paid to Hincks. There was no other arrangement as to raising the funds other than I have stated. When I returned, I told Bowes that Hincks said it was all right. I cannot [502] say when I had the conversation with Bowes as to the illegality of the bye-law of the 28th of June. We had several conversations before and after the 28th of June. Our arrangement for an application to consolidate the debt was previous to the 28th of June. I do not recollect that our arrangement on the subject was communicated to Hincks. My first conversation with Hincks was a casual one, relating to the probability of the purchase of the debentures. That was the whole purport of our conversation. I do not recollect distinctly what did pass. There was nothing of moment. My second interview was on the subject of Bowes' letter about raising the money. He said that it would be all ready. I always talked as if myself and Bowes were the purchasers. I may have had conversation since, but I do not recollect when or where. I understood that the offer was to be made to the Finance Committee. I remember the purport of my conversation, but I cannot tell the date. It was before the letter of the 30th of June came from the contractors, but I cannot say how long. When Bowes wrote to Quebec by me we did not discuss the terms. The draft of the letter was written when I came to the office. I have not yet discovered that I was not a purchaser. I have not yet discovered that I am not to have my share. I never knew that Bowes intended to deprive me of my interest until I heard his evidence. I had reason to think so from his acts, but never knew it till I heard his evidence. I thought from the hostile course he was pursuing towards me that he would try to cheat me. I did not make any claim because I was waiting for the result of this suit. I do not know when the bill was filed. I believe that Bowes has received the money, but being on bad [503] terms, and finding now a clamour in town about it, I do not see fit to make an application to him. I was not a party to posting placards about the matter against Bowes. I never did say to any person that I could have been a witness for the City against Bowes. There was a definite agreement that the debentures should be purchased by Bowes and myself." He is then re-examined, and says, "Prior to the letter of the 30th of June I had no communication with Hincks as to raising the money: but Bowes informed me that he had made such arrangements three weeks or a month prior to my taking the letter to Quebec. A few days previous to my going to Quebec, Bowes told me that the engineer had given his certificate, and that he would delay the issue of the debentures till Hincks' letter to the Bank should arrive. When we first talked of purchasing the debentures, Mr. Bowes told me that he had written to Wilson and Dunn, and that Dunn had offered to negotiate the debentures on good terms: in fact, not to charge anything for the business. Bowes showed me a letter from Wilson or Dunn, I won't be sure which. The application to Dunn and Wilson was for our mutual benefit in the negotiation of the debentures. It was not agreed between Bowes and myself what share Hincks should have. My impression, and I think Bowes' too, was, to give Hincks whatever he would demand for the job. Some time previous I had conversation with Hincks as to the negotiation of some debentures in England. Nothing was done. It was merely a matter contemplated. We contemplated having Hincks' assistance from the first. We could not have raised the necessary amount ourselves. I would not have entered into the arrangement for a purchase if I had not had [504] assistance from some person. We never contemplated raising the funds ourselves. I had a letter from Hincks as to the negotiation of previous debentures belonging to myself. They were Municipal. I cannot say of what municipality. He offered to negotiate them at one per cent. I showed the letter to Bowes. Hincks said the debentures were worth 95 par, payable in London: at least he proposed that as a limit." In answer to the Court he says,—"It was definitively arranged that Bowes and myself should



purchase the debentures on joint account ; it was before this that the application was made to Dunn and Wilson ; about a month or two before this. I have a clear recollection of seeing Dunn's or Wilson's answer, but I cannot say which, and I may have seen both. This was before the arrangement was concluded, perhaps a month previous. I cannot say whether I saw the letters, or heard their contents from Bowes. I had not arranged with Bowes what Hincks was to receive for his assistance. We have had communications about it, and it was supposed that Hincks might require a third or one-half. When I left Toronto with the letter, I had the full belief that I was to have half of what Bowes received, and remained under that impression. I returned from Quebec in about three weeks. I have made no application for my share. I never applied at the Bank, or to the contractors, or the Chamberlain, to know how matters were proceeding ; but Bowes stated to me, between July and November, 1852, what was doing. He told me what amount of debentures were issued and lodged ; and during this time he treated me as entitled to half. I did not hear that the debentures had been negotiated and the proceeds re-[505]-ceived, until Bowes stated it in Court. I had reason to believe before that such was the case. I did not know of the amount of profit, or that it had been received, until Bowes stated it in Court. In December last, when I returned from Quebec, I saw Bowes about different matters ; and our interview was of such a nature that we have not spoken since. I have seen Hincks since, but did not speak to him on the subject. I may have stated to parties that I had been chiselled out of my share of my profit." By Counsel—" I understand Bowes to state in his evidence that I had no interest in the profit on the sale of the debentures. I am not positive."

The evidence thus given by Cotton, being that of a person entertaining unfriendly feelings towards the Appellant, it was fit to watch narrowly and receive cautiously ; but their Lordships see no ground for laying Cotton's testimony wholly out of the case ; nor, as to a considerable portion of what he says, is he unsupported. Mr. Courtwright, whose respectability there seems no reason to question, one of the firm of Story and Co., the contractors, was examined for the Appellant, and, among other things, deposed thus :—" I was anxious for the passing of the bye-law of the 28th of June : I pressed its passing because we had arranged with Mr. Roberts, of New York, for all our iron, and had undertaken to place a portion of the debentures in his hands. It was very important to us to get the debentures at that time. The iron was then being delivered, and we got it at a pretty low rate. It had risen at that time. We got it at a very low rate. We paid 39 dollars at Quebec, and it was worth there, I think, 50 dollars. We got 1000 tons here at 37 dollars. It was an object to us not to [506] forfeit our contract. Several ships had, I believe, arrived, or were on their way with it. For these reasons we were anxious to get the debentures, and to get the bye-law passed. We had a legal adviser here from New York. We were aware that the legality of the bye-law was questioned, but we were willing to run the risk and take the debentures. Our legal adviser was also agent for Roberts. I remember writing a letter to Bowes, dated, I believe, the 30th of June. We had previously endeavoured to sell the debentures, but had not succeeded. We had authorized Roberts to sell a portion, if not the whole, at 85 cents on the dollar. He had not succeeded. We never expected to get par for them. Never said so, that I know of. Before writing the letter, we had a conversation with Bowes, two or three days before. He proposed to purchase the debentures at 80 cents on the dollar. We told him we thought he could have them ; and he wanted a written proposition, and in consequence the letter was written. This was the first proposition that was made between us and the Mayor. I am not sure whether we accepted his offer at once, or said only we thought he could have them. We thought this was as good an offer as we could get. It was no favour to Bowes." Again he deposes :—" We expected to get the debentures after the bye-law was passed as soon as we were entitled to them. We directed the Chamberlain to deposit them as issued in the Bank. We sold the whole £50,000, on the same terms, although my letter mentioned only £24,000. The residue of the debentures was talked about at the original conversation, but no arrangement was made with respect to them. I did not suspect Bowes to be the cause of the delay in issuing the debentures ; the [507] chief delay had occurred before this time. We had disposed of £6000 debentures otherwise, and did not know whether we could let Bowes have them. I cannot tell at what rate we sold them. We paid for

right of way with them. We re-purchased £5000 of the £6000 at 80 cents on the dollar. We only got £40,000 in money for the £50,000 debentures." Further he says:—"I desired the sale to Bowes to be considered confidential, because we had not sold all the debentures, and it might prejudice the sale of the rest. I did not come here long before the 28th of June at that time—only a few days before. For some time previous, none of the firm had been here. Previously I had been here, and also Mr. Laymond. During the spring, I was here part of the time, also Laymond part. We were willing to run the risk of the illegality of the bye-law, as we were advised by our legal adviser, and also Boulton; and it was thought the bye-law was not illegal; and at all events, the debentures would be legalized. We felt sure also that the City would not repudiate them. We re-purchased the £5000 debentures we had sold, because Bowes wanted to get the whole £50,000."

The letter of the 30th of June, 1852, already mentioned, is set forth in a schedule to an affidavit made by the Appellant on the 1st of September, 1853, which was in these terms:—"Firstly, I say that I have filed certain copies of documents relating to the matters in question in this suit, as set forth in my affidavit made in this cause, and filed with the said copies on the 23rd of August, which documents are particularized in the first schedule hereto annexed. Secondly, I further say, that subsequently to the City Council passing the bye-law of the 28th of June, 1852, in the [508] said first schedule hereto annexed mentioned, Messrs. M. C. Story and Co., in the said bill mentioned, addressed a letter to me, offering to sell debentures of the City of Toronto, to the amount of £24,000, which letter is now in my possession; and I submit that it is wholly irrelevant to the matters in question in this suit; I however say that I have set forth a true copy thereof in the second schedule hereto annexed. Thirdly, I further say, that subsequently to the debentures in the said bill mentioned becoming within the power and control of the said Messrs. Story and Co., and to their being publicly offered by them for sale, I have, in the course of my private correspondence, mentioned to my said correspondent the fact of the said Messrs. Story and Co. having such debentures for sale, and I have received letters from my said correspondents relating thereto; but I say that such my correspondence had relation wholly to the private transaction of the said Messrs. Story and Co. having such debentures for sale, and did not otherwise, in any manner, relate to any of the matters in question in this suit. And I submit that such my correspondence is irrelevant to the matters in question in this suit. And I further say, that I never have kept copies of or extracts from, or a copy of or extract from, such my correspondence; nor have I ever kept the letters, or any of the letters, so received by me, nor any copy of, or extract from, any part of such correspondence; but the letters so received by me have been, to the best of my belief, destroyed or cast away among waste papers, after having been read; and I say that I have not now any part of such correspondence in my possession, custody or power. I further say, that I have drawn up a statement relating to the [509] matters in question in this suit for the purpose of my defence to this suit, which statement I have placed, and it now is, in the hands of my solicitor, for the purpose of such my defence, which statement, for such reason, I object to produce. I further say, according to the best of my knowledge, remembrance, information and belief, that I have not now, and, save as herein aforesaid, never have had, in my possession, custody, or in the possession, custody or power of my solicitors or agents, or solicitor or agent, or in the possession, custody or power of any other person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of, or extract from, any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than, and except, the documents set forth in the first and second schedules hereto."

Then comes the first schedule of documents: the second schedule contains the letter of the 30th of June, 1852, from the contractors to the Appellant, which is in these words:—

"Toronto, June, 30th, 1852.

"J. G. Bowes, Esq.

"Sir,—We propose to sell you the £24,000 of Toronto debentures, authorized by



the City Council on the 28th instant, to be issued in aid of The Ontario, Simcoe, and Huron Union Railroad; you to pay us eighty cents on the dollar, on the deposit of the said debentures in such Bank in the City of Toronto as you may designate, and we to deposit said debentures as soon as we receive the same.

[510] "Let us know your acceptance, or not, of this proposition in writing to-morrow.—Very respectfully, Your obedient servants,

"M. C. Story and Co."

The letter of the 30th of June was evidently written after a communication upon the subject of it between the Appellant and the contractors, who, on the same footing, and as a consequence of the same understanding, parted with all the debentures acquired from them by Hincks and the Appellant. The latter was also examined in the cause, and, among other things, deposed thus:—"The offer was made to and accepted by me to take £24,000 debentures at 80 cents to the dollar. Not on my own account. I accepted the offer eight or ten days after it was received. No arrangement was made as to what the contractors should receive on the rest of the £50,000 debentures. Only £10,000 of the £24,000 were issued. This was after my acceptance of the offer. The money was paid over to the contractors for the £10,000 debentures, at the rate of 80 cents to the dollar. No similar arrangement was carried into effect as to the remainder of the £24,000. The arrangement of 80 cents to the dollar, was the arrangement carried out throughout the whole 50,000 debentures, of which £10,000 were issued after the 29th of July, 1852, and the £10,000 before. £50,000 debentures were issued for £50,000 stock. All that the contractors received in money for the £50,000 debentures was £40,000. I did not buy the £50,000 debentures for myself. It was not understood that the proposition in the letter as to the £24,000, should be carried out as to the rest of the £50,000. No subsequent arrangement, however, was [511] made between me and the contractors. £10,000 of the £24,000 was purchased by me at 80 cents to the dollar, and the remainder of the £50,000 debentures were purchased at the same rate, but not under any arrangement with me. I was interested in this arrangement under which the £40,000 were purchased. I had the same interest in the £40,000 as in the £10,000. There was not a profit made, to my knowledge, by anybody upon the transaction of £10,000. I think there was a profit of £5000 made on it. I think not £9000. I think as much as £8000 was made, or thereabouts. This entered into the business of the firm of Bowes and Hall, of which I am a member. The share of the firm was £4000, or half of the profit that was made. The other member of the firm is John Hall. I am entitled to five-eighths of the profits of the business, or thereabouts, as I believe. This sum has gone into the business of the firm, like any other moneys of the firm. This was a partnership transaction from the first. Hall expected to have the benefit from the first." He then says, in answer to a question by the Court:—"There was no fresh arrangement made with the contractors after the letter offering the £24,000. The whole transaction proceeded on the basis of that letter. The contractors were not bound beyond the £24,000. They could have sold the debentures to any other party. Before the loan of £100,000 was taken up, the debentures had passed out of my hands. I was only the owner in part. The rest was held by the other party. I did not interfere with the debentures after the letter of Messrs. Glyn, Halifax and Co. was received. I did not abandon all interest in them." In answer to Counsel, he says:—"The remainder of the debentures beyond [512] the £10,000, were lodged in the Bank, on the tacit understanding that the Contractors should receive the 80 cents to the dollar, according to the original offer in the letter." The Appellant's examination was then interrupted by another examination, or other examinations, and resumed at a subsequent period. He then deposes:—"I think the Contractors spoke to me about the purchase of debentures more than two or three days before the date of the letter written by them to me. I do not think I had any conversation about purchasing them myself at all. They spoke to me perhaps two or three months before the date of the letter about selling the debentures, but not to myself, or I cannot tell whether to myself or not. I made no arrangement with them for purchasing debentures from them until after I had received the letter in question. I mean the letter dated the 30th of June. I sent, I think, a copy of this letter to Hincks a day or two after I received it. I suppose I

made a proposal to him to join me in purchasing them at the same time. I cannot say whether this was the first time I mentioned the matter to Hincks. I was at Quebec, and may have spoken to him on the subject before. It must have been in the summer. It must have been a month or two before I received the letter. I don't know what Hincks refers to in his letter of the 5th of July, unless to a conversation I had previously with him; there was no arrangement or understanding. There may have been a conversation between us on the subject of purchasing debentures previous to my receipt of the letter of the 30th of June. I am not sure, however, that there was any such communication. I doubt it, but still it is likely there was one. I am not aware that Hincks was in [513] communication with anybody else as to the purchase of debentures. I do not know what led Hincks to suppose that debentures would not be issued so soon, except, perhaps, some previous conversation with me. I do not recollect receiving the letter referred to in the letter from Hincks of the 6th. I do not recollect getting a letter from him desiring me to put off paying the Contractors till next mail. I may have received such letter. I have no belief about it. I think not. I think I had a communication with Cotton before receiving the letter of the 30th of June. It was only a conversation about the City purchasing the debentures. He was not a member of the Corporation. I had no conversations with him about my purchasing debentures, but about Hincks purchasing. I have no idea when they occurred. I have no recollection of a conversation with Cotton about Hincks purchasing for the joint benefit of himself and me; there may have been. There was a conversation with Cotton, but I cannot say whether before or after the receipt of the letter. I have no belief of it. I am sure, I had no conversation with Cotton at any time about any purchase in which he was to be interested that I know or believe. I never knew him in the transaction. I do not know, and have no belief, whether Cotton was aware of the purchase by myself and Hincks. I have no idea what the allusion to Cotton in the letter of 9th of August from Hincks refers to. I have found no letters or copies of letters from Hincks since I was examined. I have not found the memorandum book referred to in my evidence. I think it must have been taken out of my counting-house. I do not think Cotton ever wrote to me about these matters. I do not recollect writing to him about any debentures; I [514] do not believe I ever did. I never spoke to the Company or the Contractors about the purchase of any other debentures. I do not recollect when I first formed the intention to purchase the debentures. I do not think I formed any intention to buy the debentures which were to be issued to the Contractors or Company before the receipt of the letter of the 30th of June. I am not sure whether it was before or after the receipt of that letter that I laid the matter before the Finance Committee, probably about and subsequently to the time of receiving the letter: and before I laid the matter before the Finance Committee, I formed no intention of purchasing the debentures myself. I mean the offer that was made to me of the debentures at 20 per cent. discount." Lastly, he says:—"I think it was in January last that it was first rumoured that I was concerned in these debentures. I do not know that I ever mentioned to anybody that I had any concern in the negotiation. I do not know that any member of the Council was aware of the fact. I do not know that anybody was aware of it except to suspect, before I stated it here in Court. I do not recollect any conversation with any member of the Council upon the subject after the rumour arose. I do not think that I ever stated to any member of the Council what was not the fact. What I denied was, that I had used the City funds. I never was asked whether I had any interest in the debentures. I may have been asked the question, though I do not recollect it: but in my answer I had reference to the charge that I had used the City funds. I never mentioned, intentionally, to anybody, anything relating to the matter. This understanding arose as to what I stated with regard to the capacity in which I spoke. [515] What I said was, that I never used the City funds, or had any interest as Mayor in the negotiation of the debentures. I never gave any member of the Council to understand intentionally that I had no personal interest in the matter. I never heard that I had been misunderstood on this point until after the suit commenced. I told Mr. Cawthra I had no interest. I spoke as Mayor, but whether I said so or not I do not know. I always spoke in that capacity on this subject, but did not always say so. I do not recollect any conversation during the negotiation of the debentures on the subject."



Carr, a witness for the Respondent, deposes thus:—"I was a member of the City Council last year. I resigned in October last. I was not a member of the Council, I think, when the gift of £25,000 was agreed to. I was a member when the £35,000 loan was passed, and, I think, present in Council. I was a member when the £50,000 stock was agreed to be taken. I was present when the bye-law was passed for the issuing of £100,000 debentures to consolidate the debt. The Mayor advocated strongly the passing of these bye-laws, gift and loan; and when I made any opposition, he endeavoured to persuade me to support them. After the rumours arising as to the Mayor having an interest in the debentures, I put a question to him on the subject in Council, and he positively denied having any interest. My question was, whether he had received any benefit or expected to receive any benefit from the speculation about the £50,000 debentures? He had previously answered a similar question from Mr. Romain, that he had, neither directly or indirectly, received any benefit from it, and did not expect to receive any. He answered [516] my question by referring to his answer to Mr. Romain; and when further pressed, he appeared annoyed and indignant, and said, that if further pressed on the subject he should make it a personal matter. I have heard him declare the same thing both in and out of Council." Cross-examined. "I put the above question to the Mayor about twelve months ago; I think the latter end of last year. I think it probable that I voted for the £50,000 stock. I thought it a good exchange for the previous gift and loan. The Mayor always took an active part in favour of the Railroad. He advocated it as advantageous to the City. I opposed the issue of the debentures for the £50,000, as they were considered illegal. If that was at the same time as the change of the stock for the gift and loan, I opposed the whole. The contractors proposed the issuing of the debentures through some members of the Council. I opposed it as wrong. I think I voted for consolidating the City debt, and issuing debentures for the purpose. I think City debentures, in the early part of 1852, were at a discount of about one per cent. per annum for the time they had yet to run. When the Mayor was questioned in Council, he said that he had never purchased any City debentures, except through an agent, and to whom he paid half per cent."

Neither do their Lordships think this witness otherwise than credible.

It does not appear to their Lordships important on either side to lay stress on any other parts of the voluminous evidence before them. The leading and weighty facts, shown by what has now been read, cannot admit of doubt; and upon the whole of the materials in the case their Lordships feeling very high [517] respect for the opinions of the dissentient minority of Judges in the Court of Error and appeal, cannot but feel also some surprise that there should not have been an unanimous affirmation of the decision of the Court of Chancery, so far, at least, as it declared and enforced the liability of the Appellant to the Respondent for the ascertained and unquestioned amount of profit made and received by the Appellant, or his firm of Bowes and Hall, from the transaction in which he had permitted himself to engage respecting the Corporation debentures. The Appellant's allegation that this profit was made and received by him on behalf, not of himself alone, but of himself and his partner Mr. Hall, which we assume to be correct in point of fact, we think immaterial. It does not, in their Lordships' opinion, diminish the Appellant's liability to the Respondent, or give the Appellant any title to be treated otherwise than as he would have been liable to be treated, if he alone had been interested with Hincks. We have not failed to observe the ninth reason of appeal (it was the same as the eighth reason of the Appellant upon this appeal. See *ante*, [11 Moo. P.C.] p. 469) in the Court of Error and appeal, or the eighth reason here; but we have been unable to find that either of the answers to the Bill takes any objection to it as insufficient in parties, nor does any such objection seem to have been taken at the hearing in the Court of Chancery, and we conceive that we ought not to treat the suit as defective.

The decree deals with the Appellant as an agent or a trustee who, while acting in the agency or trusteeship, acquired for himself by contract, without the knowledge of the persons for whom he was agent or trustee, an interest in the subject of the agency or [518] trusteeship, and is accordingly incapable of retaining from them the benefit, if any, of the acquisition. And, it has scarcely been denied in argument, that if the Appellant stood in the relation of agent or trustee towards the Corporation or inhabitants of Toronto, the decree (subject to the point of Hall's

absence) has charged the Appellant rightly. The relation, however, was disputed; but, as their Lordships think, unsuccessfully. He may not have been agent or trustee within the common meaning or popular acceptance of either term, but he was so substantially; he was so within the reach of every principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others. If the Appellant, as to the matters subsisting in the year 1851 and 1852 respectively, between the Corporation upon one hand and the Contractors and Railway Company on the other, so far as the Appellant had anything to do with them, was not *negotiorum alienorum gestor*, it seems difficult or impossible to say that any person ever was so. It is evident, we think, that as a member of the Corporation, and as Mayor, he took part in those matters before and after the evil day of the 24th of June, 1852, to an extent more than sufficient to incapacitate him from dealing as he did with Hincks, and the Contractors, unless for his own loss, if there should be loss, and for the gain of the Corporation, that is to say, of the inhabitants of Toronto, if there should be gain. The able Counsel for the Appellant did not suggest that in the case of a private man of property having occasion and desiring to raise money by issuing debentures payable as to the principal at a distant day, [519] but with intermediate interest, and employing an agent for the purpose, the agent could act in the matter, with regard to the debentures, analogously to the manner in which the Appellant acted here, as to those in question, and retain the profit from his principal. The difference between the two cases appears to their Lordships accidental merely, and immaterial. It was incumbent on the Appellant, while the affair of the debentures was pending and unsettled, not to place himself voluntarily in a position in which, while retaining the office of Mayor, he would have a private interest that might be opposed to the unbiassed performance of his official duty. But he did so. In all the steps on the part of the Corporation connected with the debentures that took place between the 24th of June and the 2nd of November, 1852—and they were important—the Appellant, so far as he acted—and he did act—in the character of a member of its governing body, was under a bias, by reason of his private interest: for in truth and effect, from a time preceding July, 1852, he stood, as to the debentures, in the position of the Contractors.

The defence has been also to a great extent rested on the alleged ground that the Appellant did not give wrong advice to the governing body of the Corporation, or exercise influence over it in the matter of the debentures; that the governing body would have acted exactly as it did if the Appellant had not been a member of it; that the Corporation took altogether a prudent and correct course, and has lost nothing; and that any person not connected with it might honestly, safely, and effectually have made the bargain with Hincks and the Contractors which the Appellant did make. Assuming the alleged facts thus stated to [520] be stated accurately, we conceive that they make no difference. But in truth it is very far from clear that the City of Toronto has not suffered considerably from the Appellant's conduct. Their Lordships are of opinion, that the bill, answers and evidence were such as to throw on him the burden of proof of the fact, if material, that there was no agreement or arrangement respecting the debentures between the Appellant and the Contractors previously to the 28th of June, 1852; and we think that no such proof has been given; and that it is to be inferred from what is before us, that the Appellant had, if not before the 24th, at least before the 28th of June, 1852, ascertained what the Contractors would do, and what he could do with them as to the debentures—in effect, made himself sure of the Contractors. Now, what were the Appellant's sentiments on the subject in April, and early in June, 1852? They appear from two letters of those dates (9th of April and 10th of June), written by him to Mr. Wilson (we believe a merchant in England), and that of the 9th of April contains this passage:—"A large amount of Municipal debentures will have to be disposed of in England during the ensuing summer, to provide the 'needful' for the construction of The 'Ontario, Simcoe, and Huron,' and The 'Toronto and Guelph' Railways. Should such an agency as that referred to above not be established, an agent will have to be sent from Canada to negotiate those securities, or some Company in London, wholly unacquainted with the nature of our debentures, will have to be employed. Should an agent be sent to England on behalf of The 'Toronto and



Guelph Company,' of which I am President, he will be directed to take advantage of your valuable assist-[521]-ance in the sale of the securities of the Company." In the letter of the 10th of June, this passage appears:—"I am favoured with your letters of the 7th and 14th of May, and fully concur with you in opinion that it would be a decided advantage were you to pay a visit to this country, after having ascertained the information capitalists in England require, regarding the Municipal securities of Canada. I should have submitted a proposition on this subject to the Directors of the Toronto and Guelph Railroad, had not the Canada Company, through their Commissioner, Mr. Widder, who is himself a Director of the Railroad, volunteered to negotiate the debentures of the Company free of charge. I may mention here, that the Corporation of Toronto has agreed to aid The Ontario, Simcoe and Huron Railway, to the extent of £25,000 currency: the debentures of the City will be issued to this amount as the work progresses, the issue not to commence until £100,000 have first been expended on the road. I propose to make these debentures payable in London, and have them negotiated by an agent appointed by the Corporation, and hand their value in cash to the Railway Company, and thus prevent the credit of the City being injured by entrusting the sale of its Bonds to unskilful hands, or their being forced into the market by needy Railway contractors. The security for the punctual payment of the interest and principal of Municipal Bonds provided for by the Provincial Act under which they are issued, is so ample that no doubt can possibly be entertained regarding their validity; their perfect security being once established, surely a favourable sale could be effected in the present state of the money market in London. I applied some time since, [522] through the Bank of Upper Canada, to negotiate a loan for the City of Toronto to the amount of £50,000 sterling, to redeem debentures and small City notes now out, issued under an old Provincial Act which did not provide a sinking fund for their redemption; the Bank offered to guarantee the principal and interest, but nothing has yet been done in the matter, beyond a favourable letter from Messrs. Glyn, Halifax and Co., agents of the Bank of Upper Canada in England. I will forward, as soon as published, a statement of the City debt and revenue, and should my views be approved of by the City Council, regarding the loan and the manner of negotiating City debentures for Railway purposes, you will hear from me on the subject."

These were the Appellant's views before he had performed the journey to Quebec, announced as probable in his letter to Wilson of the 12th of June. But what that journey effected we know. It would, after the 24th, have interfered with the Appellant's personal interest; have tended to break up the arrangement with Hincks, if the debentures had been issued to the Contractors payable in England, and so the heavy discount saved; and we find that the bye-law of the 28th of June, made in the Appellant's presence and signed by him, expressly directs the debentures to be issued under it to be made payable in Canada. They were also, as we know, of very doubtful validity. But upon the delicate question, whether the Corporation should take such a step, the Mayor was necessarily prevented by his private interest from giving an unbiassed opinion.

It is after securing the discount that, at a later period of the year 1852, the English plan is arranged. [523] By means of the difference between the debentures upon that plan and the debentures on the plan of the preceding June, the gain in dispute has been made: and it would probably be wrong to assume that this was made merely at the expense of the Contractors, but be nearer the truth to say, that it was made at the expense of the Corporation (as trustees for the City), who would not have found it necessary to issue so many debentures on the English as on the Canadian plan.

The secrecy and disingenuousness with which the Appellant conducted himself do not improve his case, especially as, if he had, on the 28th of June, disclosed the true state of things to the Council, its other members might have taken a different course from that in fact taken by them (a point as to which it can be scarcely necessary to refer, particularly to the evidence of Joshua Beard, Tully, and Samuel Thompson). But we do not say, that had the Appellant, on the 28th of June, made a full communication to the Council, and nevertheless its members had acted as they did act, that would have prevented the success against him of a suit on behalf of the inhabitants, which in effect and substance this suit still is.

It has been also argued that the governing body of the Corporation was a deliberative body, and on that ground out of the operation of any civil rules or principles applicable to agents and trustees; and the reported cases of *Lord Petre v. The Eastern Counties Railway* (1 Railway Cases, 462), and *Simpson v. Lord Howden* (3 Myl. and Cr. 97), were mentioned; and it was said, that members of the British Legislature often vote in Parliament respecting matters in which they are personally interested, and do so without cen-[524]-sure or risk. We are of opinion, however, that neither the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto: trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a Legislature, properly so called, who vote in support of their private interests: if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by Courts of civil justice, which Courts, however, are nevertheless bound to apply those principles where they can be applied. The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body: nor can it be so treated. The members are merely delegates in and of a Provincial town for its local administration. For every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them. We agree that the cases of *Lord Petre v. The Eastern Counties Railway* [1 Rail. Cas. 462] and *Simpson v. Lord Howden* [3 Myl. and Cr. 97] must at present be viewed as correct expositions of English law: but so viewed, they do not, we conceive, affect the controversy before us.

It has been argued, too, that the Bill in the cause puts the case against the Appellant on the ground of loss to the Corporation, and of direct fraud, in the popular sense of that expression, upon the Appellant's part; that neither of these charges has been established, and that, therefore, the Bill should have [525] been dismissed. We consider, however, that though some allegations of the Bill are very possibly incorrect, a sufficient portion of its statements to sustain the decree has been established, and that the argument in this respect is not even plausible, except as to costs; with regard to which, had the Appellant's conduct been open and straightforward, their Lordships might have been disposed to relieve him; but his proceedings have been so much otherwise; they rendered so much grave suspicion reasonable, that their Lordships concur in the decree in point of costs as well as otherwise.

Their Lordships, however, desire to be understood as not having intimated an opinion, that if, before December, 1852, the Appellant had not entered into any agreement or arrangement, concerning any of the debentures, nor had any dealing in or with them, it would not have been competent to him in or after that month to deal for them with the Contractors as any stranger might have done.

The recommendation of the Committee to Her Majesty must be the dismissal of the appeal, with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, h. *What points may be raised*; tit. TRUST AND TRUSTEE, C. THE TRUSTEE, 11. *Liabilities of Trustee*, b. vi. d. *Profits accruing from Trust Property*. See *Vyse v. Foster*, 1872, L.R. 8 Ch. 316 n.]



[526] ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

ROBERT TOWNS,—*Appellant*; WILLIAM CHARLES WENTWORTH,—*Respondent* \* [Feb. 13 and 16, 1858].

In order to determine the meaning of a Will, a Court of construction must read the language of the Testator, in the sense which he himself appears to have attached to the expressions that he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the Testator by his Will excluded beyond all doubt such construction [11 Moo. P.C. 543].

When the main purpose and intentions of the Testator are ascertained to the satisfaction of the Court, if particular expressions are found in the Will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the Will shows that the Testator must necessarily have intended an interest to be given which no words in the Will expressly devise, the Court is to supply the defect by implication, and thus to mould the language of the Testator so as to carry into effect, as far as possible, the intention which, in its opinion, the Testator has on the whole Will sufficiently declared [11 Moo. P.C. 543].

Testator, by his Will, expressed his desire of bequeathing his estates to his children, "in such manner that the same shall be enjoyed by them respectively only for and during the period of their natural lives: in order, therefore, to limit the same strictly in entail on them my said children, and to their several and respective heirs of their bodies respectively." He then devised his real estates to Trustees, upon trust, as to part of his real estates, for his son W. for life, "and after his decease the same to go and descend to his first and other sons and daughters in tail, in order of primogeniture, males to be preferred to females, and to the several and respective heirs of their bodies, so as that each possessor shall take only a life estate and interest in the same." And, in the event of W.'s decease without issue, then the Testator devised his estates to his Trustees, upon trust to allow his other children, whom he enumerated, "to possess and enjoy the same, strictly limited to life interest, and in tail, to each of them respectively, in the order of primogeniture, males to be preferred to females."

Held, that W. took an estate for life only.

D'Arcy Wentworth of Homebush in the Colony of New South Wales, the Testator in the [527] cause, made his Will on the 5th of July, 1827, the construction of which was the subject of the present appeal. The material parts of the Will were expressed as follows:—"Whereas I am possessed of extensive real estates which I am desirous of bequeathing to my children in such manner as that the same shall be enjoyed by them respectively, only for and during the period of their natural lives; in order, therefore, to limit the same strictly in entail to them my said children, and to their several and respective heirs of their bodies respectively, I do give, devise and bequeath the whole of my property, real and personal and mixed, wheresoever the same may be situate, except as is hereinafter excepted, unto my friends, John Thomas Campbell, William Lawson, William Redfurn, Esquires, and unto my son, William Charles Wentworth, Esquire, their heirs, executors, administrators and assigns, according to the respective nature and quality thereof, to have and to hold my said real, personal and mixed estate to them my said trustees and the survivor of them, and the heirs, executors, administrators and assigns of such survivor; in trust, nevertheless to and for the uses, intents and purposes following, and to no other use, intent or purpose whatsoever, that is to say, in trust," etc.; "and upon further trust, to allow my said son, William Charles Wentworth, to have, possess and enjoy

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir John Dodson, and the Right Hon. Sir Cresswell Cresswell.

my estates in the District of Cook, etc., the said William Charles Wentworth to possess and enjoy the said estates, house and premises respectively, and every [528] part and parcel, for and during the term of his natural life, and from and after his decease the same to go and descend to his first and other sons and daughters, in tail, in the order of primogeniture, males to be preferred to females, and to the several and respective heirs of their bodies, so as that each possessor shall take only a life estate and interest in the same. And in the event of the said William Charles Wentworth's decease without issue, then I give and devise my said estates to my said Trustees and their heirs, in trust, to allow my other children, hereinafter mentioned, to possess and enjoy the same, strictly limited to life interest, and in tail, to each of them respectively, in the order of primogeniture, males to be preferred to females in the following order: D'Arcy, the whole brother of the said William Charles, George, Martha, Sophia, Robert, John, Mary Ann, and Katherine, the seven last-mentioned children being my children by the said Ann Lawes, it being distinctly understood that the estate I now devise and bequeath to my said son William Charles Wentworth is in full compensation for 1000 acres of land granted to him at Illawarra or the Five Islands, and in case of his not thinking proper to surrender the said last-mentioned 1000 acres of land, then I give and bequeath the said 1000 acres of land in the District of Cook, which I purchased of the said Robert Lowe, to my son, John Wentworth, strictly limited to life interest, to him and his issue in manner before mentioned of and concerning the said estates so given and bequeathed, in trust, for my said son, William Charles Wentworth, and the issue of his body. And, upon further trust, to allow my said son, D'Arcy Wentworth, Captain in the 73rd Regiment of Foot, to possess and enjoy my [529] said estates at Toongabbee, etc., for and during the term of his natural life, with the like limitation as to the remainder to the heirs of his body and to succession in default of such heirs, as is hereinbefore limited and declared of and concerning the estates given and bequeathed to his said brother. And, upon further trust, to allow my said children Martha, Sophia, Robert, Mary Ann, Katherine, to possess and enjoy the whole of my Illawarra Estate, consisting of, etc., for and during the respective natural lives of my said five last-mentioned children, the same to be held and enjoyed by them respectively, and by the respective heirs of their bodies, as tenants in common and not as joint tenants, with the like limitations as to remainder to their respective issue and to succession in default of such issue as is hereinbefore limited and appointed with regard to the other estates hereby devised and bequeathed to my said sons, William Charles and D'Arcy. And, upon further trust, to permit and allow my said son, John Wentworth, to possess and enjoy my South Creek estate, etc.; the whole of the said last-mentioned estates to be held and enjoyed by the said John Wentworth, for and during the term of his natural life, and from and after his decease, the heirs of his body respectively, with like limitations as to remainder to such heirs, and to succession in default of such heirs, as is hereinbefore limited and provided of and concerning the estates hereby devised and bequeathed to the said other children. And, upon further trust, to allow my son and daughter, George and Martha Wentworth, to possess and enjoy my estates at Bringelly, called my Elmsall Park estate, during the term of their respective natural lives, share and share alike, as tenants in [530] common, and not as joint tenants, and the same to go and descend to the several and respective heirs of their bodies, with the like limitations as to remainder to such heirs respectively, and to succession in default of issue, as is hereinbefore limited and declared of and concerning the same estates hereby respectively devised and bequeathed in trust for my said other children. And upon further trust, to allow my daughter, Katherine, to enjoy my estates at Broken Bay, North Harbour, and Duck River, etc., the said last-mentioned estates to be had and held by the said Katherine during the term of her natural life, and go and descend to the heirs of her body, subject to the like limitations and conditions as are hereinbefore declared of and concerning my said other real estates. And, upon further trust, to allow my said son, D'Arcy Wentworth, to possess and enjoy, after the decease of the said Maria Ainslie, the said cottage, land and premises hereinbefore devised, to the use of the said Maria Ainslie, for the natural life of the said D'Arcy Wentworth, and after his decease the same to go



and descend to his issue in like manner as the Toongabbee estate hereinbefore devised and bequeathed to him. And, upon further trust, to allow my son, William Charles Wentworth, before mentioned, to possess and enjoy my estate at Cockle Bay, etc., during the term of his natural life, and to receive the rents, issues, and profits of the same respectively, and after his decease the same to go and descend to the heirs of his body, and to their heirs, in like manner as is hereinbefore limited and declared of and concerning the said estates, hereby given and devised, in trust for my said son, William Charles Wentworth, and the heirs of his body as [531] aforesaid: it being clearly understood that the whole of the remainders hereby created and made, are to apply to such only of the issue of my said children as shall be lawfully begotten by my said children in holy wedlock. And, in the event of the death of any of my said nine children without issue of their bodies as aforesaid, then I give and devise the estate or estates hereinbefore given or devised in trust for such children and their issue as aforesaid, as shall die without such issue, to the eldest of my said children who shall be then living, in the following order of succession, which I here name to avoid misconception: my first child, the said William Charles; second, D'Arcy; third, George; fourth, Martha; fifth, Sophia; sixth, Robert; seventh, John; eighth, Mary Ann; ninth, Katherine; to be had and held by each succeeding child and the heirs of his or their body, subject to the like limitations and conditions as aforesaid. And, as to all the rest and residue of my real and personal estate, if any there be not hereinbefore specifically devised and bequeathed, I give and bequeath the same equally among my said nine children, to be held by them, their respective heirs, executors and administrators, according to the nature and quality thereof, as tenants in common and not as joint tenants."

The Testator died in 1827, leaving all the nine children named in his Will, surviving. John Wentworth, one of the children, conveyed to the Appellant the hereditaments devised to him by the Will, and duly acknowledged the conveyance, so as to bar his estate tail (if any) in the hereditaments, and all estates, rights, titles, and interests to take effect after the determination, or in defeazance of the [532] estate tail. John Wentworth died in the year 1853, without issue. George Wentworth, another of the children, died in the year 1852, without issue. Martha Wentworth died in 1852, leaving issue.

At the period of the respective deaths of George, John, and Martha, the surviving children of the Testator, were William Charles (the Respondent), D'Arcy, Sophia, Robert, Mary Ann, and Katherine.

The Appellant intermarried with Sophia Wentworth, one of the daughters of the Testator, before the commencement of the suit.

In 1854, a special case, under the provisions of the Colonial Act, 16th Vict., No. 3, was stated for the opinion of the Supreme Court of New South Wales (in equity); the questions for the Court to decide being:—First. What estate did John Wentworth take in the hereditaments devised to him by the Will; whether an estate for life or an estate tail? Second. On the decease of the respective devisees, or on the death of either of them without issue, in whom will the hereditaments devised to him or her vest?—whether in the issue of the deceased devisee next in order of succession indicated by the Will, or in the devisee then living and next in remainder, according to such order of succession?

The case was argued before Mr. Justice Therry, the Primary Judge in equity of the Court, who gave judgment on the questions, merely *pro forma*, in order to raise the points for decision by the full Court. His Honor decided,—First, that under the Will of D'Arcy Wentworth, in the special case mentioned, John Wentworth took an estate for life. Secondly, that, on the decease of any of the respective devisees in the Will mentioned, without issue, the hereditaments [533] devised to him or her respectively, vested in the eldest of the children of the Testator, in the order named in the Will, for life, with a vested remainder in his or her first and other sons and daughters in tail, in the order of primogeniture, males to be preferred to females; and, in the event of such eldest of the children of the Testator being then deceased, leaving issue, then immediately to such issue in remainder as last aforesaid.

The Appellant appealed from this judgment and decree on the grounds and for the following reasons: First, that the Court should have decided that John Wentworth took an estate tail. Second, that the Court should have decided that upon

the decease of any of the respective devisees for life without issue, the hereditaments devised to him, or her, will vest in such one of the Testator's children as is next in the order of succession particularly named in the Will, and to his issue, and not to the eldest in the whole enumeration of the children and to his issue. Third, that the Court should have held that the hereditaments will, upon such decease, pass to the next children in such order of succession as shall be then living, notwithstanding that any other child of the Testator, intermediate in the order of succession, but then deceased, shall have left issue him surviving; and that in such event, last mentioned, the issue of such intermediate deceased child will not take any interest in the said hereditaments.

The case was fully argued before the Court, and judgment was delivered by Sir Alfred Stephen, the Chief Justice, on the 28th of April, 1858, the material part of which was as follows:—"On the first point we adhere to the opinion expressed by us in *Towns v. [534] Addison*, in September, 1850, following our judgment in *Wentworth v. Bath*, in June, 1848, that each of the Testator's children took an estate for life only. Our reasons for this conclusion are fully assigned in those cases, and we need not on the present occasion, therefore, do more than here refer to them. On the second and third points, we are of opinion, that the shares of George and John respectively, are now vested in the Respondent, who takes in those shares, as in the properties devised directly to himself, an estate for life; and that, in case of his death before that of any brother or sister, who shall die without issue, the Defendant's eldest son will take the share of such brother or sister, in tail. In other words, we think that each child of the Testator took an estate for life; that the grandchildren take an estate tail; and that the preference established by the Will is in favour of the Testator's eldest child, and the latter's children, over any second or other of the Testator's children and their children. If we held otherwise, it would follow that John's share would go to Mary Ann, being the next of the two younger daughters, and George's share to Robert (to the exclusion of Sophia), as the next younger son of the Testator, and to the issue of Mary Ann and Robert respectively: for we think it clear, that the issue of each tenant for life must take what the parent took. And the result would then be, that the issue of younger children of the Testator would be preferred (which the Will plainly shows that the Testator did not intend) to the issue of his elder children. The remainder, on the death of any child without issue, is devised to the eldest of the Testator's children (that is, the eldest of the nine) who shall be then living, in their order of birth—[535] not to the then 'next' eldest child: and it is to be held by such child, and the heirs of his or her body, subject to the limitations previously mentioned. The exact words are, 'held by each succeeding child, and the heirs of his or her body, subject to the like limitations and conditions as aforesaid.' Now, were William Charles dead, the question of succession might be thought—and it has in fact been argued as being—one of some difficulty; and certainly that question, which is the third submitted for our opinion, is not of such easy solution as the second. The case is put thus:—William Charles being deceased, leaving issue, a younger son of the Testator dies without issue. The person to succeed him is the eldest of the Testator's children then living; but this cannot be any of William Charles's children: therefore, in any event, the successor to the deceased must be a sister or a brother. That reasoning, however, does not affect the second point: and the Defendant's right to the succession, as the eldest of the nine, seems to us abundantly clear. But the Plaintiff contends that the remainder being given to the eldest child then living, in the order of succession named, the Testator meant the succession to descend in that order: so that on the death of the seventh child (for example), without issue, the eighth child, and not William Charles, would succeed to the seventh's share; and the like, as to the shares *inter se* of the others. Such a construction, in our opinion, is opposed to the plain and natural meaning of the words, and is not supported by reasonable deduction from the Will, in any other part of it. Throughout the Will, the Testator manifests his preference for, first, males over females, and, secondly, among those [536] of each class, for the elder in birth: so that, on the death of William Charles, without issue, the other children in the order of primogeniture are to succeed. On D'Arcy's death, without issue, the latter's share is to go in the like order of succession: that is to say, to the Testator's surviving children, in the order of primogeniture. If William Charles were then one of those children, on



what construction could he be excluded, in favour of a younger child? The several shares of Robert, Martha, John, and the others, are limited in the same manner. In each case, the estate is to descend to the first taker's children, in the order of their primogeniture. It is nothing to the purpose of the present inquiry, that the Testator endeavoured here to accomplish more than the law will allow; or that he used inconsistent and absurd terms, in defining the estate of the grandchildren. The Testator clearly shows that in each case the eldest of the nine was to succeed, and, after him, his (eldest's) children. But, here, it is said, is a case not provided for; the death of a younger son, without issue, after the death of the eldest. And is not the then eldest child, or the then next living in order of birth after the last deceased, to be preferred to the grandchildren, son or daughter, of the eldest child? We think, on the whole, that the grandchild will take. Firstly, for the reason before given: that, otherwise, the issue of younger children might inherit, in preference to the issue of the Testator's elder children; and that these (the grandchildren) could never take, under the terms of the limitation, if a younger brother, or sister, took preferentially to the issue of the elder. Secondly, because the intention of the Will evidently was, as to the original shares, to give to each taker's children, [537] if any, in preference to any brother or sister; and that it may thence be reasonably inferred that the Testator had the same intention, with respect to all accruing shares. Thirdly, because in the general clause disposing of the remainders, the terms used in devising to the 'eldest child then living, and to the heirs of his body,' make the estate 'subject' to the previous limitations; of which the first is, that on William Charles's death, with issue, the property is to go to his children. Had the Testator intended to give any accruing share to a younger child of his own, in preference to William Charles's children, the terms used would probably have been a devise thereof 'with' the like limitations as in the case of the original share. But the clause subjects every devise over, on a child's death without issue, to the same limitations in favour of the issue, respectively, of each of his children, as had previously been created in favour of each child. The reasons on this third point may perhaps be more succinctly put thus:—First, the general tenor of the Will favours primogeniture. Elder sons and daughters are alike preferred to younger; and the issue of the elder to younger sons and daughters, and their issue. That is shown by the limitations of each original share to each son or daughter, and the issue respectively of each. Second, the Testator, as to the accruing shares, could not have intended to omit any of his family, more especially the elder branches; but if the share, for example, of George went to Robert, the issue of William Charles could never take. The estate, after vesting in Robert, would devolve on the younger children and their issue, and the issue of William Charles would be for ever excluded. [538] Even if D'Arcy would take, as the eldest son alive at the death of George, the same result as to the issue of William Charles would ensue. Third, the words 'subject to the like limitations' imply that the limitations previously mentioned are to take effect (*i.e.* the estate tail in the eldest son of William Charles) before all others. Paraphrased, the limitation stands thus:—I desire that the eldest child alive at the death of George without issue shall take George's property for life, with remainder to his eldest son in tail; but this is not to interfere with my prior limitations. Therefore, in the case supposed, it is not to affect the limitation in favour of the issue of William Charles. For these reasons, we hold that, in the supposed event the issue of William Charles will take in preference both to D'Arcy and his issue; although the wording of the Will, at the first blush, seems to give the estate to an elder son alive at the death of one younger, to the exclusion of the issue of others still older. The decree of the Primary Judge, consequently (which was pronounced *pro forma* merely, in order to raise the points for decision of the full Court), is affirmed in favour of the Respondent."

The present appeal was brought from this judgment and decree, and the Appellant submitted that it was erroneous and ought to be reversed, for the following reasons:—

First. Because, according to the true construction of the Will, John Wentworth took an estate tail in the hereditaments devised to him, either in possession or in remainder.

Second. Because the judgment and decree was contrary to the plain import

and true construction [539] of the words—"the eldest of my said children who shall be then living, in the following order of succession."

The Respondent, on the other hand, submitted and insisted that the decree appealed from ought to be affirmed,—

First. Because the construction of the Will adopted by the Courts below was consistent with the established rules of interpretation, and gave the fullest possible legal effect to the intention of the Testator.

Second. Because technical words must have their ordinary legal effect, notwithstanding the use of subsequent inconsistent words, unless the latter made it perfectly clear and unequivocal, that the others were not used in their proper sense, which the latter words of the Will in question failed to do. And,

Thirdly. Because the general intention of the Testator was to be preferred to any subordinate or particular intent, and the only way to effectuate the manifest general intention of the Testator was to give an estate for life, and not an estate in tail, to each of his sons and daughters, with remainder to their respective sons and daughters (as purchasers) in tail, remainder to the other children of the Testator named in the Will in the order of succession indicated by him for life estates, with remainder to their respective issue in tail.

The case was fully argued on both sides by Mr. Malins, Q.C., Mr. Wilde, Q.C., and Mr. Josiah W. Smith, for the Appellant; and The Attorney-General (Sir Richard Bethell), and Mr. Stammers, for the Respondent.

The question being purely one of construction, it is [540] not thought necessary to set forth the arguments *in extenso*; but the principal points raised and insisted on by the Appellant against the decree of the Court below were:

First. That the Court ought to have decided that John Wentworth either took an estate tail in possession, or an estate tail in remainder, after an estate to his sons and daughters (if any).

Second. That, supposing that the children of the Testator did not take an estate tail in possession or remainder, but only estates for life, or that they did not execute any disentailing instrument, the Court ought to have decided that, in the event of the decease of any child of the Testator without ever having had any issue, or of the decease and failure of issue of any such child, the hereditaments devised to such child would pass to such one of the Testator's children as should be the next or eldest after such child in the order of succession particularly named in the Will, and his or her issue, for the same estate or estates as such child and his or her issue took the hereditaments originally devised to him or her and his or her issue, and not to the eldest of the whole class of such children and his or her issue.

Third. That upon this last supposition, the Court ought to have decided that, in the event aforesaid, the hereditaments devised to any such child so dying without issue would pass to the eldest child of the Testator then living (whether the eldest of the whole class of the Testator's children, or eldest of the children after the child so dying), and not to the issue of any elder child then dead.

Upon these points the following authorities were cited and commented upon in the course of the argu-[541]-ment: *Seaward v. Willock* (5 East. 198), *Wright v. Leigh* (15 Ves. 564), *Parr v. Swindels* (4 Russ. 283), *Doe d. Blandford v. Applin* (4 Term Rep. 82), *Doe d. Cock v. Cooper* (1 East. 229), *Mortimer v. West* (2 Sim. 274), *Woodhouse v. Herrick* (1 Kay and J. 352), *Doe d. Cotton v. Stenlake* (12 East. 515), *Reece v. Steel* (2 Sim. 233), *Bamfield v. Popham* (1 P. Will. 54), *Blackburn v. Edgley* (1 P. Will. 606), *Baker v. Tucker* (3 H.L. Cases, 106), *Attorney-General v. Sutton* (1 P. Will. 754), *Doe d. Liversage v. Vaughan* (5 Barn. and Ald. 464), *Stanley v. Lennard* (Eden, 86), *Doe d. Gallini v. Gallini* (5 Barn. and Ad. 621), *S.C.* 3 Ad. and Ell. 340), *Ginger v. White* (Willes Rep. 348), *Jesson v. Wright* (2 Bli. 1), *Wollen v. Andrews* (2 Bingham. 126), *Bankes v. Holme* (1 Russ. 394, note), *Laneshorough v. For* (Ca. Temp. Talbot, 262), *Campbell v. Harding* (2 Russ. and Myl. 411), *S.C.* on appeal, 2 Clk. and Fin. 421), *Bristow v. Boothby* (2 Sim. and Stu. 465), *Voller v. Carter* (4 Ell. and Bla. 173), *Ellicombe v. Gompertz* (3 Myl. and Cr. 127), *Robinson v. Robinson* (1 Burrows, 38), *Doe d. Bean v. Halley* (8 Term Rep. 5), *Austen v. Taylor* (1 Eden, 364), *Lowe v. Davies* (2 Lord Raym. 1561), *Lisle v. Gray* (2 Levintz, 223), *Bagshaw v. Spencer* (2 Atk. 577, 580), *Radford v. Radford* (1 Keen, 486). Prior On Issue, p. 136. Gilbert "On Uses" (3rd Edit.) pp. 31, 39. Fearn on Cont. Rems. pp. 141, 181



[542] Judgment was reserved, and now delivered by

The Right Hon. T. Pemberton Leigh (26th Feb., 1858).—This case comes before us by appeal from a decree of the Supreme Court of New South Wales, by which a construction has been put on two clauses in the Will of a gentleman resident in that Colony, named D'Arcy Wentworth.

The Will was made on the 5th of July, 1827, and the Testator died in the course of the same year.

He was the owner of extensive landed estates in New South Wales, and at the date of his Will, and of his death, he had nine children, five sons and four daughters; two legitimate and seven illegitimate.

By his Will he provided for all his children; male and female, legitimate and illegitimate; by devising lands to each child, and the issue of such child; and in case of the decease of any child without issue, the estate is given over.

John Wentworth, one of the sons, died without having had issue, having barred the entail in the estate devised to him, if he was tenant in tail, and having conveyed his right to the estate to the Appellant, Towns.

There are two questions for consideration: first, what interest John Wentworth took under the devise to him; secondly, who are the parties entitled under the devise over of the Testator's estates if any child dies without issue.

The case on the first point was argued before us most ably and elaborately. The rules of construction applicable to it, with the leading authorities which establish them, were brought fully to our notice, and, [543] as far as they are material to the decision of the point now in dispute, they do not seem open to any doubt.

In order to determine the meaning of a Will, the Court must read the language of the Testator in the sense which it appears he himself attached to the expressions which he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the Testator has by his Will excluded, beyond all doubt, such construction.

When the main purpose and intention of the Testator are ascertained to the satisfaction of the Court, if particular expressions are found in the Will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the Will shows that the Testator must necessarily have intended an interest to be given which there are no words in the Will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the Testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the Testator has on the whole Will, sufficiently declared.

The application of these rules is often attended with very great difficulty, as the number of cases found in the books upon the subject, not always very easily reconcilable with each other, sufficiently testifies; but in the present case, their Lordships do not think that the application is attended with any serious difficulty.

The Testator begins his Will by devising all his [544] property, real, personal and mixed, to trustees and their heirs; prefacing the devise with a declaration of his object in making it, in these words: "Whereas I am possessed of extensive real estates, which I am desirous of bequeathing to my children, in such manner as that the same shall be enjoyed by them respectively, only for and during the period of their natural lives: in order, therefore, to limit the same strictly in entail, to them my said children, and to their several and respective heirs of their bodies respectively, I give and devise." And then follows the devise to the trustees.

It is said, that this shows a clear intention to give estates tail to the children. If these words had been words of devise, such, under the rule of law called the *Rule in Shelley's case*, would have been its effect. But the words indicate, in their popular sense, no such intention; to entail an estate strictly on a man and the heirs of his body is a very different thing from giving him an estate tail: and in this case there can be no doubt that if the trust had been executory, and a conveyancer had been employed to give effect by an instrument properly prepared for the purpose, to the intention so expressed, he would have carried them into effect, and the Court of

Chancery, if called upon to act, would have carried them into effect, by giving estates for life to the children, and limiting estates tail after their deaths, to their children as purchasers.

The Testator, however, proceeds to execute his own intention, and he declares the trusts of his estate in the District of Cork, in these words:—"And upon further trust to allow my son, Charles William Wentworth, to possess and enjoy the said estate, house and [545] premises, and every part and parcel thereof, for and during the term of his natural life: and from and after his decease the same to go and descend to his first and other sons and daughters in tail in the order of primogeniture, males to be preferred to females, and to the several and respective heirs of their bodies, so as that each possessor shall take only a life estate and interest in the same."

The Testator here, in terms of all but strict legal accuracy, limits an estate for life to William Charles, with remainder to his first and other sons in tail general, with remainder to his first and other daughters in tail general successively. He has carried out in a formal manner the intention which, in sufficiently plain though technically inaccurate terms, he had declared in the commencement of his Will. It is true that the Testator has added a direction which the law will not allow to take effect, namely, that each possessor shall take only for life. That direction being inconsistent with the main purpose of the Will, must, in conformity with the rule already referred to, be disregarded.

But then follow these words:—"And in the event of the said William Charles Wentworth's decease without issue, then I give and devise my said estates to my said trustees and their heirs in trust, to allow my other children, hereinafter mentioned, to possess and enjoy the same, strictly limited to life interest and entailed to each of them respectively in the order of primogeniture, males to be preferred to females in the following order." He then names his children, with the order in which they are to take. It is said that the effect of this devise over, in the event of William Charles Wentworth's decease without issue, is to give [546] an estate tail by implication to William Charles Wentworth.

If the devise had been to William Charles for life, and afterwards to his children for life, and for default of issue of William Charles, then over, the authorities would require such a construction: because as the estate was not to go over till failure of the issue of William Charles, it would be necessary to imply an estate tail in William Charles either immediate, or in remainder after the life estate of his children, in order to let in such issue, and to prevent the devise over from failing for remoteness.

But here there is a limitation to all the issue of William Charles (subject to an observation to be presently made); and what pretence is there, therefore, for enlarging the estate for life, expressly given to the first taker, in order that his issue may take by implication an interest which they have already by express devise?

It is said, however, that the devise to the children of William Charles, and the heirs of their bodies, would not of necessity include all issue of William Charles, for that one of his children might die in the lifetime of the Testator leaving issue, who in that case would not take under the limitations in the Will, if William Charles takes only for life.

But the answer is, that the Testator makes his Will with reference to the state of his family as it existed at the date of his Will, and as he contemplates that it will continue at his death: and the failure of issue spoken of, therefore, includes all the issue of William Charles in the contemplation of the Testator. The supposed difficulty would be increased rather than diminished by giving William Charles an [547] immediate estate tail, in which case, if he happened to die in the Testator's lifetime, all his issue would be excluded. But it is said that an estate tail in William Charles in remainder, after the estates to his children and the heirs of their bodies, may be implied, in order to let in the issue who might, by possibility, be excluded. It is admitted that this construction is in direct opposition to the decision in *Ginger v. White* (Willes, 348), and it is quite opposed to the principle furnished by other cases, in which a limitation on failure of issue generally following a devise to issue, has been read as if the words were, "on failure of such issue," as is previously mentioned.

If there had been in this Will an omission of any particular class of issue which



the Testator might have been expected to foresee and provide for, the question would have been whether, according to the doctrine of *Blackborn v. Edgely* (1 P. Wms. 605), the authority which seems to be recognized in the late case of *Baker v. Tucker* (3 H.L. Cases, 106), and the several subsequent cases which have adopted the same rule, the words "failure of issue," in order to support the gift over, must not be read, "failure of such issue," as is previously mentioned.

But when the limitation to issue of the first taker includes all the issue which can come into existence, if the Will be read as speaking at the death of the Testator, it is admitted, that there is no case in which it has ever been held that any other issue can be intended. In this case, therefore, the devise over on failure of issue of William Charles is equivalent to a remainder on failure of the former limitations.

[548] Their Lordships, therefore, entertain no doubt that the devise to William Charles is a devise of a life estate, with remainder to his sons and daughters successively in tail as purchasers, with remainder over: and that there is no room for implication of an estate tail in William Charles, either immediate or in remainder.

The question, however, does not arise upon the devise to William Charles, but upon the devise to John; and it was contended, though but faintly contended, that the devise to John was in different language, warranting a different construction from that to be put on the devise to William Charles.

The devise to John is in these words:—"And upon further trust, to permit and allow my said son, John Wentworth, to possess and enjoy my South Creek Estate, etc., the whole of the said last-mentioned estates to be held and enjoyed by the said John Wentworth for and during the term of his natural life; and from and after his decease, the heirs of his body respectively, with like limitations as to remainder, to such heirs and to succession in default of such heirs as is hereinbefore limited and provided of and concerning the estates hereby devised and bequeathed to the said other children."

No doubt if the words of this devise were not expounded by a reference to the previous devises, there would be an estate tail in John under the devise to him for life, and after his decease to heirs of his body; but the Testator has expressly declared that the heirs of the body of John are to take by limitations, and that those limitations are to be similar to those already declared with respect to the estates given to his other children.

[549] Now, the limitations thus referred to, are the limitations in favour of William Charles and his issue, which have been already fully stated, and subsequent devises to his son D'Arcy and his issue, and others of his children and their issue; in words which, in their Lordships' opinion, subject these devises to the same construction with the devise in favour of William Charles, and they think that the devise to John must be governed by the same rule.

Upon the whole, therefore, their Lordships entirely agree, on the first point, in the conclusion at which the Court below has arrived, and in the reasons most clearly and ably stated by the Chief Justice, in the judgments (a), in two other cases arising on this Will, and which are referred to as forming the grounds of decision on this case.

As to this point, therefore, they must advise Her Majesty to affirm the decision complained of.

The second question turns on the meaning of the following clause:—"And in the event of the death of any of my said nine children without issue of their bodies as aforesaid, then I give and devise the estate or estates hereinbefore given or so devised in trust for such children and their issue as aforesaid, as shall die without such issue [clearly showing what issue he had contemplated], to the eldest of my said children who shall be then living, in the following order of succession [he then names them], to be had and held by each succeeding child, and the heirs of his or their bodies, subject to the like limitations and conditions as aforesaid."

[550] Upon this clause the Primary Judge in the Court below has held, that "on the decease of any of the respective devises in the Will mentioned, without issue,

(a) *Wentworth v. Bath*, and *Towns v. Addison*. These judgments were printed in the Appendix to this appeal. They were both delivered by Sir Alfred Stephen, Chief Justice.

the hereditaments devised to him or her respectively, vested in the eldest of the children of the Testator, in the order named in the Will, for life, with a vested remainder in his or her first and other sons and daughters in tail, in the order of primogeniture, males to be preferred to females; and in the event of such eldest of the children of the Testator being then deceased leaving issue, then immediately to such issue in remainder as last aforesaid."

But little argument was addressed to us upon this point, and it is not, indeed, susceptible of much illustration.

It is obvious that the construction adopted by the Court below requires either that the words "who shall be then living" shall be struck out of the Will, or that the words "or who shall have died leaving issue then living," or some equivalent words, shall be introduced. Now, a Court is not justified either in inserting or striking out words, or in any manner altering the language of a clear devise upon mere conjecture; upon the mere ground that the devise seems capricious, and that a gift in other terms would be more in conformity with other dispositions contained in the Will. Their Lordships can find here no certain indication of an intention that the Testator meant anything else than he has said. The words relied on by the Court below, namely, the limitation "to the heirs of the body subject to the like limitations and conditions as aforesaid," mean only, in their Lordships' opinion, that the child who may so happen to take, shall hold in the same manner and with the [551] like limitations to his issue as are already declared of the other estates. They must, therefore, advise Her Majesty upon this point to reverse the decision in the Court below, and to make a declaration according to the opinion which they have thus expressed, namely, that under the clause in question, the estate of any child dying without issue, vested in the eldest child of the Testator who was then living, with remainder to the issue of the child so succeeding, according to the limitations contained in the devise to *Samuel Charles Wentworth*. Each party will pay his own costs in this appeal.

[*Mews' Dig. tit. WILL; IX. CONSTRUCTION; a. General Principles; h. Devisees and Legatees, 7. b. ii. Gifts of Real Estate. S.C. 6 W.R. 397. See Fisher v. Webster, 1872, L.R. 14 Eq. 288; Sweeting v. Prideaux, 1876, 2 Ch.D. 416; Bowen v. Lewis, 1884, 9 A.C. 900; Mellor v. Daintree, 1886, 33 Ch.D. 206.*]

## ON APPEAL FROM THE COURT OF ERROR AND APPEAL OF UPPER CANADA.

ALLAN GILMOUR,—*Appellant*; JOHN SUPPLE,—*Respondent* \*

[Feb. 26, 1858].

By the law of England, under a contract for sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. If the seller is to do something to the goods sold, the property will not be changed until he has done it, or waived his right to do it [11 Moo. P.C. 566, 567].

There is no distinction between the law of England and the law in force in Upper Canada in this respect.

The Respondent entered into a contract in writing, for the sale to the Appellant of "a raft of timber now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove Booms. Price for the whole 7½d. per foot. Payment, one-third cash, one-third sixty and ninety days after date." Shortly before the contract was signed, the raft had been

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Dodson, and the Right Hon. Sir Cresswell Cresswell.



measured by a public officer, called the Supervisor of Cullers, appointed under the Canadian Act, 8th and 9th Vict., c. 49, and the number of pieces of timber and the contents of each piece was set down in a specification thereof, which made a total of 71,445 feet, and this specification was delivered by the Respondent, before the execution of the contract, to the Appellant, and sent by him to the place where the raft was to be delivered. The raft was towed to the Indian Cove Booms, the appointed place for delivery, where it arrived in the afternoon, and notice of its arrival given to the servants of the Appellant, who assisted in fastening the raft outside the Booms. This was done at the instance of the Appellant's servant, as, from the state of the tide, the raft could not be placed inside the Booms. During the night a storm arose, by which the raft was carried away, broken to pieces, and dispersed, and a great portion of it lost. The Appellant employed his servants in collecting as much of the wood as was saved, and that was put into the Appellant's Booms.

Held, that as the Respondent had ascertained the price of the raft by the measurement previously made, the specification of which was in the Appellant's possession, and as the contract did not show that any future measurement of the raft was necessary, no act then remained to be done by the Respondent or by the Appellant, and that the raft, upon delivery at the Indian Cove Booms, had wholly passed to the Appellant, and the loss incurred must be borne by him.

This was an action brought by the Respondent against the Appellant in the Court of Common Pleas [552] at Toronto, in Upper Canada, to recover the sum of £2307 1s. 7d., the price of 71,445 feet of timber, at 7 $\frac{3}{4}$ d. per foot.

The declaration contained a special count and *indebitatus* counts. The special count alleged, that in consideration that the Respondent would sell and deliver to the Appellant a raft of timber, then at Carouge, at 7 $\frac{3}{4}$ d. per foot, and deliver it at Indian Cove Booms, the Appellant promised to pay for the raft one-third in cash, one-third in sixty days, and one-third in ninety days, after delivery. The count then alleged a delivery of the raft of timber to the Appellant at the appointed place, but that the Appellant had not paid the price. The *indebitatus* counts comprised a [553] claim for the price of goods sold and delivered. The Appellant pleaded the general issue to the whole declaration; and a plea traversing the delivery of the raft, as alleged in the first count.

The action was tried at the Ottawa Spring Assizes, 1855, before Mr. Justice Richards.

The following facts appeared in the evidence upon the trial:—On the 20th of October, 1856, the Respondent was possessed of a raft of timber then at Carouge, a place on the River St. Lawrence, about eight or nine miles higher up the river than the Indian Cove. The Indian Cove was a cove on the river where the Appellant occupied certain wharfs, and certain parts of the river adjoining, enclosed by Booms, for receiving and securing rafts of timber. Shortly before that day the Respondent had caused the pieces of timber forming the raft to be measured by an officer called the Supervisor of Cullers, appointed under the Canadian Act, 8th and 9th Vict., c. 49, and the number of pieces and the contents of each piece was by the Supervisor set down in specifications thereof. By these specifications, it appeared that the raft contained 1977 pieces of white pine and 104 pieces of red pine, measuring 71,445 feet of timber. On the 28th of October, 1856, the Respondent sold the raft to the Appellant and his partners, John Gilmour and David Gilmour, trading under the firm of Allan Gilmour and Co., and the following memorandum of the bargain was signed by the parties:—"Sold Allan Gilmour and Co., a raft of timber now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove Booms. Price for the whole, 7 $\frac{3}{4}$ d. per foot. Payments, one-third cash, one-third sixty and ninety days after date. Quebec, 28th of Oc-[554]-tober, 1856. John Supple.—A. G. and Co." At the same time, the specifications made by the Supervisor was delivered by the Respondent to the Appellant. On the 24th of that month the raft was taken out of the Booms, at Carouge, and by steamer towed down the river to the Indian Cove Booms, where it arrived

between four and five o'clock of the same day. It was about high water when the raft was taken out of the Booms at Carouge, being the usual and proper time for the purpose. On the arrival of the steamer with the raft opposite to the Appellant's Booms, called the Indian Cove Booms, the steamer was about to put the raft in at the upper end of one of the Appellant's wharfs, called the Long Wharf; but in pursuance of the direction of a person named Welch, who was the Appellant's foreman at the Booms, the raft was placed at the lower end of the wharf, and was made fast to the Booms there by the crew of the steamer and a man in the employ of the Respondent, named McCrea, who had accompanied the raft to the Indian Cove Booms. McCrea immediately went to the Appellant's agent there, who promised to order Welch, the foreman at the Booms, to take charge of the raft. After some delay, Welch, accompanied by McCrea, went to the raft, taking with him four men and some ropes and chains, and with these ropes and chains he fastened the raft to the Booms. Welch stated that, on account of the wet and the state of the tide, he could not then get the raft into the Booms, but that he would do so in the course of the night. At that time the weather was fine, and no danger was apprehended. During the night a storm arose, and Welch endeavoured by means of an anchor and chain cable to secure the raft, which had never been taken within [555] the Booms; but notwithstanding this, and great exertions made by Welch, the raft was carried away by the storm, and the chief part of it was lost; but some pieces of the raft were scattered on the banks of the river. On the following days the Appellant sent his men to collect as much of the wood as was saved, and this was put into the Booms.

Conflicting evidence was given by the Appellant's witnesses and by the Respondent's witnesses in reply, as to what constituted a receipt of a raft of timber at Booms, and as to whether the raft in question arrived in reasonable time to be received by the buyer. From the evidence of the usage, it appeared that when a raft is sold to be delivered at Booms, the seller delivers the raft outside the Booms, and the buyer is at the expense of taking the raft within the Booms; that where a specification is made out by the Supervisor, showing the quantities of wood the seller sells by the specification, which is handed to the buyer, and when the raft has arrived at the Booms, the buyer usually checks the number of pieces by the specification, which the witnesses generally described as "like checking an invoice" of goods. That checking the specification was sometimes done within and sometimes without the Booms; and that generally, the buyer contented himself with averaging the measurement; but when there was a deficiency in the number of pieces or measurement, a deduction was made from the price accordingly.

The Judge, in his charge to the jury, said, that the question in the end must be decided as a fact by the jury, whether there was a delivery to the Appellant of the raft or not; that if they were satisfied there was an actual taking possession by the Appellant or his [556] servants, then that the Respondent was entitled to recover. That, as to the usage of the trade, it did not appear to him that there had been any very clear settled usage shown, except that delivery at a Boom, meant delivery outside of the Boom. The fact of the time being reasonable for the delivery, the calmness of the day and night at the time of the arrival there, any want of notice to the Appellant's servant of objection to receive it then, and the mode of securing, were all facts to go to the jury to be considered by them in coming to their conclusion. That the facts stated by Appellant's servants as to their conduct, what they did and said, the unreasonableness of the hour, the state of the tide, and the impossibility of ascertaining the quantity of the timber, were all facts to be considered as showing that Appellant's servants did not receive the raft. And, he told the jury, that if there was an actual delivery to the Appellant's servants, and taking possession by them, the Respondent was entitled to a verdict; but if the securing the raft by them was to assist in preserving the property merely as the property of the Respondent, not considering that they were taking possession of it for their master, then their acts in that respect ought not to be considered as evidence of acceptance. If the fastening of the raft by the Appellant's servants was with a view of keeping it for their employers to secure it, to take into the Boom when the tide rose, then that was evidence of its being received. That there could be no fair pretence for keeping the raft outside the Booms to measure it, as the raft had been measured at Carouge, and that the specifications which were *prima facie*



evidence of its contents were in the hands of the [557] Appellant; that the act of the Appellant's servants collecting the floating timber after the loss, was evidence to be taken into consideration, whether the raft had been delivered and accepted by the Appellant.

The whole evidence went to the jury, and they found that the raft had been delivered to and received by the Appellant, and a verdict was entered for the Respondent, with £2307 1s. 7d. damages.

In the following term a rule *nisi* was obtained to set aside the verdict and enter a nonsuit, pursuant to leave reserved at the trial, or for a new trial, on the ground, that the verdict was against law and evidence, and for misdirection of the Judge, the reception of improper evidence, and the rejection of admissible evidence; and because the verdict was perverse and against evidence. In Trinity Term, 1855, the Court of Common Pleas, after argument, gave judgment, discharging the rule.

The Appellant appealed from that judgment to the Court of Error and Appeal at Toronto in Upper Canada.

The grounds of appeal were: First, that there could be no delivery or acceptance of the property sold, sufficient to sustain the action, whilst anything remained to be done in order to ascertain the quantity or price. That according to the terms of the contract and the evidence, it was necessary that there should have been a counting or examination of the contents of the raft, after its arrival at the Appellant's Booms, before there could have been such a delivery or acceptance as the Respondent required to prove; and that such counting or examination never having taken place, there was no delivery or acceptance; and the Appellant submitted, that the Respondent failed in his action. Second, that the misdirection [558]-tion complained of was on the following points: in telling the jury that the conduct of the Appellant's partners after the accident, in causing part of the wrecked timber to be collected, and otherwise dealing with the property, was a fact which was open to them to consider, in common with all the other facts of the case, as evidence of an admission that the Appellant and his partners considered themselves responsible for the loss; the Appellant submitting that no such inference could be legally drawn from such a fact. The Appellant further alleged, that the Judge misdirected the jury in telling them that the Cullers' specifications were *prima facie* evidence of the exact contents of the raft, so as to dispense with the necessity for the Appellant's having any opportunity to ascertain such contents. The Appellant submitted that the specifications were in themselves no evidence against him and in no way binding upon him. Third, that the reception of improper evidence objected to by the Appellant, consisted in allowing admissions and offers of compromise stated by a witness (Hamilton) to have been made without prejudice and with a view to an amicable settlement to go to the jury as evidence against the Appellant. The admissible evidence tendered by the Appellant and rejected at the trial, was the declaration or statement made by the deceased watchman, Kief, to White in the ordinary course of his duty, as to the statements of the Respondent's raftsmen, McCrea, at the time of the accident. That McCrea's statements were material evidence, formed part of the *res gestae*, and the watchman's report to his superior of those statements, was admissible evidence. Fourth, the Appellant submitted that the verdict was perverse and against the weight of evidence [559]; that the Plaintiff's case rested wholly on the evidence of the witness, McCrea, who alone proved anything sufficient to constitute a delivery of the raft; and that his evidence was contradicted by all the witnesses of the Appellant, five or six in number, and according to their evidence there was no delivery direct or indirect.

The Respondent contended, in his answer to the grounds of appeal, that the verdict was right, and the judgment of the Court discharging the Appellant's rule correct; that there was legal proof of a delivery and acceptance by the Appellant, or of either a delivery or an acceptance sufficient in law; that the contract of sale was complete, and that the property in the timber had passed to the Appellant before the loss; that nothing remained to be done in the way of counting or ascertaining the quantity contained in the raft to prevent the property passing, or to leave the risk in the Respondent; and that there was no substantial misdirection at the trial, nor rejection of legal or admission of illegal evidence.

The judgment of the Court of Common Pleas was affirmed by the Court of Error and appeal, on the 5th of March 1856, and the appeal dismissed with costs.

Against this judgment, the Appellant brought the present appeal.

The Attorney-General (Sir Fitz-Roy Kelly), Mr. Wilde, Q.C., and Mr. W. Murray, for the Appellant.—The Judge at the trial ought to have explained to the jury the legal rights of the parties under the con-[560]-tract; that the fact of the timber having to be measured, the property did not in law vest in the Appellant, in order that they might put a proper construction upon the acts and conduct of the parties. We submit that in law the verdict should have been entered for the Appellant. The measurement of the raft at the place of delivery was an act to be done by the seller before the price could be ascertained, and was a condition precedent to the absolute vesting of the property in the Appellant. *Logan v. Le Mesurier* (6 Moore's P.C. Cases, 116) is identical with the present case. There a written contract was entered into by H. L. and Co., with L. and Co., for the sale of a quantity of timber, stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain Boom at Quebec, and to be paid for by promissory notes, at a rate of 9½d. per foot measured off; if the quantity turned out more than above stated, the surplus was to be paid by the purchasers at 9½d. per foot, on delivery; and, if it fell short, the difference was to be refunded by the sellers. The price of 50,000 feet at the agreed rate was paid by L. and Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, and the greater part of the timber was dispersed and lost; and it was held by this Court that by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete, and that the risk remained with the sellers. That case falls within the principle laid [561] down in *Simmons v. Swift* (5 Bar. and Cr. 857). There the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was weighed and delivered to him. In such circumstances, the Court of King's Bench held that the property in the residue did not vest in the purchaser until it was weighed.—[Sir Cresswell Cresswell: In that case Littledale, J. (p. 864) doubted whether the property did not pass by the contract, and that doubt he thought was not inconsistent with *Hanson v. Meyer* (6 East. 614).]—In *Hanson v. Meyer* it was part of the contract that the starch should be weighed by the vendor before delivery, and it was determined by the Court that the absolute property did not vest in the purchaser till it was weighed. The cases of *Rugg v. Minett* (11 East. 210), *Wallace v. Breed's* (13 East. 522), *Austin v. Craven* (4 Taunt. 644), *Acraman v. Morrice* (8 Com. Ben. Rep. 449), *Shepley v. Davis* (5 Taunt. 617), *Busk v. Davis* (2 Mau. and Sel. 397), and *Godts v. Rose* (17 Com. Ben. Rep. 229), show that where anything remains to be done by the seller, until he has done it, the property does not pass to the purchaser. No opportunity was given the Appellant of checking the specifications or measurement of the timber which the contract provided. The fact of a public officer under the Canadian Act, 8th and 9th Vict., c. 49, having at the Respondent's instance measured the timber, cannot affect the Appellant's right to have the same measured by himself. He was not bound by the [562] specifications as to the quantity. There was no evidence that the performance of this necessary act had been waived by the Appellant, or of any authority from the buyer to his servants to accept the raft without measurement. Again, the seller had a lien on the timber until the cash was paid and the Bills given, and it nowhere appears in the evidence that he authorized his servant to or intended to abandon such lien. The right of property in the raft at the time of the storm was, therefore, still in the Respondent, and the loss which happened was at his risk. There was no delivery to the Appellant, *Startup v. Macdonald* (6 Man. and Gr. 593).

Mr. Hugh Hill, Q.C., and Mr. Unthank, for the Respondent.—The sale of the raft was complete; the quantity of the timber in it had already been ascertained, and nothing remained in the Respondent but to deliver the raft at the Indian Cove Booms, and upon delivery the property immediately vested in the Appellant. Nothing more remained to be done by the seller; the transaction was perfect upon the ascertainment of the quantity of the timber and delivery to the Appellant.



*Tansley v. Turner* (2 Bingham, N.C. 151), *Rhode v. Thwaites* (6 Bar. and Cr. 388), *Swanwick v. Sothorn* (9 Ad. and Ell. 895), *Alexander v. Gardner* (1 Bingham, N.C. 671). The case of *Logan v. Le Mesurier* (6 Moore's P.C. Cases, 116), relied upon by the Appellant, differs materially from the present. There the raft of timber was by the contract to be measured off on its arrival at the Boom. Here, it was measured off before the sale, [563] and its quantity known. Whether there was a delivery or not, was a question for the jury, and the Judge who tried the case below properly submitted that question to them, and they found that there had been a delivery to the Appellant. The collection of the pieces of timber by and at the expense of the Appellant's firm was an important fact in the case, as it tended to show that the Appellant and his partners regarded the raft as delivered to them, and as having become their property.

The consideration of the judgment was reserved, and now delivered by

The Right Hon. Sir Cresswell Cresswell (20th March 1858).—This action was originally brought in the Court of Common Pleas by the Respondent against the Appellant. The first count of the declaration alleged that in consideration that the Plaintiff would sell and deliver to the Defendant a raft of timber, then lying at Carouge, containing about 71,000 feet, and deliver the same at Indian Cove Booms, at the price of 7½d. per foot, amounting to £2307 1s. 7d., the Defendant undertook to pay for the same, one-third in cash, one-third at sixty days, and one-third at ninety days from the delivery. Averment of delivery at Indian Cove Booms and non-payment. Count for goods sold and delivered. Plea, *non assumptis*. Secondly, to the first count, that the Plaintiff did not deliver the raft.

At the trial the Plaintiff gave in evidence that he was possessed of a raft of timber lying at Carouge, and that on the 20th of October 1853, he entered into a contract in writing with the Defendant in these words:—"Sold Allan Gilmour and Co. a raft of timber [564] now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove Booms: price for the whole, 7½d. per foot; payments, one-third cash, sixty and ninety days' date.—John Supple. A. G. and Co.—Quebec, 20 Oct. 1853."

The contract was written by Defendant, and signed by him "A. G. and Co.," and by Plaintiff, "John Supple." He also proved that before the contract was made, the raft had been measured for him by an officer appointed under a Canadian Act, by whom a specification was made out, showing the contents of each log, and making a total of 71,443 feet. That specification was given by the Plaintiff to the Defendant before the contract was made; he, therefore, knew what quantity of timber the seller would charge him with, notwithstanding the form of the written contract, which left it unascertained. The Defendant retained the specification, and sent it over to Indian Cove, where he had Booms and an establishment for receiving and storing timber.

The evidence showed it to be usual for purchasers of rafts sometimes before, sometimes after, they were placed within the Booms, to check over the logs received with the specification previously delivered, to see that they corresponded with it; but there was no evidence of its being usual to measure the contents of each log to ascertain the number of feet contained in it. It was also proved that delivery at a Boom, meant delivery outside the Boom.

The raft was towed down the river from Carouge, or Cap Rouge, to Indian Cove (about eight miles), by a steamboat, employed by the Plaintiff: one of his men went with it, and when at Indian Cove gave notice to [565] the Defendant's servants there that it had arrived, and they together fastened it outside the Booms. There was conflicting evidence as to whether possession of the raft was given up by the Plaintiff's servant, and taken by the Defendant's. In the night a storm arose, the raft was broken up and dispersed, and a great portion of it lost.

The Judge told the jury that if there was an actual delivery to the Defendant's servants, and taking possession by them, the Plaintiff was entitled to recover, but that otherwise they should find for the Defendant. The jury found for the Plaintiff. The Defendant moved, in pursuance of leave reserved, for a nonsuit, or verdict for Defendant, on the ground that there could be no delivery or acceptance of the property sold sufficient to sustain the action, while anything remained to be done

in order to ascertain the quantity or price; that, according to the terms of the contract, and the evidence, it was necessary that there should have been a counting or examination of the contents of the raft after its arrival at the Defendant's Booms, before there could have been such a delivery or acceptance as the Plaintiff was required to prove, and that such counting or examination never having taken place, there was no delivery or acceptance. It was also contended that the verdict was against evidence; but it is not now necessary to consider that question, it being admitted that if the property was changed, the verdict must stand. A rule to show cause was granted, and, after argument, discharged.

The Defendant then appealed to the Court of Error and appeal, but the judgment of the Court of Common Pleas was affirmed, and the appeal dismissed. [566] From that judgment the Defendant appealed to Her Majesty in Council, and here, as in the Canadian Courts, it was contended that, by virtue of this contract, and the acts done in pursuance of it, the property in the raft did not vest in the Defendant, but was still in the seller, and at his risk, when the loss happened.

It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavoured to show that they had, or had not, acquired the property in that for which they contracted: and Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcileable with each other. Nevertheless, we think that in all of them certain rules and principles have been recognized, by the application of which to this case we may be enabled to arrive at a correct judgment upon it.

By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Various circumstances have been treated by our Courts as sufficiently indi- [567] cating such contrary intention. If it appears that the seller is to do something to the goods sold on his own behalf, the property will not be changed until he has done it, or waived his right to do it.

The case of *Hanson v. Meyer* (6 East, 614), one of the earliest reported on this subject, furnishes an instance of this kind. Meyer had a quantity of starch, weight unknown, lying in the warehouse of a third person. A broker employed by a person named Wallace purchased the whole of the starch of Meyer, more or less, whatever it was, at £6 per cwt.; it was in papers; the weight was to be afterwards ascertained, at the price aforesaid. The mode of delivery, in such cases, was stated to be as follows: "The seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee." Such a note was given; and on two several days the warehouse-keeper, in pursuance of it, weighed and delivered 21 cwt. 1 qr. 6 lb., and 15 cwt. 1 qr. 4 lb. Before the residue had been weighed or delivered, Wallace became Bankrupt, and Meyer then took it away from the warehouse, and the assignees of Wallace sued him in trover for it. The Court held that they could not recover, for that the particular terms of the contract made weighing a condition precedent to the absolute vesting of the property, and that the seller did not, by weighing and delivering part, waive the preliminary act of weighing in respect of any part of the commodity contracted for. The only authority given to the warehouse-keeper was to weigh and deliver, and unless he weighed he [568] had no authority to deliver. But, it would seem that if the warehouse-keeper had been authorized to deliver without weighing, and possession had, under that authority, been given to the purchaser, the property would have vested absolutely in him, and the seller would have waived his right to weigh before delivery.

Another rule may be extracted from the case of *Rugg v. Minett* (11 East, 210), namely, that where the seller is to do some act for the benefit of the buyer, to place



the goods sold in a state to be delivered, until he has done it the property does not pass. In this case it was for the interest of the seller to contend that it did pass. The circumstances were as follow: A quantity of turpentine, in casks, was sold by auction, for the Defendant, in whose warehouse it was lying. The casks were marked as of a certain weight, and it was agreed that they should be taken at that weight; but it was further agreed that they should be filled up by the seller. The Plaintiff bought thirty casks, and paid money on account. Twenty casks were afterwards filled up by the warehouseman of the Defendant; but before the other ten could be filled the whole were consumed by fire. It was held that the property in the twenty passed, but not in the ten; and that the loss must be borne by the parties respectively in those proportions.

So, also, if an act remains to be done by or on behalf of both parties before the goods are delivered, the property is not changed; of which *Wallace v. Breeds* (13 East. 522) furnishes an instance; where Lord Ellenborough observed, that the Courts had frequently laid hold of such circumstances as existed in that case [569] to retain the property in favour of an unpaid seller; and that rule was acted upon by the Court of King's Bench in *Simmons v. Swift* (5 Barn. and Cr. 857), which was an action for the price of a stack of bark, sold at £9 5s. per ton of 21 cwt. It appeared that after the sale, it was agreed between the parties that the bark should be weighed by two persons, one of whom was named by the seller, the other by the buyer. Part was weighed and delivered; the rest was much damaged by a flood before it was weighed, whereupon the buyer refused to take it. The Court held that as the bark was to be weighed before delivery to ascertain the price, and that act had not been done, the property remained in the seller, and that he must bear the loss. There, by express agreement between them, both parties were, by their agents, to take part in the act of weighing. But the case of *Logan v. Le Mesurier* (6 Moore, P.C. Cases, 116) was principally relied on by the Counsel for the Appellant. The contract was in these terms:—"Hart, Logan and Co. of Montreal sell, and Le Mesurier, Routh and Co. of the same place buy, a quantity of red pine timber, the property of Thomas Durell, L. C. but under the control of the sellers, now lying above the Rapids, near the Chaudière Falls, Ottawa river, and stated by Thomas Durell to consist of 1391 pieces measuring 50,000 feet, more or less, deliverable at Quebec, on or before the 15th of June next, and payable by the purchasers' promissory notes at 90 days' date from this date, at the rate of 9½d. per foot, measured off. Should the quantity turn out more than above stated, the surplus to be paid for by the purchasers at 9½d. per foot on delivery; and [570] should it fall short, the difference to be refunded by the sellers.—Signed, etc. To be delivered at M. B. Farlin's Booms at Sillery Cove, Quebec." The raft was sent to Quebec, and broken up by a storm before possession was given to or taken by Defendant. On the one hand, it was contended that the property passed by the contract; on the other, that it was not to become vested in the Defendant until the timber was measured off at Quebec. Lord Brougham, in expressing the opinion of the Judicial Committee, gives the result of his observations on the contract in these words (6 Moore's P.C. Cases, p. 133):—"Taking the whole of these terms together, it appears to us that until the measurement and delivery was made the sale was not complete, there being nothing in the terms to show an intention that the property should pass before the measurement; but, on the contrary, the intention rather appearing to be that the transfer should be postponed until the measurement at the delivery." And again, in page 134, he says:—"Taking the whole of the terms together, it appears to us that the first part of the contract, selling an ascertained chattel for an ascertainable sum (and which, if it stood alone, would pass the property), actually paid upon an hypothesis or estimate, is controlled by the subsequent part of the contract providing for the possession, carriage, measurement, and delivery, all by the seller;" and further on, he says, "the measurement was to be made after the delivery at Quebec," and upon that clause in the contract the decision evidently turned.

That case differs very materially from the present. In this case the terms of the written contract do not show that any future measurement of the raft was [571] contemplated. The seller had had the raft measured by a person whose position would be a voucher for his accuracy. The specification showing the exact measurement of each log was handed by him to the purchaser, and was in his hands at the

time when the contract was entered into: he retained it, and sent it over to his servants at the place where the raft was to be delivered, in order that they might check the raft delivered by it. There is nothing in these circumstances from which it can be inferred that the seller was to make any further measurement of the raft in order to ascertain the price, which would be computed from the measurement already made. The buyer might, for his own satisfaction, as was said in *Swanwick v. Sothorn* (9 Ad. and Ell. 895), measure it when delivered, but the seller had no such privilege or duty; and after his servant had given up possession, and the servants of the Defendants had taken it, he could neither have claimed to resume possession of the raft as being his property, nor on the ground that he had a lien upon it for the price. Moreover, in this case the evidence showed that, according to the usage of the trade, neither party would have measured the timber at the place of delivery, so as to ascertain the amount to be paid for it. If the buyer had compared the logs delivered with the specification, still that document would have been referred to for the purpose of ascertaining their contents. There was, therefore, nothing more to be done by the seller on his own behalf: he had ascertained the whole price of the raft by the measurement previously made: nor was there anything to be done by him for the buyer: the seller had, according to his contract, conveyed the raft to [572] Indian Cove, and, according to the finding of the jury, had delivered it there. Nor was there anything further to be done in which they both were to concur, as in *Simmons v. Swift* [5 B. and C. 857]; the case, therefore, depends upon the effect of a contract for the sale of certain ascertained goods, without anything to limit or control its legal operation. By such a contract the property was changed, and the loss must fall on the buyer.

Their Lordships must, therefore, humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal, with costs.

[Mews' Dig. tit. SALE OF GOODS: C. WHEN PROPERTY PASSES: 2. *Appropriation of specific goods*; 7. *Ascertaining quantity or quality*. S.C. 6 W.R. 445. See *Anderson v. Morice*, 1875-76, L.R. 10 C.P. 618; 1 A.C. 749.]



# REPORTS OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, 1858-59. By EDMUND F. MOORE, Barrister-at-Law. Vol. XII.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

ROBERT CRUDEN GORDON,—*Appellant*; CHARLES SCOTT, HUGH DIXSON,  
and THOMAS LOXTON,—*Respondents* \* [Feb. 15, 16, 17, and 25, 1858].

G. bought a share in a co-partnership business established by S., D., and L., in Sydney, New South Wales. No regular deed of co-partnership was executed, but by an agreement between them it was stipulated that some interest (the nature and extent of which was not defined) in a piece of land, wharf, and premises, upon which the partnership business was carried on, should form part of the partnership property. This property was then held by S., D., and L., under a lease, and was also subject to a mortgage. During the negotiation for the partnership, S., D., and L. paid off the mortgage, and acquired by purchase the fee of the property, and upon failure of the partnership concern sold the same, receiving the consideration money, which they refused to account for to G., or to treat as partnership assets, on the ground, that the property had been acquired by them on their separate account, and not purchased with the partnership assets. Held (reversing the decree of the Supreme Court at New South Wales),

First. That S., D., and L. having purchased the fee in the property during the negotiation for the partnership, and the consideration money paid by G. for his share in such partnership being based upon the fact of the property being freehold, the purchase must be treated as being for the benefit of the partnership concern; and that G. was entitled to participate and share with S., D., and L. in the freehold interest so acquired, G. contributing in the sum paid by S., D., and L., for the purchase thereof, to the extent of his share in the partnership.

Second. That S., D., and L. were chargeable with interest from the date of the receipt by them of the purchase-money, at the rate of 8 per cent., the rate of interest allowed in the Colony in the absence of any special contract.

The question involved in this appeal was, whether certain freehold premises situate in Barker Street, Sydney, in the Colony of New South Wales, formed part of the property of a co-partnership subsisting between the Respondents and the Appellant. The Appellant contended that such property formed part of the assets of the co-partnership, which the Respondents denied, insisting that they alone were in-

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Dodson.

terested [2] therein, as it was purchased by them on their separate account, and not in their character as partners or with the partnership funds.

The facts of the case were these:—

The Appellant and the Respondents carried on the business of Sugar Refiners in partnership together, under the firm of "The Sydney Sugar Company," in and upon certain premises situate in Barker Street, Sydney, under the name of "The Sydney Sugar Works." Prior to the Appellant entering into the partnership, the Respondents carried on business in partnership with one Hunt, under the style of "Dixon, Scott, and Co." The premises in question were then held by them under a lease, for a term of five years, being also subject to a mortgage. In April, 1853, the Respondent, Scott, on account of the partnership concern, entered into an agreement with Deloitte, the owner of the reversion in fee of the premises, for the purchase of the equity of the redemption, for the sum of £100, subject to a subsisting mortgage to the Australian Trust Company, which amounted on the 24th of June, 1853, to the sum of £3077 16s. 4d., and that mortgage [3] was paid off on that date by him. In the month of June, 1853, the Appellant became a partner with the Respondents, and purchased from them a share of the partnership property, business, and works, for the sum of £1000, and the business thereof was thenceforth carried on under the style of "The Sydney Sugar Company," the Appellant being appointed manager of the business and works at a salary. No deed of co-partnership was executed between them, there being only an agreement. The Appellant and the Respondents afterwards, in August, 1853, purchased Hunt's share in the business, who retired from the firm, by which arrangement the Appellant and the Respondents became owners in equal proportions of the property of the partnership. In the month of April, 1854, the business proving unsuccessful, it was discontinued, when the Respondents, without the concurrence of the Appellant, sold the premises in question, and received the proceeds of the sale, insisting, that the Appellant had no title or interest in the freehold premises, which they alleged were purchased by them with their separate funds on their own account, and that they were alone interested therein, and they refused to account to the Appellant for any part of the proceeds of the sale.

Under these circumstances, the Appellant instituted a suit in the Supreme Court of New South Wales, against the Respondents, for a dissolution of the partnership, and to have an account taken of the dealings and transactions thereof, and of what might be due to him for salary as manager, and for a declaration that he was, as a partner, entitled to an equal share in the freehold property, as it had been purchased for and belonged to the co-partnership.

[4] The Bill stated, amongst other things, that in the year 1851, one Alexander Donaldson, of Sydney, in the Colony of New South Wales, obtained a lease from The Australian Trust Company, the then mortgagees in possession, of a certain wharf and premises situated in Barker Street, in Sydney (being the freehold hereditaments before mentioned), for the purpose of carrying on the business of refining sugar; and, with that intention erected and put up upon the premises a sugar-house, together with certain machinery and other utensils necessary for carrying on the business, and called in the trade a plant, and for some time carried on the business, using the sugar-house and plant, and also another building which was on the land for that purpose, and resided in a certain dwelling-house, also situated upon the premises so leased as aforesaid. That Donaldson, in the year 1851, or 1852, having become indebted to the Respondent, Scott, gave him a lien upon his, Donaldson's, interest in the premises for the amount in which he was so indebted. That, in the month of September, 1852, the Respondents, Scott and Dixon, together with one Moutry, having determined to commence the business of sugar refining, purchased of Donaldson all his interest in the lease, including the plant which he, Donaldson, had erected and put up upon the premises, for the sum of £1000, which sum was paid, or agreed to be paid, in equal proportions between the Respondents, Scott and Dixon, and Moutry; Scott receiving from Donaldson the amount of the debt so due to him as aforesaid; and thereupon Scott, Dixon, and Moutry, took possession of the whole of the property so leased, including the wharf, sugar-house, plant, and dwelling-house, and proceeded with [5] the completion of the works. That shortly after this purchase, Moutry retired from the business, and the Respondent,



Loxton, was received as a partner in his place, Moutry receiving the same amount he had paid to the partnership concern. That the Respondents, in the early part of the year 1853, acting as such partners, purchased the equity of redemption of the mortgaged premises from Deloitte, the owner of the equity of redemption, and commenced business in the concern, using the sugar-house built by Donaldson, and the buildings before particularly mentioned, for the works more immediately connected with the sugar-refining process, the dwelling-house being occupied partly by the sugar boiler to the Company, partly as an office for the Company, and partly for other purposes connected with the concern; that the wharf was let to one Miller by the Respondents, they reserving the right of landing thereon all coals and other articles used in the sugar-refining business. That the Respondents continued operations for some time, the Respondent, Loxton, acting as manager, for which he had an allowance of £500 a year. That in the month of March or April, 1853, one Hunt, of Sydney, having agreed to enter the partnership, paid the sum of £750, for one-fourth share of the property and business of the Company, which was afterwards called "The Sydney Sugar Company," and he became a partner therein, and the sum of £750 was divided between the Respondents; the arrangement being, that Hunt should become a shareholder upon equal terms with themselves, upon payment of the sum of £750, to the Respondents: and there being some delay on the part of Hunt in paying his share, the Respondent, Loxton, wrote the two following letters to Hunt, namely:—"Barker Street Sugar Works, Sydney, 28th of April, 1853. Dear Sir,—After the conversation of this morning, it is necessary for you to complete the purchase of the share, and be in the same position as the other shareholders, that those interested may be able to consult together as partners having an equal interest in the questions that may arise, affecting the interests of the Company. The deed of partnership being nearly ready for consideration, and as opportunities are offering of selling part of the stock as soon as the deed is completed, your immediate reply is requested."—"Sydney, 23rd of May, 1853. Dear Sir,—I am directed by Messrs. Dixon and Scott, to inform you that as they have done all in their power to meet your wishes, and as you have not paid for your share, they have resolved that if the amount be not paid before five o'clock this afternoon, they will accept the offer of another party." That in reply to the last letter, Hunt forwarded to the Respondents, Dixon and Scott, a cheque for £750, and shortly afterwards the Respondent, Loxton, wrote a letter to Hunt, with a memorandum of accounts enclosed, of which the following are copies:—"Sydney, 25th of March, 1853. Balmain. Dear Sir,—I am directed by Messrs. Dixon and Scott, to acknowledge the receipt of (by the hands of Mr. Ronald) your cheque on the Bank of New South Wales for £750: on the other side you have a memorandum with interest calculated to 23rd instant, showing a balance of £15 5s. 11d. still due, which please to send me through Mr. Ronald.

"Memorandum for Mr. Hunt.

1853.

|           |   |      |    |    |
|-----------|---|------|----|----|
| April 15. | To one-fourth share of sugar [7] works, Barker Street, as they stand at this date, exclusive of purchase money, of land, and premises . . . . . | £757 | 6  | 11 |
| May 23.   | To interest to date, 38 days at £10 per cent. . . . .   | 7    | 19 | 0  |
|           |   | 765  | 5  | 11 |
| May 23.   | By cash to account . . . . .  | 750  | 0  | 0  |
|           |   | £15  | 5  | 11 |

Sydney, 25th of May, 1853, for Hugh Dixon and Chas. Scott, T. L."

That, in the latter end of May, 1853, the Appellant having heard that the Company required a manager, called at the office of the Respondent, Scott, who stated that the Appellant should be manager of the Company on condition of his purchasing a share in the concern, and the Appellant was to receive a salary of £500 a year as such manager, at the same time telling the Appellant that the machinery and utensils were complete and in good order, and that it only required a man to act as boiler to make the business profitable; and, at the same time, the Respondent, Scott, represented to the Appellant that the object of the then four proprietors (the Respondents,

Scott, Dixon, Loxton, and Hunt) was to form a Company with a capital of £8000, to be arranged thus:—four new proprietors of shares of £1000 each to be set against the interest of the then four existing proprietors, which joint interest was estimated as being worth £4000; and that the four new shares of £1000 each were intended to form a cash fund to constitute the working capital of the Company; but this arrange[8]-ment was carried out in another way by the cash credit at the Bank of Australasia, as after mentioned. That, in pursuance of such proposal, the Appellant wrote the following letter to the Company:—"Sydney, 28th of May, 1853. Gentlemen,—From a conversation with Mr. Charles Scott, I am led to believe you are willing to give me the management of your sugar refinery in Sydney, on my finding a proper and efficient person to work the same, and on my becoming a partner by the purchase of one share, for the sum of £750. I am willing to fulfil the above condition, provided that the gentleman (now in Melbourne) whom I named to Mr. Scott, and whose experience and ability I am desirous of securing as a practical sugar boiler and distiller, consents to join me in the working of the establishment. It is understood that the sum of £500 per annum be paid to me for the first year as manager, and for the providing of the person whom I wish to secure as the sugar boiler, the said sum to be paid in monthly payments of £41 13s. 4d. Also, that the said salary be doubled at the expiration of the first year, in the event of the operations of the Company being successful." That the sum of "£750," mentioned in the last-mentioned letter, was altered to "£1000" at a meeting of the Company, at which the Appellant's letter was entertained, and the words "to the extent of £200 per week net profit" were added at the end of it, without the consent or knowledge of the Appellant. That a meeting of the Proprietors of the Sugar Company, at which the Respondents, Scott, Loxton, and Hunt, were present, was held on the 1st of June, 1853, when it was resolved and agreed, amongst other things, "That the capital of the Company should be [9] doubled by creating and selling four additional shares of £1000 each, and that the additional £4000, thus obtained, should be appropriated as a working capital for the Company, and that the Appellant's offer of the 28th of May, 1853, should be accepted." That after that meeting the Appellant received his letter back from the Respondent, Scott, with the following communication on the third page thereof (the "£750" being altered to "£1000," as thereinbefore mentioned):—"Dear Sir,—I agree with what you have written on the other side, and have seen the rest of my partners, who are willing to carry out the arrangement; and I have only to remark that your share will not be transferable without the sanction of the Company. For Dixon, Scott, and Co. Chas. Scott." That the Appellant always considered that his letter was accepted in the terms in which he wrote it, excepting the alteration of £750 to £1000, to which alteration he afterwards acceded; and, on or about the 7th of June, 1853, when he entered into the business as manager, he entered a copy of the letter in the minute book in the terms upon which it was originally written, except that the £1000 was written instead of £750, as if the £1000 had been originally mentioned; and, on the following day paid to Messrs. Scott, Dixon, and Co., as such proprietors of the Company, the sum of £1000, for his share in the business and partnership property, and became thereby a partner in the property and business of the Company. That, on the Appellant joining the concern, he also made an entry in the journal of the Company, at the suggestion of the Respondent, Loxton, who, with Hunt, acted as auditors to the Company, and by whom, as such auditors, the books and accounts of the Company were examined and audited, which entry [10] was so copied from a rough sketch written by the Respondent, Loxton (which has since been lost), and the following was a copy of such entry:—

Stock of Sydney Sugar works.

Dr. to sundries.

To Charles Scott

For one-eighth share of Sydney Sugar works . . . . £1000 0 0

Hugh Dixon

For one-eighth share do. do. . . . 1000 0 0

Thomas Loxton

For one-eighth share do. do. . . . 1000 0 0



## Edward Hunt

|  |       |   |   |
|--|-------|---|---|
| For one-eighth share of Sydney Sugar Works . . . . . | £1000 | 0 | 0 |
|--|-------|---|---|

## Reserved shares

|  |      |   |   |
|--|------|---|---|
| For four one-eighth shares held for sale . . . . . | 4000 | 0 | 0 |
|--|------|---|---|

|  |      |   |   |
|--|------|---|---|
|  | 8000 | 0 | 0 |
|--|------|---|---|

Dr. to R. C. Gordon.

## Reserved shares

|  |      |   |   |
|--|------|---|---|
| For one-eighth share of Sydney Sugar works . . . . . | 1000 | 0 | 0 |
|--|------|---|---|

Dr. to Reserved shares.

## Cash

|   |      |   |   |
|---|------|---|---|
| For cash received from R. C. Gordon for his one-eighth share in<br>the Sydney Sugar works . . . . . | 1000 | 0 | 0 |
|---|------|---|---|

And those respective sums of £1000 appeared in the ledger book of the Company to the credit of each of the above-named shareholders. That it was agreed by the Company that three other shares of £1000 each in the Company, other than those already existing, should be disposed of at some future time; but, at a meeting of the proprietors, held on the 8th of [11] June, 1853, it was arranged, upon the motion of the Appellant, that the three shares should be reserved and a Bank credit obtained in lieu thereof. That, at a meeting of the Company, held on the 13th of July, 1853, it was resolved that a policy of Insurance should be effected with the Sydney Mutual Association for the sum of £5000, on the property of the Company, namely, £2000 on the buildings, and £3000 on the stock and machinery, and a form of proposal, of which the following was a copy, was filled up by Hunt, and signed by the Appellant on behalf of himself and the other proprietors, and with their concurrence:—  
“To the Directors of the Sydney Fire Insurance Company. Sydney, August 6th. 1853. Gentlemen,—I have to request that you will insure against risk from fire with the Association the following property:—

|  |       |   |   |
|--|-------|---|---|
| 1st. On a brick building used as a Sugar refinery, shingled<br>and detached on three sides . . . . .   | £1000 | 0 | 0 |
| Also on a brick building used as a Sugar refinery,<br>shingled and detached, situate in Barker Street, and<br>the rear open to the waters of Darling Harbour . . . . . | 1000  | 0 | 0 |
| On stock in the said two buildings . . . . .   | 2000  | 0 | 0 |
| On the machinery of the above . . . . .  | 1000  | 0 | 0 |
|  | 5000  | 0 | 0 |

[12] But the proposal was subsequently rejected, on account of the nature of the business and of there being a number of wooden sheds adjacent to the property. That, about this time, Hunt became uneasy on account of a disposition shown on the part of the Respondents to exclude him from any share in the land and buildings in question, and he refused to become a party to the loan from the Bank, until the matter was satisfactorily arranged; and, in consequence of his refusal to join in the application to the Bank for the loan, the following letter, signed by the Appellant and the Respondents, was sent to the Bank of Australasia: “Sydney Sugar Company’s Office, 5th of August, 1853. Sir,—We beg leave to solicit a cash credit for the sum of £2000 for the Sydney Sugar Company, of which we are shareholders to an equal extent. We are prepared to give Bond to the Bank for due payment of the same, and remain, Sir, your obedient servants, Chas Scott, Hugh Dixon, Thos. Loxton, R. C. Gordon.” And the loan was eventually granted by the Bank to the Appellant and Respondents, who executed the usual cash credit Bond. That, at a meeting of the Company, held on the 24th of August, 1853, Hunt offered to sell his share in the Company to them, for the sum of £800, which was accepted, and a promissory note for that sum, payable at six months, was given to him in full for all his right, title, and interest in the concern; and this purchase from Hunt was made by the Company itself, and the promissory note was (in accordance with a resolution of the proprietors, that all bills, notes, and cheques should be signed by two Directors and the manager) so signed by two of the Directors and the manager, and a bill of sale of his share [13] was subsequently signed by Hunt, and the note was afterwards

retired out of the funds of the Company. That no deed of partnership was ever executed, but the affairs of the Company were for some time managed by the Appellant, but owing to the imperfect state of the machinery no profit was made by the business; and, on or about the 12th of November, 1853, the Appellant by letter informed the proprietors of the fact, and recommended that operations should be discontinued until certain new machinery came out from England, and this was for a time acquiesced in by the Respondents, and operations accordingly ceased. That the Respondents, Dixon and Loxton, becoming uneasy at the state of affairs of the Company, wished to sell out of the same, and instructed the Respondent Scott, to endeavour to dispose of their shares, and thereupon the Respondent, Scott, instructed the Appellant to endeavour to form a new Company, which was attempted by the Appellant, but the scheme proved abortive, and on the 21st of March, 1854, the Respondent, Scott, having been absent from the premises some days on account of illness, wrote the following letter to the Appellant:—"Sydney, 21st of March, 1854. Dear Sir.—I wrote you last week, and not having seen or heard from you I suppose that you have been disappointed in all quarters, and as my time is very much occupied, will you give the best description of the premises you can. The dwelling-house and the store separate, the length and breadth of the land and the depth of water, and agree among yourselves what auctioneer you will employ, as I am only waiting for the above to complete the advertisement." And, the description of the sugar works and [14] premises was subsequently furnished by the Appellant to the Respondent, Scott. That nothing further was done in the business, and the concern lingered on, waiting for the machinery, and as the premises were vacant, the Respondent, Dixon, requested the Appellant to store some goods for him on the premises, which the Appellant did, and a short time afterwards the Respondents, Loxton and Dixon, manifested evident signs of dissatisfaction, and during the Appellant's absence from the premises in consequence of illness, the Respondent, Dixon, took from a clerk in charge, the keys of the establishment, and thereupon the Appellant, seeing it was quite idle to consider that the concern could continue, on the 13th of April, 1854, wrote and delivered the following letter to the Respondents:—"Messrs. Charles Scott, Hugh Dixon, and Thomas Loxton. Sydney. Gentlemen.—As you have taken the keys of the sugar works and office, and deprived me of the possession, custody, and charge thereof, I hereby give you notice that I consider you have thereby (as well as in other ways) discharged me from any further responsibility in reference to my position as manager of the Company, and that I am, therefore, unable to act any longer in that capacity." That the Respondents had, since the last-mentioned letter, without having in any way obtained the concurrence, permission, or assent of the Appellant, leased the whole of the real property, that is, all the property, including the plant and machinery, to one Blake, for the term of five years, at a rental of £900, per annum, and, without the concurrence, permission, or assent of the Appellant, had since, sold all the real property aforesaid (subject to the lease), to Messrs. Garsed and Woods for the sum [15] of £7500; that they had sold the plant and machinery on the premises to Messrs. Garsed and Woods for the sum of £1000, and that they had sold all the machinery then coming out from England to the same parties at cost price. That the money paid by the Respondents for the land, buildings, plant, and machinery, did not altogether exceed £3100, which, with a further sum of £300 for money expended by them with reference to certain improvements in the machinery, made a total outlay by them of £3400, and deducting from this sum the sum of £750 received by them individually, from Hunt, left £2650, or the sum of £883 6s. 8d. each. That the Appellant had contributed £1000, and yet the Respondents contended that they were entitled to the whole of the land and buildings to themselves, and to treat the assets of the Company as consisting only of the plant and machinery, thus bringing in the Appellant as a loser of his £1000, in addition to his share of losses of the Company upon that assumption; or, in other words, that the Appellant should sink his £1000, and pay an additional £300, whilst, on the other hand, the Respondents should make a net profit of £1316 13s. 4d. each, being one-third of the said sum of £7500, the purchase-money for the land and buildings, after deducting therefrom their respective shares of the debts or liabilities of the Company, which amounted to about £2200, and the sum of £883 6s. 8d. each, as before mentioned, over and above the sum of £1000 for the machinery, which they had also received. That the freehold property belonged to the Company, and



that the Appellant, as a partner in the Company, was entitled to one equal fourth share in the proceeds of the sale thereof. And the Bill [16] prayed that the partnership might be dissolved, and that an account might be taken of the co-partnership property, dealings, and transactions, and an account of the moneys received and paid by the Appellant and Respondents, and an account of what might be due to the Appellant as manager, by way of salary, and that the Respondents might be decreed to pay the Appellant what, if anything, should, upon taking the accounts, be due to him; the Appellant offering to pay to the Respondents what should, upon taking the accounts, be due to the Respondents, and that the Respondents might be restrained by injunction from collecting or receiving any of the debts or assets belonging to the co-partnership, and for further relief.

The Respondents put in separate answers to the Bill, and thereby insisted that the freehold premises in question formed no part of the co-partnership assets, and that the Appellant had no right, title, or interest therein.

Evidence was entered into by both parties, the Appellant and Respondents being themselves examined. The principal part of the evidence upon the question of the freehold interest in the premises acquired by the Respondents, being intended to form part of the partnership concern, is stated in the judgment of their Lordships.

The cause was heard before His Honor Therry, the Primary Judge in Equity of the Court, who was of opinion, that as the Respondents had represented the capital of the concern as being of the value of £4000, such capital could only be of that value, by including the freehold of the premises on which such business was carried on, and, by a decree, bearing date the 21st of October, 1856, it was declared, that the land, wharf, [17] and buildings in the pleadings mentioned, free from the mortgage thereon to The Australian Trust Company, formed part of the joint property of the partnership between the Appellant and the Respondents. And, it was ordered, that the partnership between the Appellant and the Respondents should be dissolved, and that it should be referred to the Master, to take an account of all and every the co-partnership property, dealings, and transactions, and an account of the moneys received and paid by the Appellant and Respondents in respect of the partnership business, and an account of what might be due to the Appellant, as manager of the Sugar Company in the pleadings mentioned, by way of salary, with the usual directions. And, it was further ordered, that what, upon taking of the accounts, should appear to be due to the Appellant, should be paid by the Respondents to the Appellant, or what, if any, amount should be found due by the Appellant to the Respondents, should be paid by the Appellant to the Respondents.

The Respondents appealed to the full Court from so much of this decree as declared that the freehold property, freed from the mortgage, formed part of the joint property of the partnership. The appeal was heard by the Chief Justice, The Hon. Sir Alfred Stephen, The Hon. John Nodds Dickinson, and The Hon. Samuel Frederick Milford, Puisne Judges, on the 5th of February, 1857, and, upon such hearing, a decree was made, whereby it was declared, that the appeal ought to be allowed, and it was ordered, that the decree of the Primary Judge, of the 21st of October, 1856, so far as it declared that the land, wharf, and buildings in the pleadings mentioned, freed from the mortgage thereon to The Australian Trust Com-[18]-pany, formed part of the partnership between the Appellant and the Respondents, should be reversed. And, it was further declared, that the land, wharf, and buildings, did not form part of the partnership. And it was ordered, that in all other respects the decree should stand confirmed. And, it was also declared, that the Appellant was entitled to an equal fourth share in the lease of the land, wharf, and buildings, in the pleadings mentioned, up to the 14th of August, 1855, the date of the determination of the lease, and that in taking the accounts the value thereof should be estimated accordingly. And that each party should bear their own costs.

The Appellant appealed against this decree to Her Majesty in Council.

Mr. R. Palmer, Q.C., and Mr. Speed, for the Appellant.—The decree of the Court of appeal, except so far as it confirms the decree of the Primary Judge, is against the evidence in the cause, which established the Appellant's case, namely, that the freehold hereditaments and premises in question, freed from the mortgage, formed part of the joint property of the partnership subsisting between the Appellant and Respondents. It is clear from the correspondence set out in the Bill, that, during

the negotiation by the Appellant with the Respondents for the purchase of a share in the partnership, this property was represented to the Appellant as part of the partnership property, and the price which was demanded and paid for the share in the partnership was actually based upon that representation. During the continuance of the partnership between the Appellant [19] and the Respondents, such property was always treated as part of the partnership property, and the Appellant considered jointly interested therein with the Respondents. The Respondents never disputed or questioned the Appellant's right to a share in such property, or ever alleged that it did not form part of the partnership property, until after they had ceased to carry on the partnership business; then for the first time, it was alleged by them, that the Appellant had no right to any share or interest in the freehold property, and the Respondents refused to account to him for the proceeds of the sale or to pay him his share of such freehold property. Though the Respondents' interest in the premises were originally leasehold, and the Respondents acquired the freehold before the Appellant joined the firm, yet the Appellant was entitled to participate equally with the Respondents in the freehold interest acquired by them in such property, as it was not competent for the Respondents, under the circumstances, having regard to the partnership, to acquire any freehold interest for their own benefit, to the exclusion of the Appellant. *Featherstonehaugh v. Fenwick* (17 Ves. 298).

Mr. Cairns, Q.C., and Mr. Bagdollay, for the Respondents.—As the land, wharf, and buildings in question, were not purchased by the Respondents with the moneys of the co-partnership which existed between the Respondents and the Appellant, or with moneys belonging to any previously subsisting co-partnership, but by the Respondents, with their own moneys for their own purposes; such property did not form part of [20] the assets of the co-partnership subsisting between the Respondents and Hunt previously to the purchase by the Appellant of a share in such co-partnership. There was not, either at the time of such purchase or at any subsequent time, any contract, agreement, or understanding whatsoever, either between the Respondents and Hunt and the Appellant, or between the Respondents and the Appellant, that the freehold land, wharf, and buildings should be treated as part of the assets of the subsisting co-partnership. The only interest the Appellant had in the estate in question and intended to form part of the partnership property, was the residue of the term of the subsisting lease formerly granted to the Respondents. The freehold interest was an entirely distinct and separate property, and belonged by reason of the purchase by Scott to the Respondents only.

Their Lordships' judgment was delivered by

The Right Hon. Lord Justice Knight Bruce (25th Feb., 1858).—In this case their Lordships find themselves unable to agree wholly with either of the two decrees before them. As to that of the Primary Judge, because it does not direct Gordon, the Appellant here, to be debited with any part of the sums of £100 and £3000, and a fraction, respectively paid by the Respondent, Scott, for the purchase from Deloitte, and the acquisition from The Australian Trust Company, of their respective interests in the land, wharf, and buildings which, in their Lordships' opinion, that decree properly declares to have formed part of the joint property of the partnership between the Appellant and Respondents. As to the decree of the full Court, because, reversing the former, so far as it [21] declared that the land, wharf, and buildings "formed part of the partnership," the decree of the full Court declared the land, wharf, and buildings not to "form part of the partnership."

It is plain, and not denied, that the partnership with the Appellant was formed with an intention upon all sides, and an agreement, that some interest in the land, wharf, and buildings should form part of the partnership property. But the nature and extent of that interest was not defined. The Respondents contend, that the only interest in the land, wharf, and buildings intended to form part of the partnership property, was the residue of the term in them granted, or agreed to be granted, by the lease, or agreement for a lease, to them, dated the 14th of August, 1850, which lease was only a term of five years from the 22nd of that month, and had been acquired by Scott in the year 1852, the partnership with the Appellant having been constituted in, and not before, May, 1853, or the 1st of June, 1853. But, previously to that, in April, 1853, Scott had made the agreement with Deloitte, the owner of



the reversion (subject to a mortgage to The Australian Trust Company), for the purchase of that reversion for £100 (subject to the mortgage). The evidence satisfies their Lordships that Scott made the agreement with Deloitte, not as a person distinct from the Sugar-refinery partnership, but as a member of that partnership, on account of the joint concern. When, therefore (and before), the partnership with the Appellant was agreed on, Scott, on the account and behalf of the Sugar-refinery Company, or concern, was the absolute proprietor of the land, wharf, and buildings, subject only to the mortgage which Scott (alone [22] or with others) subsequently acquired; and as it is manifest that the expression "one share," contained in the Appellant's letter of the 28th of May, 1853, meant "one share" in the Sugar-refinery, and was so understood on the 1st of June by Messrs. Scott, Dixon, Hunt, and Loxton, when they accepted the Appellant's offer of the 28th of May, and as the expression "Sugar-refinery," used in the letter of that day, is necessarily agreed on each side to have extended to and included some interest in the land, wharf, and buildings, we are of opinion, that the Appellant was entitled to understand, and must be taken to have understood, that expression as extending to all the interest that Messrs. Scott, Dixon, Hunt, and Loxton had at that time in the land, wharf, and buildings, and that if those four gentlemen, or any one or more of them, meant that the Appellant should take no further interest in them than for the residue of the term of five years, he ought to have been so informed before he became a partner, which, in their Lordships' judgment, he does not appear to have been. Nor, in saying this, do we forget the passage in the Appellant's evidence, to which our attention was particularly called as to the payment to Donaldson. The Respondents in their examinations respectively, have stated conversations which, as their learned Counsel contend, ought to be considered, if accurately stated, as affording strong evidence against the truth and validity of the Appellant's claim. Their Lordships do not, however, find the Respondents' answers, and the testimony given by them, sufficiently in accordance together, sufficiently accurate, or of sufficient weight, to countervail the documents, the evidence of the witness, [23] Ronald, and the distinct statements contained in the Appellant's testimony. The Appellant says: "After I had paid the money I took the management and kept the accounts. I know that Hunt claimed a share in the real property, which they resisted. Hunt maintained that he had paid it, and was entitled to share. They disputed it, and Hunt said, 'Well, give me back the money.' I do not recollect saying that I would find a purchaser for Hunt's share. I do not believe I stated that Hunt was a fool for leaving the concern. I cannot swear that I did not say so. I gave Scott a list of the partnership property. The one produced, marked X, was not the one, but merely an inventory of everything on the premises. When I instructed Scott to sell the property, I did not give him the inventory marked X. I have never heard any allusion to Donaldson's lease. At our Board meetings there was not, to my knowledge, any conversation as to the rent to be paid for the premises, after the expiration of their then tenancy. There was no allusion to any lease whatever when the insurance was proposed to be effected. I was never instructed to sell the property at distinct prices. I was not instructed to sell the property to Hargreaves, or to sell it in two distinct parts. Scott did not wish to sell his share, but to form a Company with Hargreaves." And he further says: "I did not state to Loxton and Dixon that I might as well claim the real estate as Hunt had done. I had never had any conversation except on the day we bought Hunt's share. On that day I did not say that I might as well claim as Hunt did. Hunt made some allusion to my share. I stated that my share had nothing to do with his matter in dispute; that what-[24]-ever bargain I had made I would adhere to. That was all on this subject. I never stated to any of the partners that I was too poor to join them. I told Scott that I had a share in the real property. On the day of the discussion I told Scott my share was in the property. It was then one-fourth. Since Hunt went out I claimed a share of the interest purchase of the land from Deloitte. The Company had no funds then to pay £3700. The working capital of the Company was my £1000, and the cash credit. The property represented their shares, namely, the lands, building, and machinery." And again he says: "I was not informed that Hunt left because Scott would not sell him part of the freehold of the land. Hunt left because they would not acknowledge his claim to a share of the freehold. I did not tell Loxton, Scott, or Dixon, or either of them, at the sugar works, or elsewhere,

that Hunt had no claim to the land, and that I might as well claim a share in the freehold as Hunt. I recollect a negotiation with Hargreaves for the purchase. The arrangement with Hargreaves was not that he should give £6000 for the freehold. Hargreaves delayed making an offer until he received money from Port Philip. I never heard such a proposition that Hargreaves was to pay £2000 to Scott, £2000 to Loxton, or £2000 to Dixon, for the freehold. Scott wished to continue a partner in the new Company I was to make with Hargreaves; Loxton and Dixon were to go out. I have a faint recollection that Loxton said he would sell his share for £2000. I never told Loxton or Dixon that I had not the inclination to purchase the land. I always considered the land belonged to the Company before I [25] entered into partnership. I never, at any time, stated to Loxton or Dixon that I had not the means or inclination to purchase the land."

Their Lordships think that the Primary Judge was right, so far as he went, in respect of the property in contest, but that he should have charged the Appellant with a part of the £100, and of the £3000, and a fraction, in proportion to his share in the partnership; their Lordships being unable to attribute any weight to the Appellant's argument for his exemption from that contribution which he has founded on the value, or his belief or understanding of the value, of the property in May, 1853; or his alleged understanding at the time that he was becoming interested in an estate in fee simple in possession, free from incumbrances. He must, we think, be taken to have agreed to accept, and his partners to have agreed to let him have, a share in the property, such, in point of tenure and charge, as at the time it was.

The recommendation of the Committee to the Crown will be, that the decree of the full Court should be varied on the principle that has been stated, but not further: and that there should be no costs of the appeal.

A discussion took place as to the amount of interest to be charged upon the purchase-money received by the Respondents for the freehold lands and premises sold by them, when it was decided, that as the rate of interest in the Colony, where no special contract existed, was 8 per cent., the Respondents were chargeable with interest at that rate from the time they received the purchase-money.

[26] Ultimately, the following minute was agreed to:—"Vary the decree under appeal, by declaring that the fee simple of the land, wharf, and buildings in question, was, at the date of the termination of the partnership, part of the property of the partnership, and that the Appellant is entitled to one-fourth part of the proceeds of the sale thereof, with interest thereon at the rate of 8 per cent. per annum from the time of the receipt thereof by the Respondents, subject to the payment by the Appellant of one-fourth part of the purchase-money of £100, paid by the Respondents to DeLoitte, and of the sum of £3077 16s. 4d. paid by them to The Australian Trust Company, and of such costs and expenses as were properly incurred and paid by the Respondents in or about the purchase and conveyance of the premises, with interest thereon at the like rate of 8 per cent. per annum, from the dates at which such payments respectively were made by the Respondents. Remit the cause with the above declarations. No costs of the appeal."

[Mews' Dig. tit. PARTNERSHIP: IV. PARTNERSHIP PROPERTY: 4. *Conveyance*, b.]

## [27] ON APPEAL FROM THE COURT OF EXCHEQUER OF THE ISLE OF MAN.

HER MAJESTY'S ATTORNEY-GENERAL of the Isle of Man.—*Appellant*: THOMAS COWLEY and HUGH KINRADE.—*Respondents* \* [June 14, 1858, and June 30, 1859].

The Court of Exchequer in the Isle of Man has power to summon a jury to decide a question of fact.

\* Present: The Right Hon. Dr. Lushington, the Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.



This power extends to an information for intrusion and trespass by the Attorney-General of the Island on behalf of the Crown.

Such right is not affected by the Act of Tynwald of 1777, for the better regulation of juries, which is confined in its operation to the Common Law Courts, and does not extend to the Exchequer Court.

Where a Court lawfully possesses a jurisdiction for the benefit of the subject in the administration of justice, mere non-user does not take it away.

The Attorney-General of the Isle of Man, as the chief law officer of the Crown in the Island, bringing an appeal to the Queen in Council, is not required to enter into a recognizance to answer costs of appeal [12 Moo. P.C. 33].

This was an information filed by the Attorney-General of the Isle of Man against the Respondent in the Court of Exchequer for intrusion and trespass upon property of Her Majesty in the Island.

The facts of the case which gave rise to the information were as follows:—

The Manor of the Isle of Man is part of the possession and land revenues of the Crown, the annual profits from which form a portion of the public revenue, and are paid into the Consolidated Fund (see 10th Geo. IV., ch. 50, sec. 8).

Within, and parcel of, this Manor, there is an ex-[28]-tensive District, called "The Forest," separated from the other parts of the Manor, and of which District Her Majesty, in right of Her Crown, is seized in Her demesne as of fee. This District is, in numerous instances, distinguished in the Statutes of the Isle of Man by the name of "The Forest," and divers penalties are prescribed by Statute for offences committed on "The Forest."

It had of late years been asserted that "The Forest" belonged to the "inhabitants," the "people," or the "public," of the Isle of Man, and such claims being altogether undefined, and the existence of them tending to reduce the value of the Crown property, and to throw difficulties in the way of its due administration, it was considered proper that the claims thus advanced should be made the subject of inquiry in the Court of Exchequer of the Island, as the proper Tribunal in matters affecting the rights of the Crown, and the public revenue.

The Respondents having entered on "The Forest" in such a way as to amount to an assertion of right on their part, Her Majesty's Attorney-General of the Isle of Man, filed an information against them in the Court of Exchequer in the Island. The information pleaded, that the Lady the Queen, on the 1st of January, in the tenth year of Her reign, and long before, was, and is, seized in Her demesne as of fee in right of Her Crown of and in a close called "The Forest," part or parcel of the Isle of Man, as in many records, rolls, and remembrances, more fully of record, appeared; nevertheless, Thomas Cowley, Coroner of Michael, and one Hugh Kinrade, of Ballamenagh, in the parish of Lezayre, in the Isle, yeoman, the laws of [29] the Lady the Queen not fearing, but intending and contriving disinherison of the Lady the Queen, on the 22nd of July, 1856, with force and arms, in and upon the possession of the Lady the Queen of the close called "The Forest," part or parcel of the Island as aforesaid, entered, intended, and made ingress, and with feet in walking, trod down, trampled upon, damaged, spoiled, and destroyed the grass and herbage of the Lady the Queen, there then growing and being, and other wrongs to the Lady the Queen then and there did, in contempt of the Lady the Queen, and against her laws: wherefore the Attorney-General on behalf of the Lady the Queen, prayed the consideration of the Court therein, and that due process of law might be award d against Thomas Cowley and Hugh Kinrade, to appear in Court, and that Thomas Cowley and Hugh Kinrade might be ordered to answer the premises.

Separate demurrers were filed by the Respondents to this information. These were in the same form; the causes of demurrer pleaded being, that by the law of the Island, the information was not sufficient in law, and that the Respondents were not bound to answer the same, and that there was no venue or place alleged in and by the information at which the Respondents were supposed to have committed the offence, or offences, therein mentioned, or any of them, and that no relief was sought by the information against the Respondents with respect to the offence or offences mentioned in the information, and which they were supposed thereby to have committed, and that it did not appear by the information that the Court could give any

relief against the Respondents with respect to the offence or offences mentioned in [30] the information, and which they were supposed to have committed.

The demurrers were argued on the 6th of November, 1857, before His Excellency the Hon. Charles Hope, the Lieutenant-Governor of the Island, the Judge of the Court of Exchequer, assisted by the two Deemsters, the Common Law Judges of the Island, the Clerk of the Rolls, and the Water Bailiff, who is the Judge of the Court of Admiralty.

On behalf of the Respondents, it was contended, that the charge in the information was uncertain and ambiguous, and that it did not appear whether it was of a civil or a criminal nature: that proceedings by information of intrusion had never before been taken on behalf of the Crown in the Island, and were not authorized by the law of the Island; that the Court of Exchequer had no jurisdiction over the offence charged, but that it was tryable in the Common Law Court, or by a Trespas jury, under the Insular Statute passed in 1753, entitled, "An Act for the better preventing of petty larceny and trespass," and that the statement of a venue in the information was necessary for purposes of jurisdiction, for the fair information of the Defendants, and for the proper summoning of the jury. The Attorney-General of the Island, on the other hand, contended that the Crown was entitled to proceed by information of intrusion, that the Court had jurisdiction, and that the information contained a sufficient venue.

The Court was of opinion, that the demurrers were a good bar to the information; that it was a case to be tried by a jury, and, therefore, held, that the venue was not sufficient.

The Court afterwards transmitted to the Privy [31] Council the following statement of the reasons for their judgment in favour of the Respondents:—That it appeared to the Court of Exchequer, on hearing the case, that the matters charged against the Defendants involved questions which were properly tryable by a jury. That by the Common law of the Island, all actions relating to land are tryable by a jury of the Sheading wherein the land is situated. In the Courts of Common law, this has been regulated by Statute, but in the Court of Exchequer it still depended upon the Common Law. That the Island was divided into two Districts, which were again divided into six Sheadings, including seventeen parishes, and each Sheading had its own Coroner, to whom, respectively, the jury list for each Sheading is committed, and who were bound to summon the juries from those lists when required. The Court was of opinion, therefore, that it was necessary that the venue in the information should be so laid as to enable the Court to direct its process to the proper officer for summoning the proper jury; and that this was in accordance with all former precedents, as the Courts of this Island had always held that the venue must be specially laid, both in civil and criminal cases. That the only venue laid in the information filed in this case was "The Forest," which conveyed no information to the Court, as the lands known of old by the name of "The Forest" extended into every Sheading, and nearly, if not quite, every parish in the Island.

The Attorney-General of the Island being desirous of appealing to the Queen in Council from the decision of the Court upon the demurrers, presented [32] a petition to His Excellency the Lieutenant-Governor of the Island, praying his acceptance of the appeal. The appeal was accepted upon the condition, that the Attorney-General, or some other person in his behalf, entered into a Bond at the Rolls Office to the Queen in the penal sum of £2000, conditioned that he would prosecute the appeal with effect by lodging his petition of appeal in the Council Office, and causing a certified copy of the transcript record to be transmitted to the Registrar of the Privy Council Office within the term of three months from the date of the Bond, or thereafter, within such time as the Court of Exchequer might allow.

The Appellant did not enter into the Bond so required, but presented a petition to Her Majesty in Council, in which he submitted, that, as Her Majesty's Attorney-General of the Island suing for an alleged injury to Her Majesty's property in the Island, he ought to be admitted to appeal without any such condition as that imposed by the Lieutenant-Governor of the Island, and prayed that he might be at liberty to prosecute his appeal by lodging within three months from the date of Order to be made thereon, his petition of appeal in the Council Office, and causing a certified copy of the transcript required to be transmitted to the Registrar of the



Privy Council, and that he might be relieved from complying with the provision contained in the acceptance of the appeal, by which the Appellant, or some other person on his behalf, was required to enter into a Bond, as in the acceptance mentioned.

The petition was heard *ex parte*, as no appearance to the appeal had then been entered for the Respondents.

[33] (14th June, 1858.)\* Mr. Bovill, Q.C., in support of the petition.

The Attorney-General of the Isle of Man objects to the condition imposed by the Court of Exchequer in the Island, of entering into a recognizance bond for costs of appeal, as being incompatible with his judicial character as chief law officer of the Crown in the Island. The case of *The Lord Advocate v. Lord Dunglas* (9 Clk. and Fin. 173) is conclusive. There the House of Lords held that the Lord Advocate, or any other officer of the Crown, bringing an appeal, was not required to enter a recognizance to answer costs of an appeal from the Court of Session in Scotland.

The Right Hon. T. Pemberton Leigh.—Their Lordships are of opinion that you are entitled to appeal, without entering into the security bond required by the Court below.

It was, therefore, ordered, that Her Majesty's Attorney-General of the Isle of Man should be at liberty to enter and prosecute his appeal from the Court of Exchequer of the Isle of Man, without complying with the proviso for security for costs required by the acceptance of appeal.

The appeal now came on for hearing (30th June, 1859).

Mr. Bovill, Q.C. and Mr. Willes, for the Appellant.

By the law of the Island, the matters charged in the information were cognizable by the Court of [34] Exchequer without the intervention of a jury. Whatever be the practice in the Common Law Court in the Island, under the Statutes for better regulating the proceedings of that Court of 1777 (Mill's Stat. Laws of the Isle of Man, p. 363), and 1796 (ib. p. 392), to summon juries in actions relating to land, as referred to in the reasons for the judgment given by the Court below, it is immaterial to the present proceedings, as the practice of the Court of Exchequer has uniformly been to decide questions brought before it without the intervention of a jury. In fact, that Court has no power to summons a jury. No mention is made of a jury in the Book of Orders of 1561 (ib. p. 36), or in the Lords' Resolutions touching causes of the Isle of Man, passed in 1593 (ib. p. 76). Moreover, the Records prior to the year 1777, show that the practice of that Court was not to require a jury. In the Report of the Commissioners who were appointed to inquire into various points respecting the Isle of Man, made in 1792, it is stated, at p. 74, that the Court of Exchequer in the Island, takes cognizance of all disputes, or offences respecting the Lords' revenue, and like the Court of Chancery there, it usually proceeded without a jury; and to that effect was the opinion of Deemster Moore, who was examined before that Commission (Rep. of Comms. 1792, App. (C.) No. 5). In 1777, a Statute was passed for the better regulation of the proceedings in the Court of Exchequer (Mill's Stat. Laws of the Isle of Man, p. 362), but no mention is there made of a jury, and upon search being made in the Records of that Court, it does not appear, that juries have since that time been sum-[35]-moned there for the trial of any cause. Inquisitions, it is true, have been taken, as appears from the Records, in the case of *The King v. Haywood* (Liber Scaccar (Exch. Bk.) of the Isle of Man, 1786), in 1786, and in the case of *The Att-Gen. v. Holmes* (Liber Scaccar (Exch. Bk.) of the Isle of Man, 1814), in 1814, but these cases were prior to the filing of an information, in order to find out persons unknown who had possessed themselves of treasure trove, and they are distinguished from an information, such as this, for intrusion. 2 Hawkins, P.C., p. 106 (8th Edit.). The case of *The Duke of Atholl v. Bridson* is in point. There a Bill was filed in the year 1810, in the Court of Exchequer, by the Duke and his lessees for the recovery of tithes. The Defendant filed a plea in bar to the suit, and when the case came on for hearing, the Court ordered that the matter of the plea should be tried by a jury of the country at the Exchequer Court. The Plaintiffs then petitioned the Court, stating

\* Present: The Lord President (the Marquis of Salisbury), the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Turner, the Right Hon. Sir Lawrence Peel, and the Right Hon. Sir John Taylor Coleridge.

that in all matters of public revenue, as well as of tithes, it was contrary to law, as well as the practice of the Exchequer Court, to try any question by a jury. The Court dismissed the petition, but upon appeal to the King in Council, the Order of dismissal was reversed (18th April, 1815), and the Court of Exchequer afterwards tried the cause without a jury. This decision was followed by the Court of Exchequer in the year 1817, in the case of *The Bishop of Soder and Man v. Farrant*. In that case the Bishop filed a Bill in the Exchequer Court for the recovery of tithes. The Defendants put in answers, and afterwards petitioned the Court that a jury might be summoned to try the issue between the parties, but the Court refused the issue, con-[36]-sidering itself bound by the authority of *The Duke of Atholl v. Bridson*. The same course was pursued in the year 1819, in another suit relating to tithes, *The Bishop of Soder and Man v. Tobin*, and the decree in that case was likewise affirmed on appeal by the King in Council upon the same ground. Great authority is due to these recorded precedents. It is true that these last three cases relate to tithes, but, by the law of the Island, questions affecting the rights of the Crown and public revenue are placed upon the same footing as questions regarding tithes. This is the first case where an objection has been urged, that the proceedings taken by the Attorney-General, by way of information for intrusion, were wrong, and that they ought to have been under the Island Statute of 1753 (Mill's Stat. Laws of the Isle of Man, p. 312): "An Act passed for the better prevention of petty larceny and trespass." Such objection is untenable. The Act, 5th of Geo. III., c. 26, vested in the Crown all the rights of the Lords of the Isle of Man, and the Act, 10th of Geo. IV., c. 50, places the land revenue of the Crown under the management of the Commissioners of Woods, which is made to extend to and include the Isle of Man. Section 8 enumerates the possessions and land revenues of the Crown in the Island. Some of these revenues are set out in the Book of Orders of the Commissioners in 1561 (ib. p. 36).—[Lord Kingsdown: This is a proceeding respecting rights belonging to the Crown by virtue of the Crown's title under transfer of the Island, not for any prerogative rights exclusively.]—Yes, but it involves the prerogative of the Crown, and that is the reason for showing the title [37] of the Crown. The proceeding by information for intrusion was the proper remedy, Com. Dig., tit. "Prerogative" (D. 72); 3 Bla. Comm., p. 261; Viner's Abr., tit. "Prerogative of the King" (F. e. 3), pl. 2; and the suit was, therefore, rightly brought in the Exchequer Court, as the question affected the rights of the Crown. It would be so in England. Thus in *The Att.-Gen. v. Hallett* (15 Mee. and Wels. 97), on the allegation that the profit of the Crown came in question, the Court of Exchequer ordered the proceedings which had commenced in the Court of Common Pleas, to be removed into the Exchequer. Even if the Court of Exchequer had the power to summon a jury, this is a case in which that power ought not to be exercised, especially as the case was not ripe for that purpose. As to the objection that no place or the venue is stated, we submit that the form of the information was sufficient. The Crown can lay an action in any county it thinks fit, 4 Inst., p. 172; Com. Dig., tit. "Prerogative" (D. 85).—[Sir John T. Coleridge: Cannot the information be amended?—The information, we submit, is in the correct and proper form. If the Court could summon a jury under the Act of 1777, the omission of the venue would then be of no consequence.

Mr. Wilde, Q.C., and Mr. Maude, for the Respondents.—The question is substantially narrowed to this point. Has the Court of Exchequer jurisdiction to try the case by an information for intrusion, in a question between the Crown and the public; and if so, whether it ought not to have the question of fact raised, tried by a jury? This proposition may be [38] divided into two branches: First. By the law of the Island no information in the form in question has ever been known. No relief was asked by the information, nor could the Court give any relief against the Defendants in respect of the matters charged therein; but we do not now rely upon that point. By the English law, which must by analogy be looked to in determining this question, informations are of two kinds, either *in rem* or *in personam*. An information for intrusion is stated in Manning's Exch. Prac., p. 196, to be "a proceeding which, although answering the purpose of a real action, is said to be in the nature of an action of trespass, *quare clausum fregit*." *Rex v. Ridsford* (Savile 35); *Wickworth v. Man* (Yelv. 114); *Porter's Case* (1 Co. Rep. 17); *Case of the Alton Woods* (1 Co. Rep. 27); 3 Bla. Comm., p. 117; Com. Dig., tit. "Action"



(N. 1); Bacon's Abr., tit. "Actions Local and Transitory" (A); Com. Dig., tit. "Prerogative" (D. 72). It is a Common Law proceeding. *The Att.-Gen. v. Lord Churchill* (8 Mee. and Wels. 171), was an information for intrusion, but the Exchequer Court held that the Crown had not the right, as of its prerogative, to lay the venue in any county, and that the venue must be laid where the lands lie. How, then, can the Appellant say, that the Court of Exchequer in the Isle of Man, which he contends is analogous to the Court of Exchequer in England, has the power to proceed by this information in the absence of any venue being stated? That argument goes too far, for it would give the Attorney-General in the Island, in virtue of the Crown's prerogative, as Lord of the Island, a power greater than the Court held, in *The Att.-Gen. v. Lord Churchill*, the Crown [39] itself possessed here. A count in an indictment containing no statement of venue is bad at Common Law. *The Queen v. O'Conner* (5 Q. Ben. Rep. 16), *Rex v. Holden* (2 Nev. and Man. 167). Then, secondly, even if an information for intrusion was the proper form, and the case was not triable before a Common Law Court of the Island, or a Trespass jury under the Island's Statute of 1753, we submit, that the precedents cited, where no jury was required, are far from being uniform or satisfactory. The title cases do not apply. 2 Eagle, "On the Law of Tithes," pp. 335-6, shows the mode of recovering tithes. The law of the Isle of Man, Statute 1736, sec. 10 (Mill's Stat. Laws of the Isle of Man, p. 242), shows that by the Common Law of the Island, trial is always by jury, and, therefore, the analogy applies to proceedings between the Crown and subjects, as by the English law, in cases of information for intrusion. *The Att.-Gen. v. Lord Churchill*, and *Regina v. Ryle* (9 Mee. and Wels. 227). *The Att.-Gen. v. The Corp. of the City of London* (14 Law. Journ. Ch. 305), is an instance of the form of an information in which the Attorney-General in England proceeds to enforce the Crown's rights.

Mr. Willes, in reply, Insisted that there was no analogy in the practice as to summoning juries, between the Court of Exchequer in England and the Exchequer Court in the Isle of Man.

Their Lordships' judgment was pronounced, as follows, by

The Right Hon. Sir John T. Coleridge (July 1, 1859).—This is an appeal from the Court of Exchequer, in the Isle of Man, against a judgment for the [40] Defendants on demurrer to an information filed against them by the Attorney-General of the Island. The objection was, on the one hand, so purely technical, and, on the other, so easily removable by amendment, that their Lordships could not fail to perceive that the case had come before them in order to procure a determination on some more important question involved in it. And, accordingly, although much learning has been displayed on both sides in regard to the technical objection, yet the real under-lying matter in dispute has been mainly the subject of argument before us.

The information states the seizure of Her Majesty in Her demesne as of fee in right of Her Crown of and in a close called "The Forest," part and parcel of the Isle of Man, and then charges, that the Defendants on the 22nd of July, 1856, in and upon Her possession of the said close, entered, intruded, and made ingress, committing trespasses there. Wherefore the Attorney-General prayed the consideration of the Court therein, and that due process of law might be awarded against them to appear in Court, and that they might be ordered to answer the premises and pay the costs.

The Defendants demurred, and assigned for causes, that no venue or place was alleged at which they were supposed to have committed any of the offences charged, and that no relief was sought against them with respect to these offences.

The Court below sustained the demurrers; here, however, on the argument, the latter ground was abandoned, and the want of venue alone insisted on.

The Court below has furnished us with a full statement of the reasons for its judgment; and these are, [41] that it appeared to them, on hearing the case, that the matters charged against the Defendants involved questions which were properly tryable by a jury; that therefore, it was necessary that the venue in the information should be so laid as to enable the Court to direct its process to the proper officer for summoning the proper jury; that the only venue laid in the information was "The

Forest," which conveyed no information to the Court, as the lands known of old by that name extended into every Sheading, and nearly, if not quite, every parish in the Island.

For the Appellant it was contended, first, that the Court of Exchequer had no power to summon a jury; secondly, that if it had such power, it would have been an improper exercise of their jurisdiction to summon one in this case; and thirdly, that at all events without the help of any venue they could have well summoned one, the course of procedure having been distinctly prescribed for them by an Act of the Tynwald.

It appears to their Lordships that upon the first of these grounds the Appellant entirely fails. We have been referred to the Report of the Commissioners, who were appointed in 1791, to inquire, among other things, into the constitution, jurisdiction, and procedure of the Courts of the Island; and we look upon this Report (indeed it was appealed to on both sides), as of great authority. Learned and able persons were members of that Commission. One, Sir William Grant, who will always be remembered as one of the most cautious, candid, and well-reasoning lawyers of his own, perhaps of any, age. In this Report, it is stated, page [42] 74, that the Court of Exchequer usually proceeded without a jury; but when the Governor (who is the presiding Judge) thought fit, he directed one to be summoned, and took their verdict: and this Court, it is stated, took cognizance of all disputes or offences relating to the Lords' (now the Crown's) revenue, rights, or prerogatives. These Commissioners printed, with their Report, a letter (App. to Rep. of 1792. (C.) No. 3), which they had received from Sir Wadsworth Busk, the then Attorney-General of the Island, making the same statement, as to the power of summoning a jury. They also printed the examination of Deemster Moore, which refers to an Act of the Tynwald, for the better regulation of the Court of Exchequer, passed in the year 1777, and states that since that year to the time at which he was speaking, no jury had been made use of in causes brought before the Court (App. to Rep. of 1792. (C.) No. 5). This last statement will deduct little from the weight of the Report and the evidence of the Attorney-General; unless upon reference to the Act in question that shall be found to have deprived the Court of its power. Where any Court lawfully possesses a jurisdiction for the benefit of the subject in the administration of justice, it is settled that mere non-user does not take it away. In the case of *The King v. The Steward of Havering Atte Bower* (5 Bar. and Ald. 691), a Manor Court for levying fines, and suffering recoveries, and trying actions, had, in fact, tried none for fifty years, and it was held that the power remained in full force; and though the words of the Charter were merely words of grant enabling the Court to act, that they were [43] imperative, and a Mandamus was issued to compel the opening of the Court. The Act of the Tynwald for the better regulation of the proceedings in the Court of Exchequer, is silent as to jury trials, but it enacts nothing inconsistent with the practice of summoning them continuing as before, and certainly contains nothing which can have the effect of abridging its jurisdiction in this respect. No one can doubt that the power in a Court to summon a jury for the trial of issues in fact is an eminently useful power, and one which cannot be taken away by so slight an implication. Further than this, two or three cases of suits for tithes were relied on by the Appellant, in which Orders made by the Court of Exchequer for trying by a jury the issues raised by the pleas were reversed by the Privy Council on appeal, and the causes remitted back to the Court in the Island for trial. We have the misfortune of not knowing what were the circumstances of those cases, or the ground of the decision: it may well be that, in respect of title suits, it may have been shown that the practice was settled for the Court itself to try them, without having recourse to a jury, and this may have been considered binding; but the cases certainly fall very short of establishing the general proposition for which the Appellant must contend. On a review of the authorities their Lordships think it clear that the Court of Exchequer has the power now claimed, of summoning juries.

But, secondly, it is said, that if the Court has the power, the exercise of it in the present case would have been improper, and that the determination to exercise it had been come to, in fact, before the [44] cause furnished any elements of decision



on the propriety of exercising it. Their Lordships would be slow to reverse the decision of any Court on such a point, on which its knowledge and means of judging must generally be greater than those which they themselves possess. But they are able to see many reasons in the present instance, why the Court might think it better to resort to a jury than decide for themselves on the disputed facts which they might expect to come before them. It is not suggested, nor do their Lordships see any grounds for apprehending, that the Lieutenant-Governor of the Island, who represents Her Majesty, and without whose consent the jury could not have been summoned, or that the other members of the Court, could have been influenced in their opinion by any indirect motive; and their Lordships feel bound to presume that they were actuated only by an honest desire to elicit the truth in the most perfect manner on questions of fact, which might be difficult and complicated. Nor do they see any reason to believe that they came to their conclusion without the means of possessing adequate knowledge. The information disclosed the nature of the case; and, without any further light from circumstances than they might judicially enjoy, they might well infer from that alone, that questions were likely to arise, many and various, with conflicting evidence derived from interested, or excited, witnesses, and that these might be more fitly left to the decision of a jury than reserved for their own. The very circumstance that such a decision would be, probably, better accepted, and have more weight than their own, in a matter in which the Crown was [45] directly interested, might not unreasonably have weight with them. On the whole, we see no grounds whatever for adopting the views of the Appellant on this second point.

The third point made by the Appellant depends on the construction to be put on the Tynwald Act, intituled, "An Act for the better regulation of proceedings by juries before a Court of Common Law" (Mill's Stat. Law of the Isle of Man, p. 365). Independently of this Act, we think we ought to give credit to the Court, which declares that for want of the venue it is unable to direct its process properly. Their Lordships think this Act has nothing to do with the Court of Exchequer. It is quite clear, when the two other Acts passed at the same time, and forming with it one entire scheme, are looked to, and, still more, when the Commissioners' Report is borne in mind, that the Court of Exchequer is not included under the term the "Courts of Common Law." All the earlier provisions of the Act are expressly limited to "actions and suits at Common Law, which require a trial by jury," and which are to "be tried and determined at the Common Law Court." It was admitted that this had no reference to suits in the Exchequer; but a later provision in this Act was relied on, which speaks of the trial of "all suits where a jury is by law necessary," and these words were said to extend the operation of the preceding clause to such a case as the present. It is obvious how inconsistent this would be with the preceding argument of the Appellant; but their Lordships think this a very forced construction. It seems to them that these words must be understood only with reference to those [46] which have gone before; and, that this is the true construction, is made abundantly clear by the proviso which follows as to a view or special jury, the motion for which must be made to the Court of Common Law expressly; showing that all the way through, the enactments correspond with the title, and refer only to the Common Law Court.

Their Lordships, therefore, are of opinion, that the Appellant fails on all three grounds. They cannot regret that their decision will confirm the Court of Exchequer in the possession of a power which is calculated in itself to be of material assistance to them in the satisfactory determination of many cases before them. Nor do they see any reason to apprehend evil consequences from their possessing the power while the exercise of it is under the control of those who cannot be presumed to be likely to abuse it to factious or indirect purposes. These considerations, however, do not influence the decision of the appeal.

Their Lordships will advise Her Majesty that this appeal ought to be dismissed; however, under the circumstances, without costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, m. *Security for Damages and Costs*; tit. COURT, D. INFERIOR COURTS, 1. *General Principle*; tit. ISLE OF MAN, 3. COURTS AND OFFICERS. S.C. 7 W.R. 713. See *Robertson*

v. *Dumaresq*, 1864, 2 Moo. P.C. (N.S.), 66; *A.-G. for Victoria (In re)*, 1866, 3 Moo. P.C. (N.S.), 527; *A.-G. for New South Wales v. Macpherson*, 1870, 7 Moo. P.C. (N.S.), 49.]

[47] ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR  
LOWER CANADA.

MARY M'CARTHY,—*Appellant*; MIRIAM JUDAH,—*Respondent* \*

[June 21, 1858].

An action was brought against the executrix of M. H. in the year 1854, upon the following document:—"On demand, I will pay at any time to Miss M. J., if she will marry my adopted son, A. T. H., £1500, currency. Three Rivers, 14th August, 1840. M. H." The declaration alleged that this promise was the ground which induced the Plaintiff (formerly M. J.) to marry M. H.'s son, A. T. H. The defence to the action was that this instrument was a forgery. Upon the evidence it appeared, that no claim had been made by the Plaintiff for principal or interest during the lifetime of M. H., nor was it shown how the instrument came into the Plaintiff's possession, nor did the Plaintiff in any way account for not enforcing the demand during the lifetime of M. H. It further appeared, that M. H. had, in two letters written about the date of the alleged note, promised to provide for the Plaintiff and any family she might have, and had, by a deed of donation *inter vivos*, provided for his son, A. T. H. and the Plaintiff and their family.

Held (reversing the judgment of the Court of Queen's Bench in Lower Canada): that, without deciding that the instrument was a forgery, sufficient appeared from the facts to lead to the conclusion that M. H. had provided for the Plaintiff by the deed of donation in satisfaction of the promise made to her, which inference, coupled with the fact of the Plaintiff not claiming, or bringing the action in M. H.'s lifetime, or accounting for the custody of the instrument, afforded strong proof of satisfaction by the deed of donation for any promise made by M. H.

Whether the evidence of cousins-german to a party in the cause is by the law of Lower Canada admissible?

The Courts in Canada examined witnesses, and compared the handwriting of the instrument sued upon, with the handwriting of two other documents put in evidence and admitted to be genuine. In such circumstances the Judicial Committee upon petition for that purpose, ordered the Court in Canada to transmit the originals for the purpose of inspection and comparison at the hearing of the appeal from the judgment of the Court in Lower Canada.

This was an action brought by the Respondent in the Superior Court at Three Rivers, in Lower Canada. [48] to recover a sum of £1500, from the Appellant, as the executrix of one Moses Hart, upon the following note:—"On demand, I will pay at any time to Miss Miriam Judah, if she will marry my adopted son, Alexander Thomas Hart, One thousand five hundred pounds currency. Three Rivers, 14th of August, 1840. M. Hart." This instrument was alleged by the Respondent to have been signed by Moses Hart, but was impeached by the Appellant as being a fabricated document.

The facts of the case were as follows:—

Moses Hart, the Appellant's Testator, who, as well as the Respondent, was of the Jewish persuasion, was a merchant residing in the town of Three Rivers, in Lower Canada. He had several children, legitimate and illegitimate; and, amongst

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.



the latter, was Alexander Thomas Hart. The Respondent, Miriam Judah, was a niece of Moses Hart. In 1840, she was living with her mother, unmarried, at New York, at which place Alexander Thomas Hart had also been staying. There had been a proposal for a marriage between the Respondent and Alexander Thomas Hart; and his father, Moses Hart, approved of the marriage, and was desirous that it should take place; and he expressed his approval by a letter written by him to the Respondent on the 15th of August, 1840, as follows: "Dear Marianne—Aleck will deliver you this letter; and if you marry him, it will not only please me, but you may rely that I shall take care of you, that you do not want, and shall assist you both; and if you have children, they shall share in my estate as my other grandchildren. Wishing your mother and family health and happiness, I am your affectionate uncle, M. Hart." And, two days afterwards, namely, on the 17th of August, 1840, he wrote to her the [49] following letter: "Dear Miriam—I received your two letters; Aleck took the first one, and said he would answer it. If you marry him, it would give me much pleasure, and I will always take care of you. Wishing your mother and family health and happiness, I am your affectionate uncle, M. Hart."

The marriage between Alexander Thomas Hart and the Respondent took place at New York, United States, in December, 1840; and after the marriage they went to live at Three Rivers, where his father employed him as his agent and manager in his business; and up to the time of a dispute between them, he appeared to have entertained great affection for him.

Moses Hart, on the 29th of January, 1847, made a formal donation *inter vivos*, of the Seigneurie of Cour Val to Alexander Thomas Hart for his life, with remainder to his children, in absolute property; or, in default of children, as to one-half, to the Respondent for her life, with remainder to his other children: and, on the 1st of April, 1847, he also made a Will, whereby he confirmed and enlarged the gift so made by him; and after making provisions for his other children, he left the residue of his property amongst them, giving a ninth share to Alexander Thomas Hart and the Appellant; appointing her executrix, and Aaron Thomas Hart, another of his sons, executor of his Will. On the 27th of July in the same year he executed a Codicil; revoking the appointment of Aaron Hart as his executor, and leaving the Appellant sole executrix; he also revoked the bequest to Alexander Thomas Hart of the share of the residue bequeathed to him by the Will, but in no other way interfered with the specific bequest to him and his children.

[50] Moses Hart died on the 15th of October, 1852; the Respondent's husband, Alexander Thomas Hart, having died in the month of April.

The Respondent on the 10th of February, 1854, brought the present action in the Court of the Three Rivers, both in her own right and as legatee for life, and, also, as guardian of Moses Alexander Hart, David Alexander Hart, and Lewis Alexander Hart, infants, the issue of the marriage with her late husband, against the Appellant, in her quality of sole testamentary executrix of Moses Hart, deceased: the declaration alleged, amongst other things, that Moses Hart, desiring that Alexander Thomas Hart, who was residing with him as his adopted son, should be married, signed and transmitted to the Respondent a written promise, which was annexed to the declaration, and was in these terms:—"On demand I will pay at any time to Miss Miriam Judah, if she will marry my adopted son, Alexander Thomas Hart, £1500 currency. Three Rivers, 14th of August, 1840. M. Hart"; that Alexander Thomas Hart and the Respondent were then too poor to intermarry without some assistance; that Moses Hart was rich, and had for some time desired to unite the Respondent in marriage with his adopted son, for both of whom he had manifested much affection; that in consequence of the above-mentioned promise, the Respondent consented to the marriage, which was celebrated in the City of New York, on the 2nd of December, 1840; immediately after which the Respondent and her husband returned to the town of Three Rivers to reside there permanently; and that without the above engagement the Respondent would not have married her late husband.

[51] The Appellant, by her answer, denied in general terms, the allegations in the declaration, stating that Moses Hart did not sign or consent to the note sued upon, and that the Appellant, in the capacity of executrix, was not liable to the Respondent as alleged in the declaration. To this the Respondent replied, assert-

ing the truth of her declaration, and that the note was the handwriting of Moses Hart.

Evidence was entered into on both sides. The evidence was of a conflicting character. Twelve witnesses were examined on behalf of the Respondent; by their testimony it appeared, that Alexander Thomas Hart was employed by his father as an agent in his business, and was much confided in and beloved by him: that, at the date of the note in question, Moses Hart was reputed to be worth £10,000, and had written the two notes before mentioned, dated the 15th and 17th of August, 1840 (*ante* [12 Moo. P.C.], pp. 48-9), urging the Respondent to enter into the marriage with her late husband. The witnesses also spoke, with more or less strength, to their opinion, that the body and signature of the disputed instrument was in Moses Hart's handwriting; but no direct evidence was given of the fact of writing or signature, or of the circumstances under which the document was written and signed, or how it came into the Respondent's possession; nor was any evidence given of the reason why payment had not been made during Moses Hart's lifetime. The Respondent also exhibited interrogatories to the Appellant; from the answers to which it appeared, that some time before the death of Moses Hart there had been a quarrel between him and his son, Alexander, the result of which was, that the latter was put out of his father's house; [52] but neither then nor at any time before the latter part of the year 1853 had she heard the slightest allusion to the existence of such an instrument. The Appellant examined five witnesses, who spoke to their belief that the body and signature of the disputed instrument were not in Moses Hart's handwriting, and gave the reasons upon which their opinions were based.

After the Appellant's case was closed, the Respondent moved that her *enquête* might be reopened; and an affidavit was made by her upon the 30th of October, 1854, to the effect that she had discovered, since the 25th of that month, that she was able to prove, first, by the evidence of Thomas S. Judah, Henry Judah, Aaron David, and many other persons, that towards the end of August, or in the month of September, 1840, or about that time, Moses Hart had told them that he had sent to the Respondent a writing containing a promise to pay her £1500, if she would marry his son; and, secondly, that she could produce witnesses who could contradict the Appellant's evidence. The Appellant objected to further evidence being entered into; but, on the 7th of November, the Court (Mr. Justice Mondelet dissenting) allowed the Respondent's *enquête* to be opened, for the purpose of admitting the first head of evidence, but rejected the rest of the motion. Under this permission, the Respondent examined Thomas S. Judah and Henry Judah, two of the witnesses named by her. Thomas S. Judah, being examined on the *voir dire*, deposed that he was not related to the Respondent, but that the late Moses Hart married the sister of the witness's father. The Appellant objected to the reception of his evidence, on the ground that the witness was within the prohibited degree of relationship to Moses Hart, of [53] whose succession the Appellant was the representative; and insisted, that by the law of Lower Canada, the testimony of a person related to the parties in the cause within the degree of first cousin, could not be admitted. The Judge (Vanfelson) overruled the objection, as it did not go to any relationship between the witness and the Appellant, but only to her interest in the succession of the deceased, Moses Hart. The witness then deposed that he had been the legal adviser of Moses Hart for many years, and that he had frequently had conversations with Moses Hart of a confidential nature respecting his private affairs; and that the deceased had told him that he, deceased, had written to the Respondent that if she would marry Alexander Thomas Hart he would give her £1500; and that he would do more, and would provide for any children she might have; the witness also deposed to the note being in the deceased's handwriting. Henry Judah was also examined on the *voir dire* before Mr. Justice Smith; he stated that he was not related to the Respondent, but that he was related in the same manner as the last witness to the deceased, Moses Hart; the same objection was then taken on the part of the Appellant, and reserved by the Judge. The witness deposed to conversations with Moses Hart, in which he expressed his intention to confer advantages on the Respondent if she married his son Alexander Thomas Hart; that the deceased was greatly pleased with the marriage; and that the witness well knew the writing and signature of the deceased, and had no doubt the note was written and signed by him.



On the 6th of June, 1855, the Superior Court, Mr. Justice Day dissenting, pronounced judgment, reject-[54]-ing the evidence of Thomas S. Judah and Henry Judah, on the ground, that the witnesses were related to the Respondent within the degree prohibited by law, and the Court held upon the merits of the contestation raised between the parties, that considering it was not proved and established to the satisfaction of the Court, by evidence produced in the cause, that the paper writing whereon the Plaintiff's action was founded was of the proper handwriting of the late Moses Hart, but that on the contrary thereof, it appeared to the Court that the paper writing was forged and counterfeit, and the Court dismissed the action with costs.

The Respondent appealed to the Court of Queen's Bench for Lower Canada, on the ground that the declaration had been fully proved; that the evidence of Thomas S. Judah and Henry Judah had been improperly rejected, there being no alliance or relationship between them and the Respondent; that the Appellant had not contradicted or destroyed the Respondent's proof; and, that the judgment was irregular and contrary to law and justice.

The Court of Queen's Bench, on the 1st of October, 1856, consisting of the Chief Justice Sir L. H. Lafontaine, and the Puisne Judges, Aylwin, Duval, and Carow (Mr. Justice Aylwin dissenting), reversed the judgment of the Superior Court; the majority of the Judges being of opinion, that the evidence of Thomas S. Judah and Henry Judah had been rejected on the principle that they were allied to the Respondent within the prohibited degree, though, in point of fact, they were not allied to her; and that the view taken by the Superior Court of the evidence was not justified on a due appreciation of it; but that, [55] on the contrary, it resulted from the evidence, that the document in question was genuine, and had been truly written and signed by Moses Hart; and the Court accordingly condemned the Appellant to pay to the Respondent the sum of £1500, with interest from the 10th of February, 1845, the day of the commencement of the action, and costs.

The Appellant appealed from this judgment to Her Majesty in Council.

After the petition of appeal was lodged, the Appellant moved (22nd Feb. 1858 \*), on petition, for an order on the Court of Queen's Bench in Lower Canada for transmission of documents. The petition set forth that the witnesses of the Appellant, in the Court below, deposed that the instrument of the 14th of August, 1840, was not, in their opinion, in the handwriting of Moses Hart; and that divers of the letters in the same had been retouched, and that the same was not a genuine handwriting, but in a forced imitation of the handwriting of Moses Hart to the two letters written by him on the 15th and 17th of August, 1840; that the instrument of the 14th of August, 1840, and also those two letters, filed in the Superior Court, had since been transmitted to the Court of Queen's Bench, in Lower Canada; and that the Appellant had been advised that the pending appeal could not be satisfactorily heard unless the note sued on and letters were laid before their Lordships for examination and comparison, and the petition prayed that the instrument of the 14th of August, 1840, and also the two letters of the 15th and 17th of the same month, might be trans-[56]-mitted to England. This petition was supported by an affidavit of the Appellant's agent in England to the effect that the appeal could not be satisfactorily tried, or full justice done to the case of the Appellant unless the documents were submitted to the inspection of their Lordships.

Mr. W. Field, in support of the petition.

Their Lordships granted the application (see *Mason v. The Att.-Gen. of Jamaica*, 4 Moore's P.C. Cases, 228, as to the power of the Judicial Committee to order certified copies of documents, not part of the transcript, to be transmitted to the Privy Council).

It was, therefore, ordered that the note sued on, and the two letters, all purporting to be signed by Moses Hart, should be transmitted by the Court of Queen's Bench for Lower Canada, in original, to the Registrar of the Privy Council, to be laid before their Lordships on the hearing of the appeal, and that duly-authenti-

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\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Cresswell Cresswell.

cated copies of the documents be filed in the Registry of the Court of Queen's Bench whilst the original documents were transmitted to England.

The original documents having been transmitted, the appeal now came on for hearing (21st June, 1858).

Mr. R. Palmer, Q.C., and Mr. W. Field, for the Appellant.—First, as to the admissibility of the evidence of the witnesses, Thomas S. Judah and Henry Judah, who were examined by the Respondent. Their evidence, we submit, was inadmissible by the law in force in Lower Canada, as they were nephews to Moses Hart, and cousins-german to his children, who, being légataires under Hart's Will, are parties interested in [57] the suit. The *Ordonnance* of 1667, Tit. 22, Art. 3, which governs this point, declares that "*les parens et alliés des parties jusqu'aux enfans de cousins issus de germain inclusivement, ne peuvent être témoins en matière civile, pour déposer en leur faveur ou contre eux mais seront leurs dépositions rejetées.*" They also referred to Guyot's *Rép., voc. "Témoignage,"* Tome 17, p. 66; Merlin's *Rép., de Jur.,* Tit. "*Témoïn Judiciaire,*" Tome 17, s. I., Art. III., secs. vii. and viii.; and Pothier, "*Traité des Obligations,*" No. 795, referred to in *ib.* Secondly. Upon the face of this instrument, it bears every appearance of being fabricated. Witnesses depose that it is not in Moses Hart's handwriting. It is apparently written upon a scrap of paper, torn off from a letter, or some other document; many of the letters in it appear to be painted, and others in a forced imitation of the writing of Moses Hart in the two letters of the 15th and 17th of August, 1840, which have been all along in the possession of the Appellant, or of her deceased husband.—[The Lord Justice Knight Bruce.—Would it not be proper to examine here a person competent to give evidence upon this point?] (See *Cooper v. Bockett*, 4 Moore's P.C. Cases, 433, where the Judicial Committee examined an expert, accustomed to examine and compare writings.)—We do not propose to do so. The letters are admitted to be in the handwriting of Moses Hart. Again, it is an important fact, that notwithstanding those letters were written within a very short time after the date of this alleged promise, no allusion to this document is made in either of those letters, or in the Will or Codicil of Moses Hart. No trace of such a document was to be found until it was produced in this action. All these are suspicious facts. Neither [58] has it been shown how it came into the Respondent's possession. It seems strange that if the instrument was genuine, the Respondent did not, on the marriage taking effect, enforce payment of such a large sum at once. Lastly. The promises made in the letters of the 15th and 17th of August to provide for the Appellant, and the children of the marriage, were fulfilled by the provision made by the deed of gift *inter vivos*. So that even assuming that the instrument sued upon was genuine, there is a presumed revocation of the promise from the execution of such deed of donation, and such instrument cannot, by the law of Lower Canada, confer a right of action on the Appellant. The object of that instrument must be considered as specifying the extent of Moses Hart's liberality, which is indefinable from the two letters. But, if such instrument be taken in connection with these letters, the intention of Moses Hart must be considered to have been to make a donation *en faveur de mariage* of the Appellant. By the law of Lower Canada, marriage settlements may be made, giving the wife all the powers of a *femme covert*. In the absence of such settlement, the *régime en communauté* arises, and the husband is invested with the sole management. Now, the intention of Moses Hart, to be collected from this alleged note, was to make the Appellant a gift or donation, or to settle on her, £1500. It may be, that the marriage, not being preceded by a settlement, frustrated his intention. It must, therefore, be deemed that the deed of *donation entre vis* repaired the want of a settlement. By the law of Lower Canada there must be express acceptance by the donee, without which the donation is not perfect. Grenier, "*Traité des Donations,*" No. 56, Tome 1, [59] pp. 362-3-4, *ib.* No. 58, p. 376 (4th Edit. Paris). Here the Appellant fails in the essential particulars of acceptance and delivery. Again, when and by whom was this instrument delivered to her? How and when did she notify to Moses Hart her acceptance, so as to bind him to specific performance and prevent revocation? No such demand was made, and the Appellant and her children now enjoy the property under the donation *inter vivos*, of Moses Hart.

Mr. Manisty, Q.C., and Mr. Ayrton, for the Respondent.—The evidence of  
P.C. III. 833 27



Thomas S. Judah and Henry Judah was admissible. They were not within that prohibited degree of relationship to the Appellant or Respondent, which the law of Lower Canada rejects. The majority of the Court below, consisting of the Chief Justice Lafontaine, and two other Judges, were of opinion, that they were not disqualified from giving evidence in the cause. Upon the evidence it was satisfactorily proved that the instrument upon which the action was founded was in the handwriting of Moses Hart. As to the appearance of the note, which has been so strongly observed upon by the Appellant's Counsel, the paper on which it is written is apparently torn off from a larger sheet of paper, probably from the paper on which Moses Hart wrote to his niece in August, 1840, and at the time gave it to his son to make use of in advancing his suit with her. A satisfactory answer may be given to the question now urged by the Appellant, why no demand was made for payment of the amount promised in the instrument. The Respondent, her husband and family, were living with and maintained by Moses [60] Hart. If any attempt had been made to enforce the Respondent's rights under this note in Moses Hart's lifetime, it would have caused a rupture in the family, and materially interfered with any disposition he might by Will make in favour of herself and family as he had promised to do. The benefit received by the Respondent and her family, under the deed of donation *inter vivos*, was never intended as a satisfaction for the sum promised by this instrument. No mention is made in the deed of donation to that effect.

The case stood over for consideration.

Judgment was now delivered by

The Right Hon. T. Pemberton Leigh (2nd July, 1858).—The Appellant is the executrix of Moses Hart. The Respondent is the widow and executrix of Alexander Thomas Hart, an illegitimate son of Moses Hart, of whom the Respondent was a niece.

The appeal is against a judgment of the Court of Queen's Bench for Lower Canada, on the appeal side, in an action brought by the Respondent against the Appellant, by which payment of a sum of £1500, currency, with interest and costs, is ordered to be made by the Appellant, in her representative character, to the Respondent.

The facts appear to be these:—

In August, 1840, Alexander Thomas Hart had made proposals of marriage to the Respondent; and his father, Moses Hart, was very anxious that his proposals should be accepted. Alexander appears to have been a favourite with his father, to have been brought up in his house, and to have been a clerk in his mercantile office at Three Rivers.

[61] In the middle of August, 1840, Alexander went to New York (where the Respondent, then Miriam Judah, resided), for the purpose, apparently, of urging his suit; and on this occasion, Moses Hart wrote and sent by Alexander to his niece, the Respondent, letters in the following terms:—(His Lordship here read the letters of the 15th and 17th of August, both of which are set forth in the previous statement of the case, *ante*, pp. 48-9.)

Both these letters show the desire of Moses Hart that the marriage should take place, and hold out an assurance to the lady, that both she and any children she might have, should be the objects of the affection and care of the writer; but except as to placing the children on an equal footing with his other grandchildren by his Will, the writer says nothing specific as to the extent or mode in which he would exercise his bounty.

The marriage took place in the month of December, 1840; whether any reference was then made to these letters, or any other engagements on the part of Moses Hart, does not appear. Upon the marriage the new married couple left New York, where the ceremony took place, and the wife accompanied her husband to Canada, and they took up their residence at Three Rivers (and, as it seems, in Moses Hart's house), where Alexander continued for some years to live on the most affectionate terms with his father, and to act as his confidential Clerk in the management of his business.

Whether, before the execution of the deed to which we are about to refer, any, or if any what, provision was made by Moses Hart for his son and his wife, in con-

formity with the letters which he had [62] written, does not appear; but on the 29th of January, 1847, there being then two children born of the marriage, Moses Hart made a formal donation *inter vivos*, of the Seigneurie of Cour Val, a property, as it seems, comprising about six square leagues, to Alexander for life, with remainder to his children in fee (to use the terms of English law), and, in default of children, as to one-half, to the Respondent, for her life, with remainder to Moses Hart's other children.

This deed contained no provision for the benefit of the Respondent as distinct from the benefits to her husband and children, except the limitation to which we have referred.

On the 1st of April, 1847, Moses Hart made his Will, and thereby ratified the gift made on the 29th of January preceding, and as to one-ninth of the general residue of his estate gave it to Alexander and the Appellant in moieties.

At some period (the date is not distinctly stated) a violent quarrel took place between Moses Hart and Alexander, in consequence of which, as is alleged by the Appellant in her examination, "the Testator put Alexander out of his house, and kept him out until he died."

On the 27th of July, 1847, Moses Hart made a Codicil to his Will, and thereby revoked the bequest of the share of residue made to Alexander.

In the month of April, 1852, Alexander died, having appointed the Respondent his executrix, and she was duly appointed by the proper Court guardian of her children.

On the 15th of October, 1852, Moses Hart died.

In the autumn of 1853, it was alleged by the Respondent, for the first time, as far as it appears, that [63] she was in possession of a promise, written and signed by Moses Hart, by which he engaged to pay her £1500, currency, if she would marry his son, Alexander, and on the 10th of February, 1854, she brought an action claiming that sum from the Appellant as the representative of Moses Hart.

The plaint describes the Respondent, as Miriam Judah, the wife of Alexander Thomas Hart, and she sues as well in her proper and private name "*comme commune en biens avec son dit feu mari*," as in her character of usufructuary legatee under his Will, and as guardian of her infant children; three sons, who are named.

This may be not wholly unimportant, as it seems to show that the husband and children were supposed to have some interest in the property the subject of the suit.

The plaint alleged, that on the 14th of May, 1840, (a mistake in the date which was afterwards corrected), Moses Hart wrote and signed a paper "*sous seing privé*," containing this promise. It may be material to read this passage of the plaint:— "*Que le quatorzième jour de Mai, mil huit cent quarante, le dit Moses Hart désirant marier son fils adoptif, le dit Alexander Thomas Hart, alors demeurant avec lui, fit un engagement ou promesse par écrit sous seing privé, en langue Anglaise, qu'il signa de sa propre main et écriture sous le nom de 'M. Hart,' par lequel il promit et s'obligea de payer en aucun temps, à la demanderesse en cette cause, sous le nom et qualification de 'Miss Miriam Judah,' la somme de quinze cents livres courant, si elle, la dite demanderesse, épousait le dit Alexander Thomas Hart, et transmit alors à la dite demanderesse le dit engagement ou promesse fait et signé [64] comme susdit, comme le tout paraît au dit engagement ou promesse sous seing privé que la dite demanderesse produit et dont copie est ci-annexée.*"

No account is given of the mode in which this paper came into the possession of the Respondent, beyond what may be found in the words of the plaint, that Moses Hart "*transmit alors à la dite demanderesse le dit engagement.*" The plaint then alleged, that upon the faith of this engagement the Respondent consented to marry, and did marry, Alexander, and that without such engagement she would not have married him. No notice is taken in the plaint of the letters already mentioned.

To this plaint a plea was put in by the Appellant, denying that any such promise had ever been made by Moses Hart, and insisting that the paper was a forgery, and denying generally the facts stated in the plaint, and the liability of the Appellant.

In support of her case, the Respondent produced the paper on which she relied, and examined twelve respectable persons acquainted with the handwriting of Moses Hart, who all declared their opinion to be, that the body of the instrument and the signature were written by him. The paper itself was in these words:—(His Lordship



here read the instrument, *ante*, p. 50.) This was the whole of the evidence on which, in the first instance, the Respondent relied.

The Appellant examined five witnesses, all well acquainted with the handwriting of Moses Hart, who stated, with more or less confidence, their belief that the paper was not in his handwriting.

After the evidence had been closed, an application was made by the Respondent for liberty to examine additional witnesses, and liberty was given to her on [65] the 7th of November, 1854, to prove by witnesses that, towards the end of August, or in the month of September, 1840, or about that time, Moses Hart had told them that he had sent to the Respondent a writing containing a promise to pay her £1500, if she would marry his son.

Under this permission the Respondent examined two witnesses of the name of Judah, to whose evidence we shall have occasion to refer.

On the 6th of June, 1855, the cause came before the Court, which rejected the evidence of the Judahs, on the ground of relationship, and held upon the merits, that it was not proved and established to the satisfaction of the Court, by evidence produced in the cause, that the paper-writing whereon the Plaintiff's action was founded was of the proper handwriting of the late Moses Hart, but that, on the contrary, it appeared to the Court that the paper-writing was forged and counterfeited, and the Court dismissed the action with costs.

From this judgment, both as to the rejection of the evidence and on the merits, one Judge dissented.

On the 1st of October, 1856, this judgment was reversed on appeal, by the Court of Queen's Bench in Lower Canada, the majority of the Judges being of opinion, that the evidence of the Judahs was admissible, and that the instrument in question was proved to have been written and signed by Moses Hart, and the Court pronounced a judgment in favour of the Appellant for the sum demanded, with interest from the 10th of February, 1854, the date of the institution of the action, and with costs.

From this judgment one Judge (Mr. Justice Aylwin) dissented.

[66] The Courts below seem to have considered that the sole point on which the question depended was this: whether the alleged note was in the handwriting of Moses Hart, or was a forgery. But their Lordships do not concur in that view, and it is material, therefore, to inquire what facts it was incumbent on the Respondent to prove in order to establish her claim under the circumstances in which it was brought forward.

It must be admitted that those circumstances were such as to throw very great suspicion upon it. The document in question was alleged by the Respondent to have formed the ground upon which she had consented to marry Moses Hart's son, and without which she would not have married him.

Immediately on the marriage, therefore, she became entitled to demand and to receive this sum, the interest of which would have formed some provision for herself and her husband. Yet no payment of principal or interest is alleged ever to have been made or asked for, nor does the note appear ever to have been alluded to in the lifetime of Moses Hart.

It is suggested that no demand was made for many years, because Moses Hart, in truth, was maintaining his son and the Respondent; and that if they had insisted on the note it might have diminished or prevented his bounty towards them, and might have occasioned a rupture between them and Moses Hart. But, at some time before the death of Alexander, and, as it seems probable, in 1847, such rupture did actually take place; Moses Hart turned his son out of his house, and never received him back into it. Why was no claim brought forward at this time? Again, in April, 1852, Alexander died, and the Re-[67]-spondent became his representative. What reason could prevent the claim from being then asserted? There was, indeed, this circumstance to prevent it—that Moses Hart was then alive: that he knew perfectly well whether he had ever made such a note, and, if he had, whether it had been handed over to the Respondent, and had formed the consideration for the marriage; and, if so, whether it had been satisfied by the substitution for it of the donation of the Seigneurie of Cour Val.

In October, 1852, Moses Hart died, and it is not till the latter end of the year

1853, thirteen years after the promise is supposed to have been made, that anything is heard of it.

Again, this note is said to have been made on the 14th of August, 1840.

On the 15th of that month and year, Moses Hart writes a letter to his niece, the Respondent, strongly urging the marriage, and holding out inducements to it, yet not saying one word of that which the Respondent alleges to have been the engagement which induced her to contract the marriage. On the 17th, he writes again, substantially in the same terms, and for the same purpose, and is equally silent about this note.

Now, how did this note come into the possession of the Respondent? When, and by whom, and for what purpose, was it delivered to her? In whose custody was it up to the death of Alexander? This is a matter within her own knowledge; she has delayed her claim till the only two other persons likely to know anything about the matter, Moses Hart and Alexander Thomas Hart, are dead, and she gives no explanation at all about this most important point.

It is said that the evidence of parties themselves, [68] their relatives, and domestics is inadmissible by the French Law, and that, therefore, she could not prove any statement she might make. It is by no means clear that she could give no other proof of the facts; but, at all events, she knew, and could have stated, and was bound to state, how it was that she got possession of this instrument, if it was genuine. If her story was true, it could not be inconsistent with the facts proved in the suit, and the Court would have been able to judge whether the circumstances were such as to render direct testimony impossible; or, at all events, to dispense with its necessity. But, instead of any positive statement of the actual circumstances, we have had different theories suggested by her Counsel at the bar, none of which appear to us to account for, or remove, the difficulties of the Respondent's case.

When the instrument itself is examined, it is of a most singular appearance. It has apparently formed part of some larger paper, from which it has been torn away; and it was suggested by the leading Counsel for the Respondent, that it probably had formed part of a letter which Moses Hart had originally written to his niece, and that he tore off this portion of it and gave it to his son to take with him to New York, and make use of, if he found it necessary, in the prosecution of his suit.

But this is a purely gratuitous assumption; and if it were true, there is no evidence that the paper ever was made use of; and, still less, that Moses Hart ever was informed that it was made use of.

Again, Moses Hart had promised to make some provision for his son, Alexander, his wife, and children. Was this gift intended to be for the sole and separate use of the wife? If so, it should have been secured to her by some deed. If it was intended to be the subject of settlement on her, and her husband and children, then the question arises, whether the Seigneurie of Cour Val was intended to be given in addition to the £1500, or in lieu of it. If the £1500 was not the subject of settlement before the marriage, the husband would have been entitled to receive it, whether the rights of the parties were governed by the English or by the French law: "*jure mariti*," if the English law prevailed; as administrator of the "*biens en communauté*," if the French law prevailed. The husband, therefore, might have accepted the Seigneurie of Cour Val in lieu of the £1500, promised (if it was promised) by the note. Were the husband and children to have both the Seigneurie of Cour Val and the £1500? All these matters would have been cleared up, if the demand had been made in proper time, but there seem strong objections to permitting a Plaintiff to suppress a claim for thirteen years, and to take benefits which the person against whom it is made may have conferred, in the belief that no such claim existed; and, after his death, when all possibility of explanation by him is removed, to bring forward, for the first time, the demand.

All these considerations appear to throw upon the Respondent the *onus* of giving proof which, in ordinary cases, it might not be incumbent on her to produce. In ordinary cases, the possession of the document, assuming it to be genuine, might be sufficient proof that it was given to her by the person who made the promise, and that it came by lawful means into her hands.

But here the improbability of Moses Hart ever [70] having given to her this docu-



ment, or of its ever having come by lawful means into her hands for the purpose of being enforced, is so great, that their Lordships think that much more is required from her, and that she has not discharged herself of the *onus* thrown upon her. If this paper was amongst Moses Hart's papers, Alexander Thomas Hart, before his quarrel with him, had ample opportunity of possessing himself of it. If it was given to Alexander Thomas Hart by Moses Hart for any purpose (explained possibly by that portion of the document which has been removed), it may have been in his possession at his death, and have thus come into the hands of his executrix, the Respondent. In the absence of all evidence or explanation of any of these matters, there appears to their Lordships to be a strong presumption either that this instrument never constituted a valid claim against Moses Hart, or that, if it did, the claim under it was satisfied in his lifetime.

These observations proceed on the assumption that the handwriting of Moses Hart to the document is satisfactorily established. But their Lordships cannot say that this is by any means the case; no evidence is so unsatisfactory as testimony for or against the genuineness of handwriting. Probably, if it were necessary to decide positively one way or the other on the fact of the handwriting, without reference to the surrounding circumstances, the evidence in favour of it might be considered to preponderate. But the Respondent is the Plaintiff, and has to prove her case affirmatively, and their Lordships are very clearly of opinion, that mere evidence of handwriting in this case is quite insufficient to establish the validity of the Respondent's claim against all the circumstances of pro-[71]-bability to which they have adverted. They cannot but entertain the belief that the claim of the Respondent is fraudulent, whether the instrument by which she attempts to support it be, or be not, in the handwriting of Moses Hart.

They do not think it material to consider whether the evidence of the Judahs ought to have been received. If such testimony be received, it will not at all alter their opinion. The evidence of both of these gentlemen consists of a deposition as to conversations which took place about fourteen years before; and supposing their depositions to be accurate, they would not remove the grounds on which their Lordships have come to the conclusion that the Respondent has failed in the proof of her case.

They must advise Her Majesty to reverse the judgment complained of, and to vary the original judgment by leaving out the words, "but, that on the contrary thereof it appears to this Court that the said paper writing is forged and counterfeited," a declaration not necessary to support the judgment, and with that variation to affirm such judgment. We think that the Appellant must have the costs of this appeal, but that there should be no costs of the appeal from the first Court to the Court of appeal in Lower Canada.

The original documents transmitted to England in pursuance of the Order of their Lordships (see *ante* [12 Moo. P.C.], p. 56) will be returned to the officer of the Court below.

## [72] ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

LANG, FREELAND and COMPANY,—*Appellants*; REID, IRVING and COMPANY,—*Respondents* \* [June 14, 15, and 16, 1858].

The law in force in Mauritius is the French law, as settled by the *Code Civilé* [12 Moo. P.C. 88].

By that law a judgment obtained in the Island against a debtor, and duly registered in the Island, constitutes a specific charge on the debtor's real estate in the Island, with priority according to its date [12 Moo. P.C. 88].

L., F. and Co., Merchants at Trieste, in the Austrian dominions, had extensive

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, and the Right Hon. The Lord Justice Turner.

mercantile dealings with R., I. and Co., Merchants in London, and in the result, R., I. and Co. were found largely indebted to L., F. and Co. R., I. and Co. became embarrassed, and stopped payment. No commission of bankruptcy issued against them, and they were permitted to wind up their affairs under a deed of inspection, which provided for a distribution of their estate in the same manner as if a commission of Bankruptcy had issued, and adjudication had been made thereon. R., I. and Co. had real estate in the Island of Mauritius, and, before the deed of inspection was executed, they had sent C. as their agent to Mauritius, with a power of attorney, authorizing him to look after their property, and "to demand and sue for debts" due to them in the Island. A similar power was afterwards given to B., as substitute of C. L., F. and Co. brought a suit in the Court of First Instance in the Island of Mauritius to recover the balance on the account between them and R., I. and Co. Neither L., F. and Co. nor R., I. and Co., or any member of either firm, was resident, or domiciled, in the Island. Process was served on B., as agent for R., I. and Co., and he appeared and protested against the jurisdiction of the Court, as he had no authority from R., I. and Co., under the power of attorney, to defend any suit.

Held: that, as R., I. and Co. were not domiciled in Mauritius, the Court had no jurisdiction, as the power of attorney was restricted to suing for debts of R., I. and Co., and conferred no power upon B. to accept service of process, or to elect the acceptance of a domicile for R., I. and Co. in the Island, as provided for by the French law prevailing in Mauritius [12 Moo. P.C. 98].

*Semble.* The rule of the French law, in order to give jurisdiction to a Court of Justice over a Defendant in a civil action, is, that the suit must follow the person of the debtor, and that the action must be brought against him in his *domicile réel*. This rule is, however, subject to the qualification, that a person may elect a special domicile for the purpose of his trade, or for other purposes, and that such elected or conventional domicile is for those purposes equivalent to his *domicile réel*. But, inasmuch as the election of such domicile draws after it most grave and extensive liabilities, it is settled, not only that the appointment of an agent in a Colony with the largest powers, by a domiciled Frenchman, does not amount to an election of domicile in the place where such power is to be executed, but that no agent, with powers however extensive, can make such election on the part of his principal, unless his power contains express authority to do so [12 Moo. P.C. 97].

Lang, Freeland and Co., the Appellants, were Merchants carrying on business at Trieste, in the Austrian dominions. The Respondents, Reid, Irving [73] and Co., were Merchants carrying on business in the City of London. In the month of September, 1847, the Respondents stopped payment, and arrangements were made to wind up their affairs without Bankruptcy; and, with the consent of the creditors, the Respondents from that time carried on business under a deed of inspection, solely for the purpose of liquidation and distribution of the partnership estate among the creditors. For some time before the Respondents stopped payment, extensive mercantile transactions had taken place between the Appellants' firm at Trieste, and the Respondents' firm in London, and the result of these transactions, as alleged by the Appellants, was a balance of £21,227 19s. 3d. due to them by the Respondents' firm.

In February, 1845, a person named Currie was sent to Mauritius by the Respondents to look after their affairs, with a power of attorney from them, dated the 19th of February, 1845, to manage their estates there. This power of attorney authorized and empowered Currie to "demand, sue for, recover, and receive of and from all and every persons and person whomsoever, body and bodies politic or corporate, residing or who shall reside in the Island of Mauritius, who is, or are, [74] or may, or shall be, liable to pay or deliver the same, all and every debt and debts, rents, sum and sums of money, principal money and interest, goods, chattels, wares, merchandise, and effects, of what nature or kind soever, which now is, or are, or hereafter shall or may be due, owing, payable, or belonging to us the said con-



stituents jointly, or to our said firm, or to either of us separately, or which may be consigned to the said Island of Mauritius to or for our account."

On the 17th of August, 1847, the Respondents executed a similar power of attorney to one Comrie, whom they send out as a special agent to Mauritius. This latter power stipulated that the previous power of attorney given to Currie should not be revoked, and authorized him to appoint one or more substitutes in his stead. In the year 1848, Comrie left Mauritius, having delegated his powers to Currie, and, in case of his inability to act, to Herbert Irving Bell.

In 1848, Currie became bankrupt from the failure of the house of H. Adam and Co., in the Island of Mauritius, in which he was a partner. In consequence of this bankruptcy, Bell, named in the act of substitution, acted for some time as the agent of the Respondents in the Island.

On the 11th of January, 1849, the Appellants, who had not signed the deed of inspection, and were represented in the Island by Messrs. Scott and Co., took out a plaint against the Respondents in the late Court of First Instance in the Island (since abolished, by Order in Council of the 23rd October, 1851), for the recovery of the sum of £21,227 19s. 3d. claimed by them as due upon the balance of an account current rendered by [75] the Respondents under date the 8th of February, 1848.

This action was commenced against the Respondents as represented by Bell.

Neither the Appellants or Respondents, nor any member of either firm, were domiciled or residing in Mauritius, but the Respondents' firm possessed large sugar plantations in that Island.

An appearance was put in to the plaint by Bell on behalf of the Respondents, and it was objected orally that they were not represented generally in the Island by Bell, only for special purposes, and not to defend or plead in that action. By the General rules and orders of the Court of the 6th of July, 1847, framed by the Judges of the Court of appeal of Mauritius, and which by the General Rules of the 13th of October, 1847, were extended to all commercial actions, it is provided that in all commercial causes the defence shall be made orally.

No decision was given upon the above objection made on behalf of Bell, but in accordance with that objection no person appeared subsequently in the action either on behalf of Bell, or of the Respondents.

On the 6th of March, 1849, the cause was called on for trial: the Respondents did not appear either in person or by any one as their representative. Judgment was consequently demanded for the Appellants, and was given by way of default, in their favour, for £21,227 19s. 3d., together with interest and costs.

On the same day, in pursuance of the judgment of the Court of First Instance, an inscription was taken by the Appellants against the whole of the immoveable goods of the Respondents in the Island, and registered [76] in the Mortgage office of the Island. Many other inscriptions were taken out on, and subsequent to, the 6th of March, 1849, by creditors of the Respondents who had obtained judgments in their favour in the Court of First Instance, which were also registered in the Mortgage office of the Island.

The Respondents were, from time to time, informed by Currie of the judgments and attachments as they were obtained. Judgments had also been obtained against the Respondents by other creditors in the Court of First Instance; and two appeals were brought to the Supreme Court to try the question of jurisdiction. No proceedings were taken, either by the Appellants for payment of their debt, or by the Respondents or their representative by way of appeal against this judgment, until the 6th of December, 1855, when the Appellants, having on the 27th of November, 1855, been subrogated in the prosecution of the seizures of the estates in the Island belonging to the Respondents, sent notices to the agents of the Respondents, calling on them for an account of the revenue and expenditure of certain specified estates, and of their management of the whole of the affairs of their principals, the Respondents.

The power of attorney given on the part of the Appellants to Stein, of the firm of Messrs. Scott and Co., had been taken away from him, and a fresh one made out in favour of one Hewetson, who immediately on his arrival in the Island in the year 1855, began to take steps to put in force the judgment of the Court of First Instance.

On this being done, Currie, on the 11th of December, 1855, on behalf of the Respondents, gave three notices of appeal to the Supreme Court of Mauritius [77] against the judgment given by the Court of First Instance. The following were the reasons of appeal:—First, Because Reid, Irving and Co. were not and never were represented generally in the Colony by Currie or by Bell; but because in reality they were only represented there for special purposes, and not to defend or plead in the suit or action brought against them by Lang, Freeland and Co., the Plaintiffs in the Court below. Second, Because, at all events, Reid, Irving and Co., of London, Merchants, could not be sued before the Courts at Mauritius in the person of any agent whomsoever at Mauritius, at the suit and request of merchants in the City of Trieste for mercantile transactions or operations which might have taken place between them, but which were entirely foreign to Mauritius. Third, Because the Courts at Mauritius were incompetent for, and the laws of Mauritius inapplicable to, merchants of Trieste and of London. Fourth, Because, again, at all events, the claim preferred by Lang, Freeland and Co. was not proved, and was unsupported by valid documentary or other evidence.

On the 5th of January, 1856, the Appellants prayed the Supreme Court to declare the appeals informal, and to bind the Respondents to pay costs, and to confirm the judgment of the late Court of First Instance, on the following grounds:—First, Because three appeals could not be entered against one judgment, and because the appeals entered or notified, were not made within the time and in the form prescribed by law. Second, Because, the judgment had been made at the request and with the consent of the Respondents. Third, Because the Respondents had not defended to the Appellants' action [78] before the Court below, and after having suffered final judgment to be given against them, and had due notice of such judgment, had acquiesced to the judgment and to the proceedings made by the Appellants, and had finally waived all objections against the judgment or proceedings. Fourth, Because, Reid, Irving and Co. were sufficiently represented in the Colony for the purpose of the present action, even if no power or letter of attorney existed; that the simple fact of the possession by Currie of all the property in Mauritius of Reid, Irving and Co., who had stopped payments since the 17th of September, 1847, and still in a state of insolvency, entitled any lawful and *bona fide* creditor of Reid, Irving and Co. to apply to Currie in order to exercise the general lien granted by law to every creditor upon the property of their debtor. Fifth, Because, Reid, Irving and Co. were so well represented there for the purpose of the action, that numerous claims of the same nature as that then preferred by the Plaintiffs had been paid there by the said James Currie. Sixth, Because the Respondents could not then plead to the jurisdiction of the Courts of Mauritius, which they had duly admitted in the Court below. Seventh, Because at all events the claim preferred by the Appellants had been duly acknowledged and admitted by Reid, Irving and Co., and by their representatives, and was supported by valid evidence.

The appeal was heard by the Supreme Court on the 1st of February, 1856, and was adjourned, from time to time, for the hearing of arguments and the examination of witnesses. At the hearing it was contended on behalf of the Appellants, first, that [79] by the withdrawal of the record from the registry of the Court of First Instance (which was then abolished), by the legal agents of Reid, Irving and Co., in December, 1849, as appeared by the endorsement on the record, the power of appeal was taken away. Second, that no objection having been taken in the Court of First Instance to the want of jurisdiction of the Court of Mauritius, in cases where the cause of action arose out of transactions between Merchants residing in Trieste and London, it was not competent for the then Appellants to object to the jurisdiction in the proceedings of appeal. Third, that Currie was the general agent of Reid, Irving and Co., in the Island of Mauritius; that he had power to appear for them in any legal proceedings taken against them, and if he had not such power, he was, by his acts, in the habit of assuming it. That Bell was also an agent of Reid, Irving and Co. in the Island, empowered to act generally on their behalf, in case of impediment of Currie; that he did so act as their agent in appearing and receiving service in various other legal proceedings taken against them, as well as in the present action. That the bankruptcy of Currie was an impediment to his acting as such agent.



Fourth, that the Courts of Mauritius had power to take cognizance of transactions between parties not residing or being domiciled in the Island.

The evidence given on the various points was to the following effect:—On the first point, it was proved by Stein, of the firm of Messrs. Scott and Co., that he was the agent of the Appellants in that Island, and as such held a general power of attorney from them. That he received in the year 1848, a statement of an account current between the Appellants and the Respondents, by which the balance [80] was against the latter; that he then called on Currie, who declined to admit the claim of the Appellants, and referred him to the remedy provided by the Courts of the Island; that he, however, took no immediate steps; but, in March, 1849, several judgments having been given in the Court of First Instance and in the Supreme Court, against the Respondents, he applied again to Currie, for the settlement of the claim of the Appellants, who agreed to offer no extraordinary defence to any proceedings taken for its recovery. Another witness, named Terry, who acted as the attorney of the Respondents in the actions brought against them, gave evidence as his opinion, that an appeal could be brought after the withdrawal of the record, and this opinion was confirmed by a witness named Kœnig, who deposed that such withdrawal was not an acquiescence in the judgment; it was also insisted at the hearing on the part of the Respondents that the judgment of the Court of First Instance and the giving up of the right of appeal to the Supreme Court was never intended to be acquiesced in, either at first, when no opposition was made to the taking out of the judgment by the agents of the Respondents, or afterwards, when the record was withdrawn, a proceeding asserted by them to have been done irregularly, and by mistake; and further that it appeared from letters which had passed between Lang, one of the Appellants, and Stein, their agent, that neither Lang nor Stein thought that the acquiescence of Currie and Bell in the legal proceedings in the Court of First Instance prevented the Respondents from appealing to the Supreme Court; but there was nothing to show that either of them knew at the time of writing those letters of the withdrawal of the re-[81]-cord. On the question of agency, it was proved that Currie was the agent of the Respondents in the Island at the time of their failure in England, but left there before any judicial proceedings were taken against them; also that on certain claims being pressed against the Respondents, Currie instructed Kœnig, as his legal adviser, to defend the actions brought in the Court of First Instance against the Respondents, not by application for postponement, as was usual in that Court, but only in such way as to reserve the right of appeal, and to prevent the judgment from becoming definite. Currie, in the two cases in which appeals against the judgment of the inferior Court were entered and argued, instructed Kœnig and in the second case he directed him to argue the question again before the Court of appeal. That, at that time, Currie being an uncertificated Bankrupt, a doubt was raised whether he could legally act as agent for the Respondents, and in consequence, Bell, who was named under the deed of substitution, acted as their sole agent, under Currie's directions. It further appeared that the amount of the inscriptions taken out in the Mauritius Court was about £111,000. That creditors, representing about £90,000, had at various times signed the deed of inspection, and had thereby relinquished their right to enforce the judgments and inscriptions taken out by them. That some of the creditors had been paid in part by Currie, who by such payments had induced them to abandon their inscriptions. That the Appellants had not signed the deed of inspection at the time of the hearing of the Appeal, nor had they done so since. The account current between the Appellants and Respondents, the foundation of the action in the Court of First Instance, furnished and signed [82] by the Respondents, was proposed to be put in by the Appellants. The Respondents objected to this, and the Court decided that its production was premature.

The Supreme Court of Mauritius, consisting of the Acting Chief Justice, Surtees, and the Judges, Rémono and Bestel, gave judgment in the appeal on the 11th of June, 1856. The reasons assigned for the judgment as delivered by the Acting Chief Justice upon the question of jurisdiction were: that the Court considered the powers possessed by Bell did not extend to an authority to appear for the Respondents in the action. The Court was also of opinion, that there existed no acquiescence in the judgment of the Court of First Instance on the part of the Respondents, and that the right of appeal to the Supreme Court was in no ways barred. That every fair

exception might be brought forward on appeal, even against the jurisdiction of the Courts of Mauritius in this matter. That as the judgment of the Court of First Instance was given by default against the Respondents, yet in the case of an appeal from any judgment given by default, the whole case was open before the Court of appellate Jurisdiction in Mauritius; and the Court cited in support of this position, Gilbert, *Codes Annotés de Sirey*, vol. 2, pp. 322, 112. "*L'Art 7 de la loi du 3 Brum an 2, qui ne permettait pas aux tribunaux d'appel de prononcer sur d'autres demandes que celles qui avaient été formées en première instance, ne s'étendait pas (non plus que l'art. 464) aux exceptions nouvelles que l'intimé faisait valoir pour sa défense.*"—23 *Frim. an 9*. Cass. (S. 1, 2, 283, C.N., 1 D.A. 4, 792). 113 *id.* "*Les Juges d'Appel pouvaient statuer sur des exceptions que le défendeur originaire [83] n'avait pas proposées en première instance.*"—12 *Frim. an 10*. Reg. (S. 21, 101, C.N., 1 D.A. 4-791); and that the exception of jurisdiction was well founded as the parties were foreigners, as regarded Mauritius, having no domicile or residence there, nor did any part of the transactions out of which the claim was made, have any reference whatever to the Island, and that, therefore, the Respondents could not be sued there (*Buchanan v. Rucker*, 1 Campb. 63), and that Bell had no authority, express or implied, to appear for them in the action. The Court, therefore, reversed the judgment appealed from, and condemned the present Appellants in costs.

The appeal was brought from this judgment.

Sir R. Bethell, Q.C., Mr. Bovill, Q.C., and Mr. M. Bere, for the Appellants.—The principal point turns upon the authority of Currie, and Bell, as substitute of Comrie, to act for the Respondents in the Mauritius. Our contention is, that they had under the power of attorney, full power to manage the affairs and protect the property of the Respondents, and to cause an appearance to be entered for them in the action brought by the Appellants. In fact, Bell did procure such appearance, by Terry, as their attorney, to be entered, for the purpose of protecting the property and interest of the Respondents. By the power of attorney the most general powers are given to Currie and to Comrie, or the substitute, Bell, over the property of the Respondents in the Island, and by it authority is given to appear in any of the Courts for the purpose of the power of attorney. No want of jurisdiction in the Court of First Instance has been shown to justify the judgment [84] appealed from. Surely, that Court must be held to have jurisdiction in the action after an appearance and plea by the attorney for the Respondents; and though they afterwards withdrew from further defence of the action, and allowed judgment to go by default intentionally, in order to prevent preferences to other creditors, they cannot be heard to object that the Court had no jurisdiction over them. Moreover, the Respondents were informed of, and for upwards of six years acquiesced in, adopted and ratified the appearance of the attorney on their behalf. But the Respondents having consented, for their own purposes, to the judgment being obtained against them, and having availed themselves of it in effecting arrangements with their other creditors, and acquiesced in it for upwards of six years, cannot now appeal against it. The withdrawal of the record prevented the Respondents from appealing. If the Respondents were at liberty to appeal to the Supreme Court in the Island, it was only upon the merits, and not on the ground of their having appeared in the Court of First Instance, solely by way of protest to the jurisdiction of that Court. A regular judgment by default had been obtained and recorded in the Court of First Instance against the Respondents, after an appearance and plea by them in the name of their attorney, Terry, and the Respondents have not shown that such judgment was improperly obtained, or did they disprove the case established by it in favour of the Appellants: they were, therefore, barred of their appeal to the Supreme Court, and ought not to have been heard. They cited *Sirey*, Recueil, General les et Lois des Arrêt, Tome 30, p. 234, and Tome 42, p. 327.

[85] Mr. R. Palmer, Q.C., Mr. Cotton, and Mr. Coleridge, for the Respondents.—Substantially, the argument is narrowed to one of jurisdiction, which involves the question whether the Appellants had any right to sue in the Island at all, as there was a deed of inspection which was equivalent to an adjudication in bankruptcy in England, and under which they could have come in.—[Mr. Pemberton Leigh: If the Appellants come in now, would these proceedings be an objection to their receiving



a dividend?)]—There would be no disposition on the part of the Respondents to deprive them, if they came in, of any dividends that might be declared under the deed of inspection. The Courts of Mauritius had no jurisdiction to entertain a suit of a merely personal nature, and brought in respect of a claim which arose out of transactions in no way connected with or originating in the Mauritius. None of the parties were domiciled or resident in the Island. Nor were the Respondents represented generally there by Currie or Bell; they represented them for special purposes only, with powers limited to manage, demand, sue, and recover their constituents' debts in the Island, but not for the purpose of accepting service of process or of defending, or pleading, in the action brought against them by the Appellants in the Court of First Instance, nor to elect a domicile for them in the Island. The want of jurisdiction cannot be supplied by the appearance of Bell, who, however, expressly denied the jurisdiction, by pleading that he had no authority to appear, and refused to defend the action. Such refusal was tantamount to a demurrer in this country, and was sufficient to negative the assumption of jurisdiction by the [86] Court. The question of jurisdiction is to be decided by the law in force in Mauritius, which is the French law as settled by the *Code Civile*, and regulated by the decisions of the French Courts. Story, "Conf. of Laws," § 542, lays it down, that the general rule of the French Tribunals is not to entertain jurisdiction of controversies between foreigners respecting personal rights and interests. The *Code de Procedure Civile* tit. 2, par. 59, expressly provides that in personal matters the Defendant is to be sued before the Tribunal of his domicile, or, if the Defendants are more than one, in the domicile of one of them; and as regards partnerships, in tit. 2, par. 69, it declares that trading partnerships are to be cited at their place of business, or if there be none, on the person of or at the domicile of one of the partners. So it is also enacted in Art. III. of *Code Civile*. The decisions of the French Courts show that in the present case the Courts of Mauritius had no jurisdiction in the suit. *Pater de Rosemond v. Lemasue* is in point. In that case the Appellant was resident in France, and was sued in Bourbon, through an agent acting for her in that Colony. Judgment was obtained against her in the Colony, but the *Cour de Cassation* reversed the judgment of the Colonial Court, holding that the mere fact of the Appellant having an agent in the Colony did not give the Court jurisdiction to entertain a suit against her; and the same principle was recognized by the *Cour de Cassation* in *De St. Croix v. De Hammont* (Sirey's Rep., Pt. I. p. 197) in a case from Martinique. The Respondents never acquiesced in the judgment of the Court of First Instance, or did any act to lead the Appellants to suppose that they had abandoned their right of appeal to the Supreme Court. [87] On the contrary, the judgment was allowed to go by default with the Appellants' knowledge and consent, and with the understanding that the question of jurisdiction would be raised by appeal. Lang himself wished the appeal to stand over, and the arrangement was promoted by him. As soon as the Appellants sought to enforce their judgment, contrary to the agreement of the parties, the appeal was lodged. By the law in Mauritius, acquiescence must be by the express act of the principal, by *d'acquiescement ne peut résulter que du fait de la partie, et non de celui de son avoué*. Carré, *Procédure Civile*, Tome ii. p. 310.

Their Lordships' judgment was delivered by

The Right Hon. T. Pemberton Leigh (17th June, 1858).—This case comes before us by appeal against a judgment of the Supreme Court of the Island of Mauritius, reversing a judgment of the Court of First Instance in that Colony, dated the 6th of March, 1849, which had been obtained by the present Appellants against the Respondents for the sum of £21,227 19s. 3d., with interests and costs.

The Appellants are Merchants, carrying on business at Trieste, in the dominions of Austria, and the Respondents are also Merchants, who, up to the time of their failure, carried on business in London. The two firms had extensive dealings with each other, in the result of which the Respondents became indebted to the Appellants in a large sum of money.

In the month of September, 1847, the Respondents stopped payment. No commission of bankruptcy was issued against them, but they were permitted by their creditors to wind up their affairs under a deed [88] of inspection, which, it seems, provided for a distribution of the estate amongst the creditors, in the same way as if a bankruptcy had taken place.

The Respondents had large landed property in the Island of Mauritius, and they

had given a power to one Currie to act for them in that Island, and to sue for and settle demands by or against them, and generally to manage their affairs in the Colony. This power enabled Currie to appoint a substitute in his stead, and he appointed for that purpose Mr. Bell.

The power of attorney in question gave no authority to Currie to accept service of process in actions brought against the Respondents, nor to elect a domicile for them in the Island, according to the provisions of the French law.

When the Respondents stopped payment, many of their creditors appear to have formed a design to obtain a preference for payment of their debts out of the landed estates of the Respondents in the Island, by means of judgments against them in the Courts of the Colony. The Mauritius is governed by the French law, as settled by the *Code Civile*; and by that law, judgments obtained against a debtor, and duly registered in the Island, constitute a specific charge on his real estates within the Colony, with priority according to their dates.

Reid, Irving and Co. and their inspectors were desirous, as it was indeed their duty, to secure, as far as possible, equal division of the assets amongst the creditors, and they, therefore, instructed their attorney to resist those actions, by which particular creditors were attempting to obtain a preference. Currie accordingly advised with Koenig, his law agent, who was of opinion that, inasmuch as the Respon- [89] dents were not represented in the Colony in the manner required by the French law, in order to subject them to any process, no action could be maintained against them, and he, therefore, determined to rely on that defence, in the different actions. The creditors on the other hand, insisted that the appointment of agents in the Colony by the Respondents constituted a sufficient representation of them for the purpose of suit, and they accordingly sued out complaints against the Respondents, as represented in the Colony by Bell, and served process upon him.

To these actions a defence was raised by the agents of the Respondents, that Bell did not represent them for the purposes of the action.

The question of jurisdiction was, therefore, distinctly raised.

This defence was made in the Court of First Instance, but it seems to have been the habit of litigant parties in the Colony at that time, to pay little attention to the case in the Court of First Instance, and to treat the whole matter as open on appeal in the Supreme Court.

However this may be, judgments were, in fact, obtained in the Court of First Instance in all these cases, and the judgments were immediately afterwards inscribed in the Register, the earliest being dated the 16th of June, 1848, and the latest of those which precede the judgment of the Appellants on the 20th of February, 1849.

For the purpose of trying the validity of these judgments, at least two appeals were brought in the Supreme Court on behalf of the Respondents; the objection to their validity being, that, for the reason [90] already assigned, the Court had no jurisdiction to entertain the suit. While these appeals were pending, claims were brought forward by many other creditors of the Respondents, and, amongst others, by the Appellants, to have their demands established by judgments in the same way with those which had already been obtained.

In addition to the objection which was urged in the other cases, that no action in the Island could be maintained, under the circumstances, against the Respondents, it was supposed by their agents that there was this further objection to the demand of the Appellants, namely, that they were strangers, as well as the Respondents, in Mauritius, and that the French law would not entertain a suit between foreigners with respect to matters having no connection with the Island.

Communications took place between Stein, as the legal agent of the Appellants, and Currie and Koenig, as the agents of the Respondents, the effect of which was, in the opinion of their Lordships, that no objection was to be made to their obtaining judgments in the same way with the other creditors in the Court of First Instance, but that their judgment, when obtained, was to be open to all the objections in the Court of appeal on the ground of want of jurisdiction, or otherwise, which it might be competent for the Defendants to raise; the object of the Defendants' agents being to place, as far as possible, all the *bona fide* creditors of the Respondents on an equal footing, so that, if the judgments were ultimately established, they might all rank *pari passu* against the estates.

That this was the real nature of the agreement is [91] distinctly proved, not only



by the evidence of the Respondents' agents when examined by the Appellants, but also by the evidence of the Appellants' own agent, and by the letter of Stein to Lang on the 17th of March, 1849, and Lang's answer of the 7th of July, 1849.

Accordingly the same course was taken, and the same defences raised, in Lang's action, as in the other similar suits, and on the 6th of March, 1849, judgment was obtained in the Court of First Instance by the Appellants and by many other creditors.

The two causes taken by way of appeal to the Supreme Court, for the purpose of trying the jurisdiction, were decided against the Respondents. That the main point raised in these actions was the question of jurisdiction, is distinctly proved; and so important was it considered by the Respondents' agents, that after it had been decided against them, upon solemn argument, in one case, their Counsel was induced to raise it again, and to argue it in the other, though, as might be expected (the question coming before the same Judges as had decided the first case) without success. The Respondents then determined to bring the question by appeal before Her Majesty in Council. In one case, however, that of Collard, the judgment was for a sum below that for which an appeal is allowed, and, in the other, Mahomed's action, the case was compromised, and the judgment withdrawn. The question, therefore, as to the jurisdiction still remained to be decided, if necessary in the last resort. In the meantime Currie, on behalf of the Respondents, was diligently employed in persuading the creditors, who had obtained these judgments, instead of having them tried on [92] appeal, to give them up, and to come in under the deed of inspection. That these efforts were fully known to, and approved of by, the Appellant, and that they were desirous of promoting those arrangements, and knew that if they insisted on their own judgment, its validity was not to be considered as established by anything which had taken place in the Colony, but must be the subject of adjudication by the Judicial Committee, is perfectly clear from Lang's letter to Stein of the 23rd of August, 1851. "The understanding being, that, if necessary, my claim is to come for decision before the Supreme Court here, and I am quite satisfied to abide by the issue of such an appeal, which, if in my favour, would give me principal and interest: and as regards the result, I am assured by the best professional advice I could obtain, that it will be in my favour; but I would act liberally with these friends, and if Mr. Currie has recommended those in charge here to make a compromise with me, very likely I will hear from them, and while the disposition to come to a settlement is mutual, I dare say it will be arranged; and, in the meantime, with many thanks for all the trouble you have taken."

It is manifest that, at this time, Lang, the Appellant, knew that there was no intention of acquiescing in these judgments.

A year or two afterwards so much progress had been made in the negotiations with the judgment creditors, and in inducing them to give up their judgments, and come in under the deed, that the agents of the Respondents thought it necessary to come to some decision as to the claim of the Appellants, who were almost the only creditors who still held out, and [93] they threatened therefore, at once, to bring the validity of their judgment to trial by an appeal. They were only induced to suspend this step by the urgent entreaties of the Appellants' agents. What passed on the occasion is stated by Currie in his evidence:—"I wish to add, with regard to the assertion of acquiescence and Lang's knowledge of the right of appeal, a fact which seems to prove it very clearly. Some time in the year 1852 or 1853, when most of the creditors of Reid, Irving and Co. were taking judgments here, had followed the course which I had expected, and were ready to withdraw their judgments, I told Stein that Lang stood almost alone, hindering the realization of the property here; that I must, therefore, no longer delay the appeal to bring the question to an issue. Stein begged me to refrain until he could again write to Lang. Lang then went to Messrs. Reid, Irving and Co., gave them a copy of Stein's letter to him, and of his, Lang's, answer, by which he begged Stein to disabuse my mind of the idea that he was a hostile creditor, and assured Stein and me, that the idea of his taking any steps, or being in any degree hostile, was repugnant to his feelings, and contrary to the tone of every letter that he, Lang, had ever written on the subject. Copies of these letters were sent to me by Reid, Irving and Co., with Macpherson, when he acted for Lang; and, as I believe, according to Lang's instructions, it was agreed that this

judgment should be brought before the Court of appeal to be argued, without delay and without expense, upon its merits, and decided."

It was not until all the other judgments had been cleared out of their way that the Appellants attempted to give effect to theirs. If they had done so when it [94] was first obtained, they probably could have derived no advantage whatever from it; for there were, as appears from what we have already stated, many of an earlier and very many of an equal date; but at length in December, 1855, having changed their agent and appointed Hewitson their attorney, they attempted to give effect to their judgment, and immediately on their doing so the appeal was lodged. The attempt to enforce the judgment was on the 6th of December, 1855, and the appeal was lodged on the 11th of December.

The reasons of appeal were as follows:—"First. Because Messrs. Reid, Irving and Co., are not, and never were, represented generally in this Colony by James Currie, or by Herbert Irving Bell, but because, in reality, they are only represented here for special purposes, and not to defend or plead in the suit or action brought against them by Messrs. Lang, Freeland and Co., the Plaintiffs in the Court below. Second. Because, at all events, Messrs. Reid, Irving and Co., of London, Merchants, cannot be sued before the Courts of Mauritius, in the person of any agent whomsoever, at Mauritius, at the suit and request of merchants in the City of Trieste, for mercantile operations or transactions which may have taken place between them, but which are entirely foreign to Mauritius. Third. Because the Courts at Mauritius are incompetent for, and the laws of Mauritius inapplicable to, merchants of Trieste and of London. Fourth. Because again, at all events, the claim preferred by Messrs. Lang, Freeland and Co., is not proved, and is unsupported by valid documentary or other evidence."

The Appellants went into a great deal of evidence to prove the agency and authority of Currie and Bell, [95] and the arrangements agreed upon, and the conduct of the parties; and insisted, amongst other things, that the Respondents had acquiesced in the judgment against them, and were precluded now from disputing it.

On the 11th of June, 1856, the Court pronounced the judgment complained of in these terms:—"The Court rules that there exists no acquiescence on the part of the Appellants; that the right of appeal is in no wise barred; that every fair exception may be brought forward on appeal, even against the jurisdiction of the Courts of Mauritius in this matter: that the exception of jurisdiction is well founded. The Court, therefore, reverses the judgment appealed from, and condemns the Respondents to pay to the Appellants the sum of £281 0s. 2d. sterling for costs of suit."

The objections raised by the present Appellants to this judgment may be conveniently discussed under two heads:

First. As the matter stands on the proceedings of the Court, without reference to extrinsic matter.

Secondly. As it is affected by the agreements and conduct of the parties.

On looking to the proceedings in the Court of First Instance, the facts appear to be these:

On the 11th of January, 1849, a plaint was issued by the Appellants, described as of the City of Trieste, represented in this Colony by Messrs. Scott and Co., against Reid, Irving and Co., of London, represented in this Colony by Bell. The plaint claims a sum of £21,227 19s. 3d., as a debt due on the result of divers mercantile transactions between the two firms.

It is obviously, therefore, a mere personal demand, [96] not professing to be in any manner connected with any proceedings in the Colony.

This plaint was served on Bell.

On the 16th of January, 1849, Mr. Terry, Attorney-at-Law, on behalf of the Respondents, stated to the Court, "That they were not represented generally in the Colony by Bell, but that they were only so represented for special purposes, and not to defend or plead in this suit or action now brought against them by the Plaintiffs."

In mercantile causes, as this was, the Rules of Procedure provide that the defence shall be oral, and that on the cause being brought before the Court, it shall be heard at once upon the merits, unless the Court should make other order to the contrary.



No order was made of any sort upon this occasion; it is clear that no proceeding could properly be taken to establish the debt, until the fact was first established, that the Defendants were properly represented by Bell, and that the Court, therefore, had real parties before it, and jurisdiction on the subject; and, without calling upon the Plaintiffs to prove this fundamental point, without even giving Bell the opportunity of disproving it, if the onus was upon him (which it clearly was not), the Court in its subsequent proceedings assumes that the representation is proved.

On the 3rd of March, 1849, an order is obtained from the Court, to bring on the cause for hearing on the 6th of that month. This order is served on Bell, who had already alleged that he did not represent the Defendant, and who, consistently with his plea, could not possibly appear to defend; and, on the same day, [97] for default of appearance, a judgment for the amount sued for passed against the Defendants.

It would be absurd to treat such a judgment, standing by itself, as anything better than waste paper.

But it is said that the Court may look to the evidence given in the Court of appeal to supply the deficiency of the original proof, and that if it appears that Bell really had authority to represent and was bound to accept process on behalf of the Respondents, it may be sufficient to support the judgment. Assuming this to be so, it becomes necessary to inquire what is held to be necessary by the French law, in order to give jurisdiction to a Court of Justice over a Defendant in a civil action.

It is unnecessary to consider the case of a proceeding *in rem*, for this is a mere personal liability attaching upon, and to be enforced against, the debtor; in such a case the law of *domicilium rei sitae* can have no application, for the *res* itself has no *situs*. The matter in dispute here has no locality. In such cases the rule of the French law is that the suit must follow the person of the debtor, and that the action must be brought against him in his real and proper domicile—*domicile réel*. But this rule is subject to the qualification that a man may elect a special domicile for the purpose of his trade, or for other purposes, and that such elected or conventional domicile shall for those purposes be equivalent to his *domicile réel*.

But inasmuch as the election of such domicile draws after it most grave and extensive liabilities, it is settled not only that the appointment of an agent in a Colony, with the largest powers, by a domiciled Frenchman, does not amount to an election of domicile in the place where such power is to be executed, [98] but that no agent, with powers however extensive, can make such election on the part of his principal, unless his power contains express authority to do so.

These propositions appear to be fully warranted by the authorities mentioned in the very able judgment of the Chief Justice in this case, and the others which were cited in the arguments at the bar.

Applying these rules to the facts as they appear in evidence in this case, it is quite clear that Reid, Irving and Co. had no domicile, actual or conventional, in the Island of Mauritius, and that Bell in no manner whatever represented them for the purposes of this action. In the Court of First Instance there was not a particle of evidence to support the authority; and if we look at the case, as the parties seem to have regarded it, as one in which the whole matter was open on appeal, as in a new case, the evidence entirely fails to support the point contended for.

Then were the Respondents in this case precluded in any manner from making these objections?

First. It is said they had already appeared in the action, and had thereby submitted to the jurisdiction; and the rule of French law is said to be, that an objection to the jurisdiction must be taken at the earliest opportunity, and cannot be raised for the first time on appeal.

But the answer is, that the Respondents never had acquiesced in, nor in any manner recognized, the jurisdiction; that there never was any appearance in the action in the meaning of that term in English Courts of Justice: that the sole step taken in the action by the agents of the Defendants was to object to the jurisdiction at the earliest possible moment, [99] by insisting that their principals were not represented in the Island, or, at all events, were not represented by the individual on whose supposed representations this action was founded.

Secondly. It is said there was an acquiescence for six years in the judgment: that Reid, Irving and Co., and their Inspectors, had notice of the judgment having been obtained, and that if they meant to dispute its validity they should have done so at an earlier period.

There is no doubt that they knew of the judgment, but they knew also, as Lang and Co. did, upon what terms, and subject to what conditions, and for what purposes, it had been obtained: that its sole purpose was to prevent Lang and Co. from being placed in a worse situation than the other creditors who had obtained, or might obtain, judgments, and that the whole of those judgments were to be disputed unless the creditors abandoned them, and that if Lang and Co. attempted to enforce theirs, that moment its validity would be disputed.

We have already referred to the evidence by which it appears to us that these facts are established.

Under these circumstances, it was not the Respondents in this case who acquiesced in the judgment, but the Appellants, who for their own purposes forbore to enforce it, probably from the unwillingness expressed in Lang's letter to interfere with what he calls the judicious proceedings of Currie, and to disturb the arrangements which were being made with the other creditors, the effect of which was to remove competing claimants out of the way, and thereby to enhance the value of his own judgment if ultimately he could maintain it. That he could only [100] maintain it by defending it in the appeal Court of Mauritius, and, if successful there, by defending it afterwards before this Committee, he has been perfectly aware from the beginning to the end of these proceedings.

Upon the whole, their Lordships are of opinion, that the judgment in the Court below is perfectly right, and that to permit the Appellants to avail themselves of the objections on which they have insisted, would be inconsistent alike with the rules of law, and the real agreement of the parties.

Their Lordships must, therefore, advise Her Majesty to affirm the judgment complained of, with costs. They collect from what fell from the Counsel for the Respondents at the hearing, that there is no disposition to debar the Appellants from their right to receive a dividend under the deed of inspection, upon whatever amount may be actually due to them, and that no objection will be raised to their claims on the ground of the Statute of Limitations, if, under the circumstances, any such defence could be available.

[Mews' Dig. tit. COLONY; II. PARTICULAR COLONIES: 16 *Mauritius*. See *Castrigue v. Imrie*, 1870, L.R. 4 H.L. 435; *Schibshy v. Westenholz*, 1870, L.R. 6 Q.B. 160.]

## [101] ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

JOHN OWEN SMITH.—*Appellant*; FRANCIS HENRY CARPENTER.—*Respondent* \* [June 16, 17, 1858].

A mortgage bond hypothecating immoveable and other property, given by debtors in favour of a creditor to secure the debt, at a time when from the hopeless state of the debtor's affairs, sequestration was inevitable, declared void under the Cape of Good Hope Insolvent law Ordinance, No. [6] of 1843, sec. 84, as being an undue preference over the other creditors [12 Moo. P.C. 115].

By section 84 of the Cape of Good Hope Ordinance, No. 6 of 1843, the question of intention, in making an alienation, or payment, is left open to be deter-

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, and the Right Hon. The Lord Justice Turner.



mined upon all the circumstances and facts of the case, by the Court or a jury, as well with respect to pressure by a creditor to induce a debtor to give security to him in preference to the general body of creditors, as in other respects [12 Moo. P.C. 114].

This section does not require, as the English Insolvent law does, that in order to constitute fraudulent preference, the transaction should be voluntary [12 Moo. P.C. 114].

This was an action brought in the Supreme Court of the Cape of Good Hope, by the Respondent, as the sole trustee of the insolvent estate of Charles Slack Taylor and Charles Taylor, of that Colony, to set aside a Mortgage Bond, dated the 14th of February, 1856, executed on behalf of the Insolvents, by one Hull as their attorney, to Slater, in the sum of £858 0s. 6d. sterling and interest, and transferred by Slater to the Appellant.

Charles Slack Taylor and Charles Taylor carried on business at Port Elizabeth, in the Colony of the Cape of Good Hope, as Bakers, in partnership, under the style of Taylor and Son, from the month of January, 1854, till the sequestration of their estate, on the 5th [102] of June, 1856. In their business, they had dealings with Slater, representing the Steam Mill Company, and at the time of giving the Bond in question, they were indebted to him for flour and meal, with interest, to the amount of £883 15s. 3d. In December, 1855, or the beginning of 1856, Slater delivered to Taylor and Son his account up to the 1st of December, 1855, showing a sum due to Slater of £853 15s. 2d., and applications were made to them for payment of such account without success, and Slater being desirous of obtaining security for the payment of the debt, Taylor and Son agreed to give him a Bond and promissory notes for the amount of the debt due, and accordingly executed a power of attorney to Edward Hull, of Cape Town, authorizing him to execute a Bond or mortgage, and signed and handed to Slater four promissory notes for various sums, amounting together to the sum due. By virtue of the power of attorney, Hull, on the 14th of February, 1856, executed the Mortgage Bond in question, which was duly registered at Cape Town, and was afterwards transferred by indorsement by Slater to the Appellant. This instrument was in the following form:—

“Mortgage Bond, by virtue of a power of attorney. Know all men whom it may concern,—That Edward Hull appeared before me, Registrar of Deeds, he, the said Edward Hull, being duly authorized thereto by a power of attorney, granted to him by Charles Slack Taylor and Charles Taylor, co-partners, trading under the style or firm of C. S. Taylor and Son, dated the fourth day of February, 1856, and drawn up at Port Elizabeth in the presence of, and certified by, competent witnesses, which power of attorney was exhibited to me on this day; and the said Edward [103] Hull declared his constituents, the said Charles Slack Taylor and Charles Taylor, trading as aforesaid, to be really and lawfully indebted to and on behalf of Edward Slater, in the sum of £858 0s. 6d. sterling, arising from goods sold and delivered to the appearer's constituents, with the interest thereon, since the same became due and payable; renouncing therefore the legal exception *non causa debiti errore calculi*, and revision of accounts, which aforesaid sum of £858 0s. 6d., the appearer, q. q., hereby promises and undertakes to pay, or cause to be paid, unto the said Edward Slater, his order, heirs, administrators, or assigns, with the interest thereof, payable annually, at the rate of six per cent. per annum, reckoned from the first day of January, 1856, inclusive, and to continue to be so reckoned, until such time as the whole of the aforesaid principal sum shall be fully paid off; which payment the appearer, q. q., shall be allowed and also be obliged to make three months subsequent to legal notice having been given or received to that effect, provided the same be then paid in one sum in good current and lawful money, together with such interest as may be due thereon. The appearer, q. q., hereby binding in security thereof specially, as a mortgage, certain lot of ground situated at Port Elizabeth, marked No. 27, being part of the divided property transferred to the widow, Johan Philip Hartman, on the 4th of April, 1837, measuring 24 square roods and 97½ square feet, as per deed of transfer made in favour of the appearer's constituents on the 27th of October, 1855. Moreover, hereby binding, generally, his constituent's person, and all his property, both such as he is already or may in future become possessed of, moveable and immoveable, with-[104]out any exception,

and submitting them all, and the choice thereof, to constraint and execution, as the law directs."

Messrs. Taylor and Son, on the 5th of June, 1856, surrendered their estate as insolvent, and on the 11th of July, 1856, the Respondent was elected sole trustee of such insolvent estate, which election was confirmed by an order of the Supreme Court of the 26th of July, 1856. The Appellant proved, under the insolvency, against the estate, for the sum of £653 3s. 5d. and interest, by virtue of the Mortgage Bond, the balance originally due having been reduced on the 1st of April, 1856, by payment of the first of the promissory notes given to Slater by the Insolvents for the sum of £217 14s. 6d.

In consequence thereof, the Respondent took proceedings against the Appellant by summons in the Circuit Court for the Division of Port Elizabeth, in the Colony, to set aside the Mortgage Bond, on the ground that Taylor and Son, when they gave the Bond, contemplated the sequestration of their estate, and intended unduly to prefer Slater before the other creditors, and that such undue preference was given and received by a mutual understanding and common consent between the Insolvents and Slater; the former to give, and the latter to get, such undue preference; and also on the ground that at the time of giving the Mortgage Bond, the debt due to Slater had been satisfied.

The Appellant took exceptions to the sufficiency of the summons by reason of Slater not being joined as a party, and also pleaded a denial of all the allegations of fact and conclusions of law contained therein.

Evidence was taken in the Circuit Court before [105] Mr. Justice Bell, and on the 3rd of October, 1856, it was ordered by the Court, on the application of the Respondent and by consent of the Appellant, that the case should be removed for hearing to the Supreme Court. By the evidence given on behalf of the Respondent, it appeared, that at the time of giving the Bond, the Insolvents had no bills overdue. It further appeared that in July, 1854, a statement of the partnership affairs to the 30th of June preceding was made out, which showed that the partnership was then insolvent, a deficiency appearing. That the partnership books continued to be written up until October, 1855, but from that time no further formal statement of the partnership affairs was made by the Insolvents. That the business was continued by the Insolvents until the sequestration of the estate, in the extent of their insolvency having increased from time to time. The books showed that the deficiency, in June, 1854, in addition to an omitted account of the Steam Mill Company, had increased, on the 30th of December, 1854, to £731 16s. 3d.; on the 30th of June, 1855, to £1069 11s. 11d.; in October, 1855, to £2547 8s. 11d. From the last-mentioned date the books were in confusion, and the accountant who was employed, after the sequestration, to examine them, could not carry the account further. The Insolvents, in carrying on their business, obtained credit largely, giving Bills or notes payable at various dates, chiefly at six months, many of which are unpaid in the hands of creditors on the estate. It further appeared that Slater had required his account to be settled, or security to be given, and the Insolvents stated in their evidence, that that was no motive for giving the Mortgage Bond except the applications [106] made to them for payment or security, and that it was not procured from them by threats or pressure. On the behalf of the Appellant, a witness named Owen proved that he had, by the directions of Slater and the Appellant, repeatedly applied for payment, and threatened to take legal proceedings if a Bond was not given.

The cause was heard before the Supreme Court, on the 28th of February, 1857, when the Court held that the suit was properly instituted against the Appellant, and they overruled his exception; and a majority of the Judges, consisting of Mr. Justice Watermeyer, and Mr. Justice Bell, were of opinion, that the Respondent was entitled to relief, under the 84th section of the Ordinance, No. 6, of 1843 (*a*), as the

(*a*) The 84th Section of the Ordinance of 1843, No. 6, is in these terms: "And be it enacted, that every alienation, transfer, cession, delivery, mortgage, or pledge of any goods or effects, moveable or immoveable, personal or real, and every payment made by any Insolvent to any creditor, such Insolvent at the time contemplating the sequestration, either voluntary or otherwise, of his estate, and intending thereby to prefer, directly or indirectly, such creditor before his other creditors,



Insolvents at the date of granting the Mortgage Bond contemplated the sequestration of their estate and gave Slater a Bond to secure a preference to him. [107] Mr. Justice Cloete dissented, as, in his opinion, there had been a pressure upon the Taylors to induce them to execute the security for Slater's debt; and that such a transaction being *bona fide*, ought not to be disturbed. The majority of the Court accordingly gave judgment that the preference on the Mortgage Bond, for which the Appellant then stood ranked on the Insolvents' estate, was to be set aside as an undue preference. The Court were, however, unanimous that there was no proof of collusion between the Insolvents and the Appellant as to inflict the forfeiture of his claim as imposed by the 88th section of that Ordinance (a).

The present appeal was brought from this judgment.

The Attorney-General (Sir Fitz-Roy Kelly), and Mr. Honyman, for the Appellant.—It does not appear from the evidence that at the time of giving the Mortgage Bond, Taylor and Son contemplated sequestration of their estate. Nor does it appear that they intended by such Mortgage Bond to give a preference to Slater over the other creditors. [108] On the contrary, the Mortgage Bond was given in consequence of the pressure upon the Taylors for security for Slater's debt. In such circumstances, the deed was not void under the provisions of the Cape of Good Hope Ordinance, No. 6, of 1843, sec. 84. By the English law such a deed would be sustained, if not made voluntary, and preceded by pressure, though given in preference, and even in contemplation of Bankruptcy. *Hale v. Allnutt* (19 L.J. N.S. C.P. 267), *Newton v. Chantler* (7 East. 138), *Davies v. Acocks* (2 Cr. Mee and Ros. 461), *Doe d. Boydell v. Gillett* (2 Cr. Mee. and Ros. 579), *Ansell v. Bean* (8 Bingh. 87), *Fidgeon v. Sharpe* (5 Taunt. 539), *Morgan v. Brundrett* (5 Bar. and Ad. 289), *Abbott v. Burbage* (2 Bingh. N.C. 444). In an action to recover money paid by way of fraudulent preference and in contemplation of Bankruptcy, the *onus probandi* is on the Plaintiff, *Atkinson v. Brindall* (2 Bingh. N.C. 225), and the Respondent here must establish that it was a fraudulent preference in contemplation of sequestration. This we submit he has failed to do, as there is nothing in the evidence to show that the Mortgage Bond was executed in contemplation of a sequestration. The allegation in the declaration that there was a mutual understanding between the Insolvents and Slater, the one to give and the other to get an undue preference, is wholly gratuitous, without being supported by a tittle of evidence. Section 88 of Ordinance, No. 6. of 1843, cannot, therefore, apply, and such allegation fails for want of proof. No such agreement or understanding existed.

[109] Mr. Wilde, Q.C., and Mr. Aspland, for the Respondent.—A preference was given by the Insolvents to Slater by this Mortgage Bond, which hypothecates all their estate present and future, and by the law prevailing in the Cape of Good Hope in case of sequestration, a creditor by Mortgage Bond is paid in full in preference to the other creditors. If a partnership deal with the whole of the assets, it is to

shall be deemed to be an undue preference, and is hereby declared to be null and void. And every such alienation, transfer, cession, delivery, mortgage, or pledge as aforesaid, made by any Insolvent to any person whatever, such Insolvent at the time contemplating, as aforesaid, the sequestration of his estate, and intending thereby to prefer, directly or indirectly, any creditor before his other creditors, shall be deemed to be an undue preference of such creditor, in so far as he shall have been benefitted thereby, and the trustee or trustees shall be entitled to recover the amount or value of such undue preference from the creditor so preferred."

(a) Section 88 enacts, "That in every case in which any person, whether actually a creditor or not, shall be obliged, by virtue of the 84th, or 85th, or 87th Section of this Ordinance, to restore or repay, as the case may be, for the benefit of the insolvent estate, any alienation, transfer, cession, delivery, mortgage, or pledge, or any payment as having been an undue preference, such person shall not be allowed to claim, or prove as a debt, the amount of what he shall have so restored or repaid, but shall wholly forfeit such amount as regards the insolvent estate, in case such undue influence was received by such person by or through any collusive arrangement, mutual understanding, or common consent between such person and the insolvent, the one to give, and the other to get, such undue preference."

be presumed to be in contemplation of Bankruptcy. The Insolvents at the time contemplated the sequestration of their estate, and intended to give such preference over other creditors; therefore, the Mortgage Bond is, under the 84th section of the Ordinance, No. 6, of 1843, to be deemed an undue preference, and is void; and by section 88 of that Ordinance, if there is a preference given it amounts to a forfeiture of the claim as against the estate. The contemplation by the Insolvents of sequestration, and their intention to give a preference, are to be inferred from the state of their affairs before and at the time of the execution of the power of attorney and Mortgage Bond, and from the other facts; and the necessary consequence of giving the security challenged, was to cause a sequestration of their estate and a preference of one creditor over others. The Insolvents must be supposed to have foreseen and intended such consequences. The presumption, therefore, of a contemplation of sequestration and intention to prefer necessarily arises. They cited upon this point, the English cases of *Aldred v. Constable* (4 Q. Ben. Rep. 674), *London v. Sharp* (7 Scott. N.R. 375), *Flook [110] v. Jones* (4 Bingham, 20), *Poland v. Glyn* (*ib.* note, p. 22), *Ogden v. Stone* (11 Mee. and Wels. 494), *Cook v. Hitchcock* (5 Mau. and Gr. 329). Shelford on Bankruptcy, p. 184, which contains all the authorities on this point. The Appellant is not entitled to any protection or right, in respect of the Mortgage Bond, other than such as Slater would have had, if he had not transferred the same to the Appellant, in which case the Mortgage Bond would have been declared void, and set aside.

Their Lordships' judgment was pronounced by

The Lord Justice Knight Bruce (21st June, 1858).—In the month of February, 1856, Charles Slack Taylor, and his son, Charles Taylor, then carrying on business in partnership together as Bakers at Port Elizabeth, in the Colony of the Cape of Good Hope, executed there a power of attorney to Edward Hull, authorizing him to execute a Bond or Mortgage of property belonging to them at Port Elizabeth.

In pursuance of the power, Hull, for Messrs. Taylor, executed at Cape Town and caused to be registered there in the same month of February, the instrument in question, called a Mortgage Bond.—[His Lordship here read it, *ante*, p. 102.]

The debt of £858 0s. 6d. thus provided for, appears to have been justly due, partly from Charles Slack Taylor alone, but chiefly from him and Charles Taylor, to a Company, called "The Steam Mill Company," in which Slater was interested; and in which probably Smith, the Appellant before us, was also [111] interested; and by some arrangement between them, the Mortgage Bond, and the debt which it secured, became the property of the Appellant, subject to this, that the sum of £217 14s. 6d. appears to have been paid by the Taylors upon the 1st of April, 1856, to Slater, or the Appellant, or the Company, on account of the debt, which sum of £217 14s. 6d. was the amount of a first of a series of promissory notes, dated 1st of January, 1856, given by the Taylors to Slater in February, 1856, for the debt secured by the Mortgage Bond. The notes fell due on the 1st of June, 1st of August, and 1st of October, in the same year. It was scarcely, or not at all, contended, nor was there any ground for contending, that the Appellant's title to or under the Bond was better or substantially other than that of Slater. Messrs. Taylor were for some months next before and throughout the first half of the year 1856, in circumstances of insolvency; but they carried on their business of Bakers until they publicly and formally declared their insolvency on the 5th of June in that year, when they surrendered their estates as Insolvents, in the manner usual at the Cape, and became accordingly subjected to sequestration under the Cape of Good Hope Ordinance of 1843, relating to insolvency.

Carpenter, the Respondent, was appointed trustee of the estate under the sequestration, and the effect of the Bond, if valid, having been to give the Appellant a priority at the Cape, for the unpaid debt secured by it over other creditors under the sequestration, a suit was instituted against him in the Colony by the Respondent for the purpose of having the Bond declared void under the 84th section of the Ordinance of 1843. Judgment was against the Appellant on the [112] 84th section, but for him on the question of the applicability or inapplicability to the case of the 88th section. In the latter respect, the Judges were unanimous, though not so on



the point decided against him.—[His Lordship read these sections, *ante*, pp. 106-7, and proceeded.]

The question, upon which we are to advise the Crown, is whether the judgment of the Supreme Court upon this dispute of fact, namely, as to the Bond falling or not falling within the provisions of the 84th section, ought to be reversed. Now, it is clear that when the Bond was authorized to be, and when it was, executed, the Taylors were in a state of insolvency—a state which, the amount of their debts, that of their assets, their position in life, and the nature of their business considered, may, as their Lordships think, be justly represented as one of deep insolvency. Their Lordships are also of opinion, that the evidence authorizes that state to be described as not merely deep, but as likewise hopeless. Ought it then, from the evidence, to be inferred, that when the Bond was authorized to be, and when it was, executed, the Taylors were conscious that they were so circumstanced? We are of opinion, notwithstanding what they have deposed, and notwithstanding their probable ignorance of book-keeping and want of skill in matters of account, that this question must be answered in the affirmative; and in their Lordships' view the Taylors must be taken to have known when the Bond was authorized to be, and when it was, executed, that public and avowed insolvency and a sequestration were impending and substantially inevitable.

Was the motive, then, or one of the motives, by [113] which the Taylors, in consenting to execute, and in executing, the power of attorney, were influenced, a desire to favour the person or persons, or one or more of the persons, then entitled to the debt for which the Bond was given? To favour that person or those persons in respect of the debt by way of preference over the Taylors' other creditors? Their Lordships consider that question as one to which an affirmative answer is rendered necessary by the materials before them, though those materials include the testimony of the witness, Owen, which testimony being considered, it may well be that if the Bankrupt law of England, or the Insolvency law of England, were applicable to the controversy, there is not any Act of Parliament taking away from the Appellant that for which he contends. For the witness, Owen, may perhaps be justly thought to prove an amount of pressure sufficient by the English law to protect the transaction. He thus expresses himself:—"I am clerk to the Defendant. I have had many times to call on the Insolvents for the account they owed the Defendant. The first time I called was in the end of November, or early in December, 1855; I merely gave in the account; they said it would be looked at. In January, 1856, I called and pressed for a settlement. I saw Charles Taylor once or twice; he said his father was not in. Nothing more passed. I saw the father at last, and told him I wanted the titles of his house to pass a Mortgage Bond for the amount of the debt. I rather think I had not then the four promissory notes, shown to-day, but others for the like amount, with a slight difference as to interest. Taylor said he would not give the papers up. Subsequently I saw him, and told him that unless the Bond was passed, [114] judgment of the Court would be got." He is cross-examined for the Plaintiff, and says:—"I did not make any memorandum of what passed at my calls on Taylor. When I first called, Taylor did not make any reference to a conversation he had with Smith; nor did he do so at any other time; nor did I refer to it. Though I am clerk to Smith, I do many jobs for Slater. I was sent by Smith, not by Slater; but I was sent many times by Slater too. Defendant is a Director of the Port Elizabeth Bank."

The present dispute, however, must be determined, not by English law, not upon English decisions, but according to a just interpretation of the 84th section of the Cape Ordinance now before us; one of the provisions contained in which, that differs from the English law, is, in their Lordships' view, that the 84th section intended to leave the question, what was the intention of the debtor in making the alienation or payment, open to be determined upon all the circumstances of the case, as well with respect to pressure as in other respects. On the one hand, the pressure might be so extreme as to negative the intention to prefer; on the other hand, it might be so slight as even to furnish the inference of that intention. It would be for the Court or a jury to judge of this. The section does not, as it seems to their Lordships, require, as the English Insolvent Law, 1 and 2 Vict., c. 110, sect. 59, in terms requires, and as decisions on the English Bankrupt Law seem also to require,

that, in order to constitute a fraudulent preference, the transaction should be voluntary.

By force of the 84th section of the Ordinance, if a debtor, yielding, apparently or seemingly, to a pressure, neither severe nor terrifying, on the part of a [115] creditor (though such creditor is acting sincerely and in good faith), gives the creditor a security—the debtor at the time knowing himself to be in a state of insolvency, knowing that his early stoppage and failure are morally certain, contemplating that stoppage and that failure, feeling no alarm from what the creditor has said, but friendly disposed towards him, and desiring to favour and prefer him—that transaction is, in their Lordships' opinion, cut down, and such substantially in their judgment was the transaction now under consideration.

The result is, that though differing from Mr. Justice Cloete, whose reasons we have read with the great attention due to their ability and the weight of his opinion, we agree in the conclusion of the majority of the Court of which he is a member: nor is it the habit of this Tribunal, unless in a case that seems clear, to reverse a judgment, depending for its correctness upon a question of disputed fact.

Their Lordships, however, will recommend to Her Majesty the dismissal of this appeal, without costs.

#### [116] ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

DOE, on the Demise of JAMES LEE BRODBELT.—*Appellant*: ADRIANA LEE THOMSON,—*Respondent* \* [June 17, 18, 1858].

Testator by Will devised a house at Spanish Town, Jamaica, to M. in fee. By a Codicil made shortly afterwards, the Testator revoked this devise, in the following terms; "I hereby revoke the give of my house in Spanish Town from M. and leave it to L., also, with the furniture of the said house." The Supreme Court at Jamaica held, that the words of the Codicil which revoked the devise to M., substituted L. in M.'s place; and though there were no words of limitation in the devise to L., the Court was of opinion that the intention of the Testator was to give the same estate to L. as he had by the Will given to M., and that the re-devise in the Codicil carried the fee to L.: but

Upon appeal, held (reversing such judgment),

That L. took a life estate in the house only; for, though it was probable that the Testator meant to give to L. the same estate and interest that M. would have taken under the Will, if the devise to him had not been revoked, yet, looking at the language of the Codicil, which was all the Court could do, there was no express declaration to be collected of an intention to give L. more than a life estate.

Under a devise in fee with an executory devise over, indefinite in terms, the devisee over takes a life estate only in the event of the executory devise taking effect. In such circumstances, effect is not given to any presumed intention on the part of the Testator that the devisee over should take the same estate as the prior devisee would have taken.

This was an action of ejectment brought in the Supreme Court of Jamaica by the Appellant against the Respondent, to recover possession of a moiety of a house with the appurtenances, situate in Spanish Town, in Jamaica. The principal point raised in the appeal depended upon the construction of a devise contained in a Codicil to the Will of James Lee, formerly of Jamaica; the question being, whether Je-[117]-mina Johnson Lee (afterwards Jemima Johnson Thomson), the mother of the Respondent, took an estate in fee, or an estate for life only, under the Codicil.

The Testator, by his Will, dated the 12th of May, 1821, among other things, de-

\* Present: The Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, and the Right Hon. The Lord Justice Turner.



vised as follows: "I give, devise, and bequeath, to my friend, John Gardner Milward, my house in Spanish Town, in which I now reside, with the furniture (except as after mentioned) that shall be therein at the time of my death, to hold unto and to the use of the said John Gardner Milward, his heirs and assigns for ever." And the Testator, after some other devises, devised and bequeathed all the rest, residue, and remainder of his estate, real and personal, to Francis Rigby Brodbelt, and to his reputed children, Eliza Lee Brodbelt, James Lee Brodbelt, and Thomas Lee Brodbelt, their heirs, executors, administrators, and assigns, to be equally divided between them as tenants in common.

Seven days afterwards, the Testator made a Codicil to the above Will, as follows:—"At sea, on board the ship *Eliza*, Captain L. Atkinson, latitude 19, longitude 79.40, 19th May, 1821. I hereby revoke the give of my house in Spanish Town from J. G. Milward, Esq., and leave it to my reputed daughter, Jemima Johnson Lee, daughter of Eliza Gardner Johnson, also with the furniture of the said house. I also appoint her an executrix to this and my other transactions. I also request this my executrix and executors to pay to Dr. George Cox the sum of five hundred pounds, cy. of Jamaica. This is an addition to my Will executed prior to my leaving Jamaica." The Testator died at sea on board *The Eliza*.

In June, 1821, Jemima Johnson Lee intermarried with Isaac Deleon Thomson. The Respondent was [118] the only issue of that marriage. Jemima Johnson Thomson survived her husband, and died on the 13th of June, 1833, when the Respondent became her heiress-at-law, and as such entered into possession of the house in question. Francis Rigby Brodbelt having taken the name of Stallard Penoyre, executed his Will on the 5th of April, 1826, whereby he devised all the one-fourth part or share or other the share whatsoever of and in the residue of the estate in Jamaica, to which he was entitled under this Will of James Lee, unto his three reputed children, the Appellant, and Thomas Le Brodbelt and Eliza Lee Brodbelt, as tenants in common in fee. Stallard Penoyre died in 1826. Thomas Lee Brodbelt by his Will, dated the 2nd of October, 1837, devised his real and personal estate (including therein his interest under the Will and Codicil of the Testator) unto the Appellant and his sister, Eliza Lee Brodbelt, as tenants in common in fee. Thomas Lee Brodbelt died in 1844, and leaving the Appellant and his sister him surviving. Eliza Lee Brodbelt also made a Will, dated the 3rd of October, 1850, and thereby devised the residue of her estate to the Respondent in fee. She died in the year 1850.

In February, 1852, an action of ejectment was brought by the Appellant for the recovery of a moiety of the house in Respondent's possession, devised by the Codicil to Jemima Johnson Lee. The action came on for trial before Sir Joshua Rowe (the then Chief Justice of Jamaica), at the assizes held in October, 1855, when after evidence was given by the Appellant, a verdict by consent was taken for him, with liberty to move to set it aside, and to enter a judgment for the Defendant, on the following grounds: [119] First, that under the Will and Codicil of James Lee, Jemima Johnson Lee took an estate in fee-simple which descended to the Defendant as her heiress-at-law. Second, that the Defendant had acquired a statutory title under the possessory laws of Jamaica. Third, that supposing Jemima Johnson Lee took only an estate for life, the reversion expectant upon her death did not pass under the residuary clause in the Testator's Will. In February term, 1856, a rule *nisi* was granted by the Court upon these grounds. This was argued in the Supreme Court in October term, 1856, before the Assistant Judges of the Court, the Hon. William Irving Wilkinson and the Hon. Jasper F. Cargill, when the order *nisi* of February, 1856, was confirmed absolute, and it was ordered that judgment should be entered for the Respondent.

The Assistant Judges delivered separate judgments. The material part of the judgment of Mr. Justice Wilkinson was in these terms:—"As to the Testator's intention, it seems to me manifest, that where a man, ignorant of technical terms to convey his meaning, and no less ignorant of the legal effect of the language he may happen to employ, revokes, by a Codicil, a gift made by his Will from the devisee, and leaves it to another person, he intends to leave precisely that which he revokes, and this *a multo fortiori* in this case, where the devisee in the Will, as appears by that document, stood in no nearer relation to the devisor than that of his friend, while the

devise in the Codicil, as appears by the evidence, was his only child. Now, the devise by the Will to Milward being clearly in fee, there can be no misgiving; on the most natural interpretation his language suggests that it was the intention of the Testator to [120] revoke that fee 'from Milward,' as he expresses it, and to devise it to his daughter, though he has used neither technical terms nor words of limitation for that purpose. Whether the language he has used in the Codicil is susceptible of such a legal construction as will give effect to this intention, is now the question. The measure of what is revoked must, generally speaking, be taken as the measure of what is re-devised, if legal construction will permit it. Now, the language of revocation here is: 'I hereby revoke the give of my house in Spanish Town from J. G. Milward, Esq.' To construe the ungrammatical word 'give' into the substantive 'gift,' may, I conceive, pass without question, whether it be a mere clerical error or the result of ignorance. The gift to Milward, then, by the Will, being an estate in fee in the Testator's house in Spanish Town, is revoked *eo nomine* by the Codicil; and as it would be utterly meaningless to say that he revoked the house, I am of opinion, that by employing the word 'gift' he successfully revoked the estate in the house. I look upon this word as a word of reference, drawing the Will and the Codicil together for the purpose of construction, and I consider it sufficiently demonstrative, not only to indicate the intention of the Testator to revoke by the Codicil what he had given by the Will, but actually to accomplish the revocation. The fee then being revoked, what has become of it? Is it re-devised by the Codicil, or is it not? That document, after the words, 'I hereby revoke the give of my house in Spanish Town from J. G. Milward, Esq.,' thus proceeds: 'and leave it to my reputed daughter, Jemima Johnson Lee.' What does he leave? Clearly whatever the word 'it' may be legally construed to embrace. [121] It was contended for the lessor of the Plaintiff, that the pronoun 'it' constitutes an *ambiguitas patens*, as it may have referred either to the word 'gift,' or to the words 'my house in Spanish Town'; in which latter case Jemima Johnson Lee would take only for life; and a suggestion was thrown out, that this ambiguity might prove so difficult of solution as to render the Codicil, to that extent, wholly void. I do not think so. This is very different to the case of an *ambiguitas latens*, where evidence *dehors* the Will is admissible to explain the intention of a Testator, and where, if such evidence is not forthcoming, the devise must fall to the ground. If, according to the ordinary interpretation of language, and without any forced construction, the word 'it' may be read to apply to either of its alleged antecedents in preference to the other; that which was apparently ambiguous becomes at once sufficiently clear to admit of the application of the Testator's intention, as well as of the rules of legal construction. This appears to me to be the case with this Codicil, and the construction I put upon it is, that the pronoun 'it' has reference, not to the house in Spanish Town as its antecedent, but to the word 'gift'; and I think I am strengthened in this conclusion by the peculiar relation the preposition 'from' and 'to' bear to each other in the revocation and re-devise of this Codicil, aiding as they do both the natural and the legal construction, that whatever was revoked from Milward was left to the Testator's daughter. I may also add, that there can be no better test by which to resolve an apparent ambiguity of language into its real meaning, than the manifest intention of the party who employed that language, unless the stern rules of law forbid its ap-[122]-plication. Looking then upon the word 'gift' as a word of reference, which revokes from Milward the fee given to him by the Will, I must also look upon it as a word of reference, which, represented by the pronoun 'it,' carries the fee to Jemima Johnson Lee, by the re-devise in the Codicil. I do not think that if, as was contended in argument, the Defendant's mother took only an estate for life, by the Codicil the fee would revert to the Defendant as heir-at-law, instead of passing by the residuary devise. The Codicil is a clear republication of the Will by the express words, 'This is in addition to my Will.' These words, to use the language of Lord Ellenborough, in *Goodtitle v. Meredith* (2 Mau. and Sel. 14), 'brings down the Will to the date of the Codicil, making the Will speak as of that date.' The Will and Codicil must, therefore, be taken as incorporated with one another, except in so far as the former document is revoked by the latter. If then the fee given to Milward and his heirs, by the Will, was taken from him by the Codicil, and an estate for life only in the same subject-



matter of devise left to Jemima Johnson Lee, it must be read as if that estate for life only had been devised by the Will, and the fee, being otherwise undisposed of, would fall into the residue, and pass by the residuary devise. Nor do the Statutes, 4th Geo. II., c. 4, and 14th Geo. III., c. 5, commonly called the possessory laws of this Island, give the Defendant any footing in this Court. For if her mother took an estate in fee under the Will and Codicil of Dr. Lee, there would be no need to invoke them, and if she took only an estate for life, the Defendant's possession would be adverse to ulterior claimants. But these possessory Acts contemplate, in my judgment, pos-[123]-sessions of a very different character. They seem to me to go no further than to quiet possessions originally lawful, or at least supposed to be lawful, which have been uninterruptedly enjoyed for the space of seven years. Although I do not go so far as to say that an adverse possession created by any of the means mentioned in these Statutes would not entitle a party to the benefit of their provisions, still the Defendant is not shown, and cannot be shown, to have been in a quiet and peaceable possession for the space of seven years in any one of the characters, or by any one of the means required by these Statutes."

The appeal was from this judgment.

Mr. Rolt, Q.C., and Mr. Mackeson, for the Appellant.— Under this Codicil, Jemima Johnson Lee took a life estate only in the house in Spanish Town; the fee simple of which, subject to her life estate, passed by the residuary clause of the Will to the Appellant, and those under whom he claims.—[The Lord Justice Knight Bruce: All we have to determine is, the construction of the Codicil, whether the Testator did, or did not, mean to give to his natural daughter, Jemima, what he had taken away from Milward, the devisee under the Will.]—Our contention is, that Jemima only took a life estate. Upon this point and upon the question of its being a substituted gift, they cited, *Doe d. Hearle v. Hicks* (1 Clk. and Fin. 20), *Jones v. Hall* (16 Sim. 501), *Vandergucht v. Blake* (2 Ves. Jun. 534), *Bromit v. Moon* (9 Hare, 378), *Grover v. Burningham* (5 Ech. 184), *Doe d. Small v. Allen* (8 Term Rep. 497), *Right v. [124] Sidebottom* (Douglas, 759), *Milson v. Awdry* (5 Ves. 465), *Ross v. Ross* (9 Jur. 795), *Right ex dem. Compton v. Compton* (9 East, 267), *Doe d. Wright v. Jesson* (5 Mau. and Sel. 95), *Loveacre v. Blight* (Cowp. 352), *Doe d. Sams v. Garlick* (14 Mee. and Wels. 698), 2 Jarman "On Wills," p. 155 (2nd Edit.). And, that a revocation ambiguous was to be construed by the re-devise in the Codicil, *Daly v. Daly* (2 Jones and Lat. 753). That an executory devise indefinite does not follow original gift, *Roe d. Kirby v. Holmes* (2 Wilson, 80), *Middleton v. Swain* (Skinner, 339), *Woodward v. Glassbrook* (2 Vern. 388), *Fairfax v. Heron* (Prec. Ch. 67), *Pettywood v. Cook* (Croke Eliz. 52). As to the effect of republication of the Will by the Codicil, *Goodtitle v. Meredith* (2 Mau. and Sel. 14), *Williams v. Goodtitle* (10 Bar. and Cr. 895), were cited. On the other point we confidently submit, that the Respondent has acquired no title under the possessory laws of Jamaica, 4 Geo. II., c. 4, the proviso of which enacts, that such Act shall not extend to confirm or give title to any person seized or possessed of any lands conveyed or devised for any trust, or for an estate for life, or to any person whatsoever claiming or to claim by, from, or under any trustee, or under such tenant for life.

Mr. R. Palmer, Q.C., and Mr. Rennalls, for the Respondent.—No precise technical words are required for the devise of an estate in fee simple in a Will. Perkins, sec. 561, Cruise's Dig., vol. 6, tit. 38, ch. xi. § 2, [125] p. 306, much less in a Codicil like this, where one person is named to take the house at Spanish Town in lieu of another to whom the subject was devised by the Will. Here Jemima Johnson Lee took by substitution under the Codicil, an estate in fee simple in the house and premises which had been devised by Will to John Gardner Milward. The Testator after revoking the gift of the house to Milward, says: I "give it to my reputed daughter." The pronoun "it" clearly means "the house." Now, according to the true rules of construction the word "it" is to be construed as the word "same" was in *Bowes v. Bowes* (2 Bos. and Pul. 500), *Hughes v. Turner* (3 Myl. and K. 666), *Monypenny v. Bristow* (2 Rus. and Myl. 117). The devise in the Codicil to Jemima must be taken in connection with the devise to Milward in the Will; and taking the revocation of that devise in the Will, with the devise in the Codicil, it amounts to a plain intention to put Jemima in the place of Milward. *Fen v. Lowndes* (4 Burr. 2247), *Bristow v. Bristow* (5 Beav. 289), *The Earl of Shaftesbury v. The Duke of Marlborough* (7 Sim.

237), *Att.-Gen. v. Lloyd* (1 Ves. Sen. 32), *Scrivener v. Smith* (2 De G. M. and G. 399). Then the furniture of the house which was bequeathed to Milward is given to Jemima, clearly showing the intention of giving her what the Testator had taken from Milward. *Evans ex dem. Brooke v. Astley* (3 Burr. 1570), *Doe d. Atkinson v. Fawcett* (3 Man. Gr. and Sc. 275), *Doe v. Haslewood* (1 Nev. and Per. 352), *Doe v. Pratt* (ib. 366). This is a necessary construction, and can only be excluded by an express declaration that the [126] Testator, in revoking the devise in fee to John Gardner Milward, intended to give the house to the new object of his bounty for a different estate, namely, to give it to his daughter, for her life merely, or in tail, or for a term of years. On the assumption that Jemima Johnson Lee took a life estate only under the Codicil, the proper conclusion would be, that the Testator died intestate as to the reversion in fee expectant on such life estate, and the Appellant has shown no title as heir-at-law.

Judgment was postponed, and now delivered by

The Lord Justice Turner (July 5, 1858).—After stating the facts of the case, the Will and Codicil, his Lordship proceeded:—

The Supreme Court of Jamaica was of opinion that, under the Codicil, the Testator's reputed daughter, Jemima Johnson Lee, took an estate in fee, in the house in Spanish Town; and the first point we have to determine is, whether that decision is well-founded, or whether, as contended by the Appellant, Jemima Johnson Lee took under the Codicil, a life estate only in the house in question. It was not disputed at the Bar, and cannot be denied, that if the devise of this house, contained in the Codicil, had been an original devise, unconnected with the previous disposition made by the Will, Jemima Johnson Lee would have taken no more than a life estate; but it was argued in support of the judgment of the Supreme Court, that the devise by the Codicil must be taken in connection with the revocation of the devise to Milward, and that taking the revocation of the devise by the Will, and the devise by the Codicil together, there [127] was a plain intent on the part of the Testator to put Jemima Johnson Lee in the place of Milward, and to give her the same estate and interest as Milward would have taken if the devise to him had not been revoked. Their Lordships cannot but think it probable that this was the intention of the Testator, and if they felt themselves at liberty to indulge in conjecture, they would, probably, adopt that conclusion; but it is upon intention, either expressly declared or collected by just reasoning upon the terms of the instrument, or evidenced by surrounding circumstances, where surrounding circumstances can be called in aid, and not upon conjecture merely, their Lordships feel bound to proceed. The strict observance of this rule, unimportant as it may be in particular cases, is of the highest importance, when considered generally, with reference to the rights of property; for if it be not strictly observed, those rights will become dependent upon the mere arbitrary will of the Judges whose duty it may be to adjudicate upon them. In the present case there is clearly no express declaration by the Testator of any intention on his part to put Jemima Johnson Lee, in all respects, upon the same footing as Milward stood in under the Will, nor are there any surrounding circumstances from which that intention can be collected; and the question, therefore, in their Lordships' opinion, is reduced to this: Can that intention be collected by any just reasoning on the terms of the Codicil? The mere fact that the house is given by the Will to Milward, his heirs and assigns, and that by the Codicil, the gift to Milward is revoked, and the house is given to Jemima Johnson Lee, does not seem to afford any just inference of intention to give to Jemima Johnson [128] Lee more than the words of the devise to her would carry. The revocation of the devise to Milward imports that the Testator did not intend that he should take the house; but it does not import that he intended that Jemima Johnson Lee should take more than would pass by the terms of the devise to her. It is quite consistent with the revocation of the devise to Milward, that the Testator may have intended that what did not pass to Jemima under the devise to her, should either go as the law would give it, or should be the subject of future disposition. If, indeed, we give credit to the Testator for understanding the rules of law, the terms of the devices in the Will and Codicil seem rather to lead to a conclusion opposite to that at which the Supreme Court has arrived; for by the Will, the Testator gives the house to Milward, his heirs



and assigns, but by the Codicil he leaves it to Jemima Johnson Lee, without any words of limitation. It is said, however, that upon the very words of this Codicil, the Testator has given to Jemima what he has taken from Milward; that he has revoked from Milward and left to Jemima; but this argument rests upon the meaning to be attached to the word "it." If that word means the estate and interest which Milward had in the house, the argument may be good; but if it means, as their Lordships think that it does, "the house," the argument drops to the ground, for then there is no more than a revocation of the devise to Milward, and a gift of the house to Jemima. Reliance was also placed, in support of the judgment, upon the bequest of the furniture by the Codicil. It was said, that this bequest would pass only the same furniture as was given to Milward by the Will, the furniture subject to the [129] exception contained in the Will; that the bequest, therefore, showed the intention to be to give to Jemima what had been given to Milward: but whatever may be the proper construction of this bequest—and their Lordships give no opinion upon it—the bequest is, at all events, a new bequest, not to be measured by the revocation, which does not extend to the furniture; and it is difficult to suppose that if one part of the dispositions made by the Codicil in favour of Jemima was not intended to be measured by the revocation, other parts of the same disposition could be intended to be so measured. Several other arguments were attempted to be drawn from the language of other parts of this Will and Codicil; but their Lordships do not think it necessary to advert to them.

For the reasons which have been given their Lordships would find difficulty in assenting to the conclusion at which the Supreme Court has arrived, even without reference to the authorities; but they think that the authorities which were referred to in the argument bear very strongly upon the question. It seems to be well settled that, under a devise of a house in fee with an executory devise over, indefinite in terms, the devisee over takes a life estate only in the event of the executory devise taking effect. The law does not in such a case give effect to any presumed intention on the part of the Testator that the devisee over should take the same estate as the prior devisee would have taken, and their Lordships can see no reason why such an intention should be presumed and should take effect in a case like the present, if it cannot be presumed and cannot take effect in the cases referred to. It was attempted to distinguish those cases upon the ground that they were not cases [130] of substitution; but whether they were cases of substitution or not, they were cases in which the presumption would be at least as strong, if not stronger, than in the present, that the devisee, who ultimately took, was meant to take the same estate as the first devisee would have taken. It remains only to observe upon this part of the case, that the authorities which were cited in support of the judgment are clearly distinguishable. Upon the whole, their Lordships are of opinion, that Jemima Johnson Lee took a life estate only in the house in question.

The only other point in the case is, whether the reversion in fee expectant upon the determination of Jemima Johnson Lee's life interest passed under the residuary devise in the Will; and their Lordships are of opinion that it did, for there was a complete revocation of the devise to Milward, and no disposition under the new devise beyond the life interest to Jemima Johnson Lee.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the judgment complained of, and to remit the case with a declaration, that the Appellant was entitled to recover in the ejectment, one moiety of the house in question, and with directions to enter up judgment for the Appellant, with the costs of the action accordingly. The costs, which were given against the Appellant, if paid, to be refunded; but their Lordships do not see fit to recommend that there should be any costs of the appeal.

## [131] ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF LOWER CANADA.

HARLOW MINER,—*Appellant*; FRANCIS GILMOUR,—*Respondent* [June 18, 19,\* Dec. 2,† 1858].

Rights of a riparian proprietor to use of water flowing past his land explained and defined.

Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes and for his cattle, and this, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has, also, the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him.

Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury [12 Moo. P.C. 156].

Where a party purchased a piece of land with the right to use the water of a river in Lower Canada, subject to a preference in favour of a mill thereafter to be built, and which preference was to be exercised in a particular mode, such purchaser is not bound by its exercise in a different mode, and in favour of a different mill.

The purchase of the right to the use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion, from diverting the water by virtue of a right which existed prior to the first purchase [12 Moo. P.C. 154].

There is no difference between the law of Lower Canada and the English law upon these points [12 Moo. P.C. 156].

This was an appeal from the judgment of the Court of Queen's Bench of Lower Canada, which reversed [132] a judgment of the Superior Court of Lower Canada, so far as regarded the rights of the Appellant and Respondent to the use of the water in the Yamaska, otherwise Granby river, flowing by their respective lands on the banks of that river.

The Appellant was the owner of a plot of ground situate on the south bank of the Yamaska, and at the south end of a dam across the river he had erected a tannery. The Respondent was the owner of a plot of ground on the north side of that river, opposite the Appellant's land; he was also owner of a piece of land on the same side lower down the river, on which was erected a grist-mill worked by water power afforded by the river. A dam had been erected across the river from the land of the Appellant to the land of the Respondent, and in this dam there was a flume for the purpose of conveying the water held back by the dam to the Appellant's tannery. In the northern half of this dam there was a sluice, or gate, by opening which the water was drawn away from the dam, and from the Appellant's tannery, and was sent down the channel of the river. The Respondent claimed the right to open the gate on the north side, over which he had control, and by which means the water was diverted from the Appellant's tannery. In consequence of the scarcity of water during periods of dry weather, and the Respondent keeping the sluice in his part of the dam open, to allow the water to flow down to his mill at the lower dam, the rest of the water at the

\* Present at the hearing on the 18th and 19th of June, 1858: The Right Hon. Dr. Lushington, The Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Knight Bruce, and the Right Hon. The Lord Justice Turner.

† Present at the re-argument on the 2nd of December, 1858: The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, and the Right Hon. Sir John Taylor Coleridge.



upper dam was insufficient for the use of the Appellant's tannery. The Appellant deeming this injurious to his rights, commenced an action against the Respondent in the Superior Court of Lower Canada. The declaration set out the Appel-[133]-lant's title under a conveyance, dated the 13th of July, 1835, from one Horner, and alleged that the Respondent afterwards became entitled to the upper dam, except the portion thereof sold to the Appellant; and that the Respondent, intending to prevent the Appellant from using and enjoying the water privilege so sold to him, and to deprive him of his just rights, wrongfully and illegally caused to be raised and kept open the gate in that portion of the dam which had belonged to, and been in possession and under the control of, the Respondent; through which gate, so raised and kept open by the Respondent, the water of the river collected above the dam, flowed and ran to waste, and had continually and constantly so run to waste during the period of ten years; that the Appellant was thereby deprived of the use of the water for the purpose of propelling and moving the wheels and machinery of the tannery; and his privilege had been during the same period, and then was, by the illegal and wrongful acts of the Respondent, rendered almost useless, and entirely so during dry seasons. That the Respondent, by raising and opening the gate and drawing off the water, had, from time to time, caused a great quantity and weight of ice and other heavy bodies in the river to settle and rest down upon the dam, thereby breaking the supporters and timbers of the dam, and causing it to settle down and move from its position, and to crack and become leaky and insufficient to retain the water, so as to enable the Appellant to use the same for the purpose of moving and working his wheels and machinery in and about the tannery; and that in consequence of the wrongful and illegal acts of the Respondent, the bark-mill and other machinery in his [134] tannery had been idle for a great part of the time for several years then past, to the great damage of the Appellant; that the Respondent had suffered to run to waste through the gate a much larger quantity of water than would be sufficient for the driving of a grist-mill or the carrying on of its operations. That by law the Appellant, being the proprietor of land on the bank of the river, and of the water privilege and premises mentioned in the deed of sale to him, had a right to use the water of the river for manufacturing and other purposes while the same flowed adjacent to and over his lands and premises, but that he had been, and was, prevented from so doing by the acts of the Respondent. The declaration also complained of an injury to the Appellant's water-power, by reason of the Respondent having raised the level of the water at the lower dam.

The Respondent, by his plea, claimed title through a conveyance, dated the 15th of March, 1831, from Horner to one Douglas, and of another conveyance dated the 21st of July, 1835, from Horner to Louis Guerout, to the portion of the upper and lower dam, and the grist-mill on the latter, described in and conveyed by those deeds; and alleged, that the Respondent and his *auteurs* had for more than thirty years been in possession and occupation as proprietors of the grist-mill; that the upper dam was, in fact, in existence and in use for the mill at and before the deed of sale from Horner to the Appellant, that the Appellant's purchase was with full knowledge on the part of Horner and of the Appellant, of the right of the Respondent and his *auteurs* to the use and maintenance of the dam for the purposes of the mill; and that the pretended rights of the Appellant so subse-[135]-quently acquired could not interfere with, affect, or diminish the rights of the Respondent and of his *auteurs* to the mill and mill-dam; that it was true that the Respondent opened the gate in the dam, from time to time, as necessary for the supply of water for his grist-mill, and had a right so to do; that the gate had in fact been made, and was in existence and used openly by all the *auteurs* of the Respondent for more than twenty years previous to the purchase by the Appellant from Horner of the emplacement in the Appellant's declaration described, and previous to the erection of the dam, as well as by Horner, the *auteur* of the Appellant, and others from whom Horner derived title. That the Appellant purchased the emplacement with the full knowledge of the existence of such gate, and that the water of the river retained by the dam flowed through the gate for the use of the mill, then owned by the Respondent; and that by law the Appellant had no right to complain of the Respondent in raising the gate, from time to time, for the use and working of the mill. That, inasmuch as at certain seasons of the year and for several months of the summer, during dry seasons, there was a great

scarcity of water in the river, the Respondent had always been willing and disposed so to use the water as to prevent the waste thereof, and had not at any time wasted the same, but that the Respondent was entitled to open the gate so as to permit the water of the river to flow through the dam, and the Appellant had no right to complain of the acts of the Respondent. That without such gate, and the free use of it for the working of his mill, the Respondent would for several months in each year be prevented from using his mill for want of water, as, from the [136] situation of the land above the upper dam, the water of the river would not so accumulate at the dam as readily to overflow the dam and thereby reach Respondent's mill, but would be spread over an immense flat, pond, and swamp, extending for some miles above the dam.

The Appellant replied, that the Respondent could only claim the right of drawing the water from the gate and dam through a flume; whereas, he had never constructed or had any flume connected with the upper dam, through which to convey the water to his grist-mill below, but had always, since he possessed the gate, drawn off the water through the gate into the open river and caused the same to run to waste, and had injured and damaged the Appellant as complained of in the declaration.

Witnesses were examined on behalf of the Appellant and Respondent respectively, from whose evidence it appeared, that the upper dam was built after the sale by Horner to Douglas of the grist-mill, and about a year before the transfer of it to Guerout, and that for many years the water had been allowed to flow through the gate in the upper dam to drive the grist-mill. From the evidence of Horner, it appeared that he built the dam for supplying water-power to the tannery of the Appellant, and to a saw-mill, then intended to be built above a bridge, and that the dam was not intended for supplying water to mills below the bridge; that the gate in the dam was built with the intention of having a flume connected with it to convey the water to the saw-mill intended to be built below the dam; but that no such mill had ever been built. That about 192½ yards below this dam there was another dam, which crossed the river, and a [137] bridge lay between the dams, which were called the upper dam and the lower dam. Adjoining the lower dam was situated the grist-mill of the Respondent, which was worked by water-power, derived from the river by means of the lower dam and a flume connected therewith. It further appeared from the evidence, that on the 15th of March, 1831, Horner conveyed this mill to Douglas, subject to the keeping and upholding in repair one-third part of the mill dam, for the use of the mill. By Douglas the mill was conveyed to Guerout on the 17th of November, 1835, and by Guerout it was conveyed to the Respondent on the 5th of March, 1850. Besides being the owner of the mill, the Respondent, on the 5th of March, 1850, became the owner also of the plot of ground, formerly of Horner, on the north side of the river, opposite to the Appellant's tannery, extending to the mid-stream of the river there, and including the northern moiety of the upper dam. The title to this plot, as appeared from the documentary evidence, was as follows:—On the 21st of July, 1835, Horner conveyed it to Guerout, with the dam thereon erected and water privilege thereunto belonging, also with the right of drawing or carrying water in a flume across the tract thereby lastly reserved and mentioned, with the right and privilege of flowing such parts and parcels of certain lots in the conveyance specified, and of any other tracts of land then covered with water, flowing back from the said dam, but subject to the support and maintenance of the dam along with the Appellant. It appeared that on the 2nd of June, 1837, this conveyance was confirmed by a conveyance made to Guerout, by the Sheriff of the District of Montreal, under a writ of execution against Guerout: and ultimately, on the 5th of March, 1850, the plot was conveyed by Guerout to the Respondent by the same instrument by which the mill was conveyed to him as above mentioned. It also appeared that the mill was in existence in 1831, and some time previous: that in 1831, when sold by Horner to Douglas, it had two runs of stones, which had by the Respondent been increased to four runs of stones. Horner, in his evidence, further stated that he built the lower dam, and Douglas, in his evidence, stated that he had no water right above the bridge. No objection appeared to have been raised to the erection of the upper dam.

The Superior Court, on the 22nd of May, 1855, gave judgment, holding that the



Appellant had established by evidence the material allegations of his declaration, so far as the same related to the right of the Appellant to the use of the water of the river to be taken through the flume in the south end of the upper dam for the use of his tannery and all things thereunto belonging; and to the Respondent having caused to be raised and opened the gate in the upper dam lying north of the flume of the Plaintiff, whereby the Appellant was deprived of the use of the water of the river collected above the upper dam for his tannery; and the Court declared, that the Respondent had not at any time any right by law to raise or open the gate in the upper dam and draw the water of the river through the gate, so as to deprive the Appellant of the use thereof for his tannery, and ordered, that the Respondent should thereafter cease from drawing the waters of the river through the gate, and from depriving the Appellant of the use thereof.

The Respondent appealed from this judgment to the Court of Queen's Bench of Lower Canada.

[139] The Court of Queen's Bench, consisting of Sir H. L. Lafontaine, Chief Justice, and the Pusine Judges, Aylwin, Duval, and Carow, on the 12th of January, 1857, reversed the judgment of the Lower Court and dismissed the action, on the following grounds:—That Horner, by his act of the 15th of March, 1831, having sold to Douglas two lots of land in the village of Granby, and the grist-mill then erected in the river Granby, with all its dependencies, there was comprised in the sale the privilege of the flow of water for the use of the mill; that subsequently Horner, having by an act of the 13th of July, 1835, sold to the Appellant a little piece of land situate at the south end of the dam then erected by the vendor across the river, at some distance above the grist-mill, with the right to employ the water through a channel then made in the southern end of the dam, sufficient for the use of a tannery; but, nevertheless, by a stipulation expressed in the act of the 13th of July, 1835, the privilege thus ceded was subordinate to the vendor using the water for a grist-mill, which was to have the preference, that is to say, the use of the water retained by the dam in preference to that which the Appellant obtained permission to employ for his tannery; that the preference could be applied to any grist-mill whatever that Horner could acquire, even already constructed within the limits of the water-flow which was the subject of the stipulation, as also to any new grist-mill which he might construct within the same limits; that, in consequence, the stipulation might be applied to the grist-mill which Horner had sold to Douglas, in case Horner should become anew the proprietor of it; that in virtue of the act of sale of the 21st of July, 1835, from Horner to Guerout, [140] the latter stood in the place of his vendor in relation to the Appellant as regarded the act of the 13th of the same month, and that by another act of the 17th of September, 1835, Guerout had acquired of Douglas the grist-mill which the latter had acquired of Horner, and in consequence the stipulation of preference in the act of the 13th of July, 1835, ought to be applied to the mill from the moment that it had been acquired by Guerout; that the Respondent stood, by the deed of the 5th of March, 1850, in the place of Guerout with his rights as above expressed, and that, in consequence, he was justified, whilst the state of the water rendered it necessary, in taking advantage of the stipulation of preference which Horner had inserted in the act of sale to the Appellant of the 13th of July, 1835; that it was not established by the evidence in the cause that the Respondent had abused his right to use the water retained by the dam, though the volume of water necessary for the tannery of the Appellant had sometimes been diminished in a manner prejudicial to its business.

The appeal was from this judgment.

The case was twice argued by the same Counsel: First on the 18th and 19th of June, 1858, and afterwards, by direction of their Lordships, on the 2nd of December, 1858.

Mr. Wilde, Q.C., and Mr. Unthank, for the Appellant; and Mr. Manisty, Q.C., and Mr. Ayrton, for the Respondent.

The argument of the Appellant was, that the Re-[141]-spondent and his *auteurs* never gained a right to the lower dam, so as to prevent him using the water flowing to his tannery, and that the Respondent having control over the upper dam, had improperly kept the gate open and prevented the flow of the water; as the right to the use of the dam was, as between the Appellant and Respondent, regulated by con-

veyances dated the 13th of July, 1835, and the 21st of July, 1835, mentioned in the judgment appealed from.

On the part of the Respondent it was contended, that Horner, under whom both the Appellant and Respondent claimed, conveyed to the Respondent his mill, with the requisite use of the water for the same, before the conveyance was made to the Appellant of any right to the use of the water for his tannery. That the Appellant's conveyance was made expressly subject to the right of water for a mill, which right had become vested in the Respondent, and that the acts complained of were done in due exercise of such a right. That the Respondent's mill was erected prior to the Appellant's tannery, and the water had been used by the Respondent in the manner complained of for a period of time sufficient to confer a right thereto.

The authorities referred to as bearing upon the question of the respective right of the parties to the use of the water of the river Granby were: By the law of Lower Canada, Douet's Princ. of the Law of Lower Canada, Art. 186, pp. 189, 265; Pandects of Jus., Lib. 43, Tit. 13, Art. 1; Pothier, Tome 17, p. 520 (Edit. Paris, 1823).

The following English authorities were also referred [142] to: *Embrey v. Owen* (6 Exch. Rep. 353), *Liggins v. Inge* (7 Bingham 682), *Wood v. Wand* (3 Exch. Rep. 748), *Greatrex v. Hayward* (8 Exch. Rep. 291), *Bealey v. Shaw* (6 East. 208), *Mason v. Hill* (3 Bar. and Ad. 304), *Wright v. Howard* (1 Sim. and Stu. 190), Gale "On Easements," pp. 132-37; Woolwych "On Waters," pp. 263, 267. And, by the American Law, 3 Kent's Comm. p. 544; *Tyler v. Wilkinson* (4 Mason's U.S. Rep. 400).

The consideration of the judgment was postponed, and was now delivered by

Lord Kingsdown (12th Feb., 1859).—In this case, Miner, the Appellant, is the owner of a piece of land on the south side of the river Yemaska, upon which land a tannery has been constructed. The Respondent is the owner of a piece of land on the north side of the river immediately opposite to the land of the Appellant; and he is also the owner of a piece of land on the same or north side of the river lower down the stream, on which a grist-mill stands, which is worked by means of the water-power afforded by the river. Across the river, from the land of the Appellant to the land of the Respondent, a dam has been erected, and in this dam there is what is termed a flume, or conduit, for the purpose of conveying the water held back by the dam to the Appellant's tannery. In the northern half of this dam there is a sluice or gate, by opening which the water is drawn away from the dam, and from the Appellant's tannery, and is sent down the channel of the river. The Appellant insists, that the Respondent, having the control over this gate, has improperly opened it, and kept it open, and has thereby [143] wrongfully withdrawn the water from the tannery, to the great injury of the Appellant.

The Court before which the case came in the first instance decided that the Respondent had no right so to open the gate to the injury of the Appellant, and made a declaration to that effect, followed by an order restraining the Respondent from the like acts in future.

From this decision an appeal was brought to the Court of Queen's Bench of Lower Canada, which reversed the order complained of, and dismissed the Appellant's action. From this last decision the case has been brought by appeal to Her Majesty in Council.

The titles of the parties appear to stand thus:—

In the year, 1831, Horner was the owner of all the lands now in question, whether belonging to the Appellant or Respondent. Previously to that year the grist-mill, now belonging to the Respondent, had been erected with a dam of a certain height, across the stream, by means of which the water was employed to work the mill.

On the 15th of March, 1831, Horner sold and conveyed to Douglas, amongst other things, this grist-mill, with what is termed in this conveyance the "water-privilege" on the lot on which it stood, and the machinery and yard thereunto belonging or in any wise appertaining, and all his estate and interest therein.

In 1834, Horner erected the dam which is the subject of the present dispute, and which is higher up the stream than the dam of the grist-mill; and on the 13th of July, 1835, he conveyed to Miner the lot of land now belonging to him, which is described in the conveyance as a lot of land situate at the south [144] end of the dam erected across the river, together with the right and privilege of water to be



taken through the flume now erected on the south end of the said dam sufficient to supply a tannery and all things thereunto belonging.

It seems that at this time, Horner contemplated the erection of a grist-mill on the opposite side of the river, on the land there now belonging to the Respondent, and that mill was to be worked by means of the water collected at the dam, which was also to serve the tannery, and that he intended that the grist-mill so to be erected should have a preference with respect to the supply of water over the tannery, and accordingly the conveyance to Miner, after referring to such intention, provides that the taking of water for the use of the tannery shall in no case ever interfere with, or impede, the working of the grist-mill so intended to be erected, and that the grist-mill shall at all times have the preference of water to carry on its works and all things thereunto belonging. The deed then provides that Miner shall at all times keep a tight flume, and shall support and keep in repair so much of the said dam as shall be found south of the said flume.

On the 21st of July 1835, Horner sold to Louis Guerout the piece of land on the north side of the river, with the right of drawing water from the dam by means of a flume across certain lands belonging to Horner, but not included in the conveyance to Guerout; and Guerout bound himself to maintain and keep in repair so much of the dam as Miner, by his deed, was not bound to support.

It is material to consider, what at this time were [145] the several rights of Douglas, of Miner, and of Guerout, all claiming under Horner, on the assumption that Horner had a right, before the execution of any of these deeds, to deal with the water of the river as he pleased. Having sold and conveyed to Douglas, in the first instance, the mill and the right to the use of the stream for the purpose of working it, he could not afterwards derogate from that grant by a subsequent conveyance to other persons interfering with it. No diversion or interruption of the stream could be made by Horner which would prejudicially affect the mill in the state in which it was sold by him to Douglas, nor could he convey to others the right of doing what he could not do himself.

On the other hand, as between Miner and Guerout, each was bound to maintain his share of the dam; each was entitled to the use of the water, the one for a grist-mill, the other for a tannery: but the right of the tannery to the use of the water was to be subject to a preferential right on the part of the owner of the grist-mill.

Douglas was an entire stranger to the conveyances made to Miner and Guerout; he could claim nothing under them, he could suffer nothing from them; he had a clear right to insist that neither the use of the water for the new grist-mill, nor the use of the water for the tannery, should interfere with the regular supply of the water for his mill in its then state, which had been granted before either Miner or Guerout had any title to their several estates. The obligations of Miner and Guerout to each other, and to Horner, as to maintaining the dam, in no degree affected the right of Douglas to insist that, [146] whether kept in repair or not, it should not be so used as to damage his mill.

Such being the rights of the parties, on the 17th of November 1835, Douglas sold and conveyed his property in the grist-mill to Guerout, and this conveyance seems to have been confirmed by a subsequent deed of the 2nd of June 1837, the particulars of which are not important to the present purpose.

Guerout then stood in the position of Douglas, and, as claiming under him, he had a right to insist that the upper dam should not be so used as to injure the fair working of the old mill.

Miner could not possibly acquire a better right for his tannery, by reason of Guerout being the purchaser of Douglas' mill, than he would have had if any stranger had purchased it. On the other hand, Guerout, by being the owner of the upper dam, or of that portion of it in which the gate was placed, could not acquire any greater right to have it opened and kept open, than he would have had if it had belonged to a stranger; he had a greater facility of opening it, because it was under his own control, but his right was not altered. As owner of Douglas' mill, he had a right to remove any obstruction to the flow of the water for the fair use of his mill. As the owner of the gate, he had the means, by opening it, of removing that obstruction without violence, or the necessity of applying to any third person.

Again, as claiming under Horner, Guerout was bound to keep his side of the

dam in repair, and not to permit the water to leak or to run to waste, so as to prejudice the Appellant's tannery.

[147] On the 5th of March 1850, all the rights of Guerout in the lands in question were transferred to Gilmour, the Respondent. No grist-mill was ever erected by Guerout, or by Gilmour, on the plot of land conveyed to Guerout by Horner in 1835, nor was any flume constructed for the purpose of drawing away the water from the dam erected above that plot. But it appears that two pair of stones were added to the grist-mill on the lower part of the stream, which had become the property of Guerout, in the manner already described.

Both the tannery and the grist-mill continued to be used by their respective owners, without any dispute which led to litigation, until the institution of the suit out of which the present appeal arises. During all this period, it is alleged by the Respondent that he had been in the constant habit of opening the gate in the upper dam, whenever it was requisite to do so, for the purpose of working the grist-mill. In the month of September 1853, the action in this case was commenced by the Appellant, Miner, against the Respondent: and it will be desirable to examine, with some minuteness, the pleadings in the action, and the judgments, in order to see what questions, and what questions alone, are open to consideration by their Lordships on the present appeal.

The Appellant, in his declaration, after stating the conveyance to him by Horner, and the establishment of his tannery, and that the Respondent had become the owner of the opposite plot of land, and that no grist-mill had ever been erected on the plot, alleges, that the Defendant has, "nevertheless, illegally, unjustly, and maliciously, during several years last past, to wit, for a period of ten years, opened, and caused [148] to be kept open, a certain gate, which was, and is, in that portion of the said dam lying north of the said flume which has been, and now is, in the possession and under the control of the Defendant, through which gate so raised and kept open by the said Defendant as aforesaid, the water of the said river, collected above the said dam, flows and runs to waste, and has continually so run to waste during the aforesaid period of ten years: and that the Plaintiff has been, and is thereby, deprived of the use of the said water, for the purpose of propelling and moving the wheels and machinery of the said tannery, and his said privilege has been during the said period, and now is, by the said illegal and wrongful acts of the said Defendant, rendered almost useless, and entirely so during every dry season." He then alleges that the dam itself is injured and broken by the ice brought down upon it in winter by means of the water being so drawn off, and proceeds:—"That the said Respondent has wrongfully and illegally, during the period of ten years, drawn off, and caused and suffered to run to waste, as aforesaid, through the same gate, as well as through the leaks, cracks, and openings caused by the Defendant, as aforesaid, in the said dam, a much larger quantity of water than would be sufficient for the driving of the grist-mill or the carrying on its operations. That by law, the Plaintiff, being the proprietor, as aforesaid, of lands on the banks of the river, and of the water privileges and premises mentioned in the said deed of sale, hath a right to use the water of the said river for manufacturing and other purposes while the same flows adjacent to and over his said lands and premises, but that he has [149] been, during the ten years aforesaid, and is, prevented from so doing by the aforesaid wrongful and unjust acts of the Defendant." He then alleges that he has sustained damage by these acts to the extent of £225 currency, and prays that he may be paid the amount of these damages, and that it may be declared that the Defendant has no right to raise or open the said gate in the said dam, above-mentioned, and to draw the water through the said gate, and to deprive the Plaintiff of the use thereof, and that the Defendant may be ordered to desist from drawing water through the said gate, and from depriving the Plaintiff of the use thereof. He made another complaint against the Defendant, of his having raised the lower dam to the prejudice of the Plaintiff, but this matter was decided in favour of the Defendant, and is not the subject of appeal.

In February 1854, the Respondent filed his plea or answer to this declaration, and thereby, after stating his title under the deeds already mentioned, he alleges—"That the Defendant and his *anteurs* have, for more than thirty years past, had in possession and occupation, as proprietors, the grist-mill and premises in the



Plaintiff's declaration referred to, which mill is situated at a distance of thirty-seven perches below the dam in the Plaintiff's declaration referred to;" and he annexed a diagram showing the situation of the two dams. That the dam at the Defendant's mill was built about thirty-nine years since for the use of the mill and other works therewith connected and adjoining thereto, and has been constantly ever since kept and maintained by the Defendant and his *auteurs* in possession of the mill and premises there-[150]-with connected, and says it was in existence when the Plaintiff's tannery was erected.

With respect to the upper dam, he says, "That he has always hitherto done and performed all such acts, and made such repairs, and such only, as were necessary for the maintenance of the dam, and which the defendant was bound to perform and do under his said title; that the Defendant hath never contested nor interfered with Plaintiff in the exercise of his rights under the title, nor with his, the Plaintiff's, right of taking or using the water at the dams for the use of the Plaintiff's tannery and other works; nor hath he at any time injured the said dam, or done any other matter or thing whereby damage could be or was incurred by the dam or Plaintiff's works;" and he further says, "That true it is, that said Defendant opened a certain gate in said dam from time to time as was necessary for the supply of water for his said grist-mill, and had and hath a right so to do; that the said gate had, in fact, been made, and was in existence, and used openly by all the said *auteurs* of the said Defendant, for many years, to wit, for more than twenty years, previous to the purchase by the Plaintiff from said John Horner, of the emplacement in Plaintiff's declaration described, and previous to the erection of the said dam, as well by the said Horner, the *auteur* of the Plaintiff, as others from whom the said Horner derived title. That the Plaintiff purchased the said emplacement with the full knowledge of the existence of said gate, and that the waters of the river retained by the said dam flowed and must flow through the said gate for the use of the said mill, now owned by the said Defen-[151]-dant, and that thereby, and by law, the Plaintiff hath no right to complain of the Defendant in raising the said gate from time to time, and at all times, necessary for the use and working of his said mill; that inasmuch as at certain seasons of the year, and for several months of the summer, during dry seasons, there is a great scarcity of water in said river, the Defendant hath always been willing and disposed so to use the said water as to prevent the waste thereof, and hath not at any time wasted the same, but the said Defendant was, by reason of the premises and his said titles, and is now, entitled to open the said gate as to permit the water of the river to flow through the said dam, and the Plaintiff hath no right to complain of such acts of the Defendant, nor can he obtain the conclusions of his said declaration in reference to said gate. That without such gate, and the free use of it to the Defendant, for the working of his said mill, he, the Defendant, would for several months in each year be prevented from using his said mill for want of water, inasmuch as, from the peculiarity and situation of the land above said upper dam, the waters of said river would not so accumulate at said dam as readily to overflow the said dam, and thereby reach the Defendant's mill, but would be spread over an immense flat and pond and swamp, extending for some miles above said dam, of all which the Plaintiff was, and has been, well aware."

The Defendant, therefore, did not deny his liability to keep his part of the upper dam in repair, but he alleged that he had done so. He did not insist on any right to waste the water, or to take more than was necessary for his mill, but he denied that he had done so. He rested his right to open the gate, not [152] exclusively (if at all) on the preferential right to water reserved to a grist-mill in the conveyances by Horner to the Appellant Guerout, but on the general law, and the fact that his mill had been built and was in use, with the necessary flow of water, long before the Appellant had any right or interest in the matter.

To this plea the Appellant, on the 10th of February, 1854, filed a replication, in which he insisted that the Respondent could make no defence under the conveyance from Horner to Guerout. He denied that the Respondent had kept his part of the upper dam in proper repair, or that the Respondent and his *auteurs* had been accustomed to open the gate for the purposes of the grist-mill; but he did not allege that any alteration had been made in the grist-mill, or that by reason thereof, or for any other reason, the Defendant, as owner of the grist-mill, had lost or prejudiced

any right to whatever use of the water could originally have been claimed in its favour.

The cause being at issue, a great many witnesses were examined, and documents produced on each side; and on the 22nd of May, 1855, the Superior Court, in which the action was brought, pronounced its judgment, by which it declared, in effect, that the Plaintiff (the present Appellant) had established the material allegations of his declaration, so far as the same relate to the right of him, the Plaintiff, to the use of the water Yemaska to be taken through the flume on the south-end of the upper dam, in the said declaration described, for the use of his tannery, and all things thereunto belonging, in the manner by the Plaintiff in his declaration set forth: and to the Defendant (the present Respondent) having caused to [153] be raised and opened, and kept open, the gate in the upper dam lying north of the flume of the Plaintiff, whereby the Plaintiff was and is deprived of the use of the water of the river collected above the upper dam for the tannery, and the whole as set forth in the declaration; and it is, therefore, adjudged and declared that the Defendant hath not, nor had he at any time, right, by law, to raise or open the gate in the upper dam, and to draw the water of the river through the gate, so as to deprive the Plaintiff of the use thereof for his tannery and all things thereunto belonging; and it is ordered that the Defendant shall hereafter cease and desist from drawing the waters of the river through the gate, and from depriving the Plaintiff of the use thereof. The Court then decides that the Plaintiff is not entitled to any damages, inasmuch as the rights of the parties had not been theretofore ascertained and settled by judicial decision.

The Court, therefore, determined that the Defendant had no right for any purpose to open the gate in the dam so as to withdraw the water from the Plaintiff's tannery; but it must have held that as to any wrongful or malicious exercise of the right, if the right existed, any excessive use of the water, or waste of it by leakage of the dam occasioned by the Defendant, or by reason of other wrongful acts of his, no case had been made out: otherwise, of course, the Plaintiff would have been entitled to damages.

From this part of the decision there was no appeal: but the Defendant appealed to the Court of Queen's Bench from so much of the judgment as established the right of the Plaintiff to prevent the gate from being opened by the Defendant.

[154] On hearing this appeal, the Court, confining itself to the question of right, which alone was before it, reversed the decision of the Court below, and dismissed the Plaintiff's suit. The Court appears to have founded its opinion on the effect of the conveyances by Horner to Miner and Guerout, and to have held, that the preference of the right to water reserved out of the grant to Miner, might be exercised by Horner, or the Respondent claiming under him, in favour either of any grist-mill which might be built, or of any such mill which, being already built, might come into the hands of the same proprietor, with the plot of land sold to Guerout.

There appears to their Lordships to be considerable difficulty in maintaining this decision upon the grounds on which it has been rested below. It is very true that the conveyance to Guerout does not confine the right to draw the water from the upper dam to any particular grist-mill thereafter to be built, and it may be, and probably is, quite true, that the injury to the Appellant's tannery would be as great if the water were drawn away from it by means of the flume contemplated by the deed to Guerout, as it is by the withdrawal of it by means of the gate which is actually opened: indeed some of the Respondent's witnesses state that the injury would be greater. But it appears to their Lordships, that the Appellant having purchased the right to use the water, subject only to a preference in favour of a mill thereafter to be built, and which preference is to be exercised in a particular mode, cannot be bound by its exercise in a different mode and in favour of a different mill.

The question, therefore, must depend on the general [155]-ral rules of law as applied to the facts appearing in the case. The titles of the respective parties have already been stated, and the question being one merely of right, the evidence is material only as it bears upon that question.

The evidence appears to their Lordships to show, on the one hand, that the tannery may be, and in fact often is, deprived of the water necessary for its supply by the opening of the gate in the dam, as practised by the Defendant (the Respondent); and, on the other hand, that unless the gate be so opened, the Respondent's



mill must suffer great inconvenience, and cannot, in dry weather, be worked at all, and, indeed, must be stopped for several months in the year.

With respect to the usage which has prevailed, it appears to their Lordships, that the result rather shows that this gate has always been kept open whenever the use of the grist-mill required it, and that though no such usage has been proved as to constitute in itself a prescriptive right in favour of the mill, there is abundantly sufficient to show that there never has been any acquiescence, by the owner of the grist-mill, in any obstruction created by the upper dam, nor any compromise or abandonment of his right to the use of the water, whatever that right may originally have been.

It being necessary, therefore, that the tannery should suffer if the gate be opened, and that the mill should suffer if the gate be closed, the question for determination is, whether the Appellant, the Plaintiff in the action, has established a right to have the gate kept closed, and has proved that the Respondent (the Defendant) is a wrong-doer in opening it. The *onus* is upon him.

The law upon the subject, which is the French law [156] prevailing in Lower Canada, was examined and discussed by the Counsel at the bar, in the course of the two arguments which their Lordships found it expedient to require, with great learning and ingenuity. It did not appear that, for the purposes of this case, any material distinction exists between the French and the English law.

By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

Now, it being established by the evidence, that the closing of this dam does inflict a most serious injury upon the Respondent, upon what grounds can the Appellant insist that he has a right to close it?

He cannot say that the use of the water by the Respondent for his mill is not a lawful use; for such rights as he has, were acquired from the person under whom the Respondent claims, and with knowledge of the previous grant made to the Respondent.

It is not necessary to discuss any doubtful principles of law, or to inquire whether, under other circumstances, the Appellant could or could not insist, as against him, that the use of the water by the Respondent for his mill is not a lawful use; it is sufficient here to say, that the case must be dealt with as if it arose between Horner and Douglas, before the sales to either Miner or Guerout. Could Horner, having sold the mill with the use of the water to Douglas, have afterwards insisted on a right to intercept the regular flow of the water to the prejudice of that mill? Their Lordships are of opinion that he could not. The questions as to the stones added to the mill, and the injury done to the upper dam, and the neglect on the part of the Respondent to keep it in repair, are removed from consideration for the reasons already assigned. The sole question is, whether the Appellant, the Plaintiff in the action, has, in this suit, established a right to obstruct the flow of the water to the prejudice of the Respondent; if he has not such right, the Respondent was justified in removing the obstruction, doing no unnecessary injury to the Appellant. Their Lordships think that the Appellant has failed to establish his right to maintain such obstruction, and that his suit has, therefore, properly been dismissed. They must advise Her Majesty to affirm the judgment complained of; but in consequence of the great difficulty of the case, and of the affirmance proceeding upon different grounds from those on which the judgment appealed from was pronounced, they will recommend that the affirmance should be without costs.

tit. WATER, C. STREAMS, ETC., 1. *Rights and Incidents of*, b. iii.: 2. *Acquisition of Rights*, b. *By Grant*, S.C. 7 W.R. 328. See *Nuttall v. Brallwell*, 1866, L.R. 2 Ex. 9; *Edleston v. Crossley*, 1868, 18 L.T. 16; *Buccleuch v. Metropolitan Board of Works*, 1872, L.R. 5 H.L. 452; *Lyon v. Fishmongers' Co.*, 1876, 1 A.C. 683; *Orr-Ewing v. Colquhoun*, 1877, 2 A.C. 855; *Commissioners of French Hoek v. Hugo*, 1885, 10 A.C. 336; *North Shore Railway Co. v. Pion*, 1889, 14 A.C. 619.]

[158] ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

CATHERINE LLOYD and JANE ELIZABETH HART.—*Appellants*: PHOEBE ROBERTS,—*Respondent* \* [Feb. 16, 1858].

If a Will appears upon the face of it to have been properly executed according to the requirements of the Wills Act, 1 Vict., c. 26, the presumption of law is, that the Testator duly acknowledged it.

The grant of probate to a Will, which was entirely in the handwriting of the Testator, an attorney, without break or crowding, with an attestation clause in its proper place, and attested by two witnesses, was opposed by the wife and daughter of the Testator (they having been entirely excluded from any benefit under it) on the ground, that it was written after the witnesses attested the Will. One of the attesting witnesses was dead. The other deposed that when he signed the Will, with the exception of the Testator's signature, and the signature of the other attesting witness, the paper was blank.

Held, that from the appearance of the Will, as well as the circumstance that the Testator was a professional man well acquainted with the necessity of a proper execution, and the presumption of law; that the Will was written when attested, and had been duly acknowledged in the witnesses' presence, notwithstanding the testimony of the surviving attesting witness, who, in the opinion of the Judicial Committee, must have been mistaken, or his memory failed him.

John Lloyd, of Maentwrog, in the County of Merioneth, gentleman, the Testator in the cause, made his Will on the 8th of July, 1850, appointing the Respondent, a stranger in blood, sole executrix; to whom he gave and devised exclusively his real and personal estate. The Will was entirely in the hand-[159]-writing of the Testator, and attested by two witnesses, one of whom was dead. The validity of the Will was disputed by the Appellant, the Testator's widow, and by Jane Elizabeth Hart (wife of John Webster Hart), the other Appellant, the daughter and only child of the deceased, both of whom were excluded by the Will in question from all benefit in the Testator's estate, on the ground that it was not signed or acknowledged by the Testator, when the witnesses attested it.

The cause in the Court below was promoted by the Appellants, and originated in a business of citing, in virtue of Letters of Request from the Chancellor of the Consistorial and Episcopal Court of Bangor, the Respondent, to bring into the Registry of the Arches Court of Canterbury the above Will, and to propound the same in solemn form of law, otherwise to show cause why the Will should not be pronounced invalid, and the deceased intestate, and why Letters of administration of the goods of the deceased as having died intestate should not be granted to the Appellant, Lloyd.

An allegation was given in on behalf of the Respondent, which pleaded that the deceased with his own hand drew and wrote the Will in question on the 8th of July, 1850, duly executed the same by signing his name at the foot or end thereof in manner and form as then appeared, or by acknowledging his signature thereto then already

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. T. Pemberton Leigh, the Right Hon. The Lord Justice Turner, and the Right Hon. Dr. Lushington.



made. That he made or acknowledged such his signature in the presence of two witnesses, present at the same time, who respectively attested and subscribed their names to the Will in the presence of the deceased and of each other, as witnesses of the due execution thereof. That the deceased, in and by his Will, constituted and appointed [160] the Respondent sole executrix. That he was of sound and disposing mind and memory at the time of making and executing his Will. The allegation further pleaded that Edwards, one of the subscribing witnesses to the Will in question, a surgeon resident at Maentwrog, had died on the 12th of February, 1856, and that the signature, "Edward Edwards, surgeon, Maentwrog," appearing subscribed to the Will propounded, was the proper handwriting and subscription of Edwards, and was so well known and believed to be by divers persons of good faith and credit, who had often seen him write and subscribe his name to writings, and who had thereby become well acquainted with his manner and character of handwriting and subscription. That Edwards was a person of good character and reputation, and would not have subscribed his name as a witness to the execution of the Will of the deceased, unless the person executing the same had been of sound mind, and had executed the same in his presence: and that for and as such a person he, Edwards, was always accounted, reputed, and taken to be by and amongst his neighbours, friends, acquaintances, and others.

Rees, the surviving attesting witness, was the only witness examined by the Appellant. It appeared that in 1850 he was a relieving officer to a Poor law union in the neighbourhood of the Testator. He was examined *viva voce*. His evidence was as follows:—He deposed that he was then a small shopkeeper. "Q. Upon what terms was the deceased with his wife and daughter at the time of his death? A. They were not living on good terms. His wife had gone to live at a place at some distance, thirty years ago; and about five years ago I saw his daughter, Mrs. Hart, at [161] Maentwrog, but he took no notice of her. Q. Did you ever witness a Will for the deceased? A. He sent for me in company with the doctor, to sign some paper, which I was told was a Will, but I do not know whether it was a Will or not. Q. Who said it was a Will? A. He himself told me. Q. You say that he sent for you; did he come himself and ask for you, or did he send somebody else? A. He sent the servant. Q. Upon being sent for, did you go to the deceased? A. Yes; in a minute. Q. Who was the surgeon, who you said was also sent for? A. Edwards. Q. Did you accompany Edwards to the deceased? A. Yes. Q. When you got to the deceased's house, in company with Edwards, where did you find the deceased? A. Sitting on a chair close to the table. Q. In what room? A. In the room on the right-hand side, going into the upper house, at Penlan. Q. When you went into the room, did Edwards accompany you? A. Yes. Q. What did the deceased first say or do, on your entering the room? A. He folded a paper very neatly, and wanted us to sign our names in a great hurry, for he was off to London instantly. Q. What sort of a piece of paper was it? A. It was half a sheet of penny-paper, as we say in our country. Q. Was it like this (holding up a sheet of foolscap)? A. Something like that. Q. Which way did he fold it? Did he fold it crossway, or in this manner (*i.e.* lengthwise)? A. The longest way. He had rolled it down from the top, leaving space at the bottom for us to write our names. Q. When the Will was so folded down, did you see any writing on it? A. I saw his name, and that was all. It was in the corner. Q. Did you see any other writing? A. There was [162] no writing when we put our names on it. Q. Do you mean to swear that there was no writing, or that you do not recollect that there was? A. I am on my oath, and I know there was no writing. Q. What took place after the paper had been so folded down, as you describe? A. Nothing. I went away as soon as I had written my name, and I left Mr. Edwards with him. Q. What did the deceased say or do before you left the room? A. He said nothing to me. Q. Then we are to understand that nothing more passed beyond what you state? A. Nothing. Q. And you left the doctor there? A. Yes. Q. Did the deceased ask you to sign your name? A. Yes. Q. In what words did he ask you, as near as you can remember? A. I recollect his words very well: 'Write your name here, Robert Rees.' Q. Did the deceased say anything to Edwards about writing his name? A. He said exactly the same: 'Write your name.' Q. I understand that you left Edwards in the room? A. Yes, it was so." On further examination, upon being shown the Will,

and asked, whether the attesting clause was not there when he affixed his signature to it? he said, "Yes. I am quite certain as that I am standing here there was only that name (Edwards) there."

The Judge of the Arches Court (The Right Hon. Sir John Dodson) by an interlocutory decree pronounced for the Will. The material part of his judgment was as follows:—"What is the conclusion at which the Court must arrive? It is, that the witness, Rees, must be mistaken; and that his memory has failed him in this instance. The Will bears date the 8th of July, 1850, and, therefore, it is seven years [163] since it was executed. There seems to have been no imposition upon the Testator in any respect; and it is not suggested that there was; but the Court is told that the Testator might have written in the attestation clause afterwards; and then it is inferred from that, that he might also have written the Will afterwards; that, in point of fact, these persons signed their names to a blank paper; that is, blank in all respects, except the name of the Testator. But the character of Edwards renders that improbable. The Testator, too, being a Solicitor, must have known that it was necessary for a Will to be written before execution; and I can hardly conjecturally come to the conclusion, that a person in his situation, who had nothing to conceal from anybody about his Will, would have executed a blank sheet of paper. I must come to the conclusion that the deceased did sign this Will: that then he sent for two witnesses to attest it, and that he acknowledged his signature in their presence. One of these witnesses was a most respectable man, and it is admitted in the answers, that he would not have signed his name, unless everything was properly done. The most proper conclusion, therefore, for the Court to come to, is, that the surviving witness must have forgotten the circumstance, that there was any writing on the Will at all. I think, that between these two matters of conjecture, there is no manner of doubt in the mind of the Court, that the Will was written by the Testator, previous to its execution, and that then he signed it, affixed to it his seal, and had it attested by two witnesses. I think, therefore, that I must hold, that all the requisites of the Statute of Wills, 1 Vict., c. 26, have been complied with in this case; that the Testator [164] did sign his name to the Will, and did acknowledge his signature in the presence of two witnesses, who duly attested it in his presence, and in the presence of each other. I, therefore, pronounce for the Will."

Against this decree the Appellant brought the present appeal.

Dr. Addams, for the Appellant; and Dr. Phillimore, for the Respondent.—The case of the Appellant was, that Rees's evidence was conclusive that the Will had not been duly executed; as from his testimony there was not at the time he attested the Will, an attestation clause or any writing whatever, except the deceased's signature, and that in such circumstances no acknowledgment by the deceased could make the Will valid. *Hott v. Genge* (2 Curt. 160; S.C. 4 Moore's P.C. Cases, 265). Moreover, it was insisted, that the Will was inofficious as it entirely excluded the deceased's wife and daughter, and ought not in consequence to be looked at with favour by the Court.

For the Respondent it was contended: First, that from the appearance of the Will, it was apparent that it was entirely written before either of the attesting witnesses signed; that, therefore, Rees's testimony was not to be relied upon, as his memory might have failed him from the length of time since the date of the Will. Secondly, that it must be presumed that the deceased, a Solicitor, aware of the necessity of a strict adherence to the requisites of the Statute of [165] Wills, duly acknowledged his signature in the presence of the attesting witnesses. *Faulds v. Jackson* (6 Notes of Cases, Supp. 1).

The Right Hon. Dr. Lushington.—The question in this cause relates to the validity of the Will of John Lloyd, late of Maentwrog, in the County of Merioneth, the deceased in the cause. This Will is entirely in the handwriting of the Testator, without any break, or any crowding. It is sealed, and the attestation clause comes in exactly where the witnesses have signed their names. On the face of it, therefore, as everything is regular, and according to the formalities required by the Statute of Wills, 1 Vict., c. 26, it would be entitled to probate; because it appears, *prima facie*, to have been duly executed according to the provisions of the Statute. According to the maxim, "*Omnia præsumentur solemniter esse acta*," it must be presumed that the



Will was properly executed, and that presumption is strengthened by the fact, that the Testator was a Solicitor in considerable practice, and must have known that it was necessary that a Will must be written before it was attested. Now, in this case, it happens, that Edwards, one of the attesting witnesses, is dead. He was a surgeon, filling a respectable situation in the place where the Testator resided. The other attesting witness is alone available, and he is the sole witness in the cause. It is not necessary to take into account the amount of the Testator's property, or the state of the Testator's mind. These questions are not raised by the pleadings, and even if the Will is, as argued before us, inofficious, the fact of the separation [166] of the Testator from his wife and daughter for no less than thirty years before his death may account for that.

Two questions are now raised: First, that from the evidence of Rees, the surviving attesting witness, it might be that the whole Will was written after execution by the attesting witnesses. Secondly, whether there was a due acknowledgment by the Testator of the Will.

These questions depend exclusively upon the evidence of Rees, the surviving attesting witness. He is now a small shopkeeper, and at the time of his signing the Will was a relieving officer to a Union in the neighbourhood where the deceased lived. He deposes, that when he signed the Will, there was no attestation clause above the place where he signed his name: indeed, he goes on to say, that there was no writing at all upon the paper he signed, except Edwards', who signed first, and the Testator's signature thereto.—[The learned Judge here read the evidence of Rees, and proceeded.]—Everything then depends upon his testimony. That he may not have seen the contents of the paper is not unreasonable, as it very frequently happens, according to my experience, that Testators prevent witnesses seeing the contents of the Will. But to presume that nothing had been written except Edwards' signature, and the Testator's, when Rees signed his name, or that it was an attestation in blank, is a most extravagant supposition, and is contrary to the appearance of the Will itself. Then as to the acknowledgment by the deceased. The witness Rees admits that the Will in dispute had the name of the deceased written upon it, and that the Testator asked him to [167] sign his name under Edwards' signature. Can anything be more probable than that the Testator, a professional man, acknowledged his signature in their presence? for there is no doubt they were both present at the same time; that fact cannot, upon Rees' solitary testimony, deposing as he does, be questioned: and if so, that was a sufficient acknowledgment within the Statute, 1st Vict., c. 26. Upon the whole, therefore, we entirely agree with the learned Dean of the Arches Court, and have no hesitation in affirming the judgment of the Court below; but under the circumstances we think no order ought to be made as to the costs of the appeal.

[Mews' Dig. tit. WILL; IV. EXECUTION; a. *Signature of Testator*; 2. *Under the Wills Act*. See *In the Goods of Huckvale*, 1867, L.R. 1 P. and D. 378; *Wright v. Sanderson*, 1884, 9 P.D. 153.]

# [168] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

LEONIDAS DEMETRIUS BALTAZZI.—*Appellant*: ALFRED PHILLIPP RYDER, and FRANCIS HART DYKE, Her Majesty's Procurator-General,—*Respondents* \* [June 28, 1858].

## The "PANAGHIA RHOMBA."

The general, but not universal, rule is, that where a ship is condemned for breach of blockade, the cargo follows the same fate [12 Moo. P.C. 184].

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir Cresswell Cresswell, and the Right Hon. Sir John Taylor Coleridge.

The presumption is against a vessel captured in entering a blockaded port, and an imperative and overwhelming necessity for so doing must be established by the owner to exempt from condemnation.

It is not competent to owners of a cargo on board a vessel condemned for breach of blockade, to save the cargo from condemnation by showing their innocence in the transaction, as the owners of the cargo are concluded by the illegal act of the Master, although (1) it was done without the privity of the owners of the cargo, and (2) even if it was done contrary to their wishes [12 Moo. P.C. 186].

When a blockade is known, or might have been known, to the owners of the cargo, at the time when the shipment was made, and they might, therefore, by possibility, be privy to an intention of violating the blockade, such privity will be assumed as an irresistible inference of law, and it is not competent to rebut it by evidence, as in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent: the Master is to be treated as the agent for the cargo, as well as for the ship.

In this case, *The Panaghia Rhomba* was captured on the 27th of November, 1855, by Her Majesty's Ship *Dauntless*, Alfred Phillipp Ryder, Esq., Commander, within two miles of Odessa, which was then blockaded and had been so since the 1st of February, 1855. She was sailing under Greek colours, and had on board Wallachian and Servian colours. [169] According to the Master's statement, she had sailed from Galatz, on the 22nd of September, 1855, with a cargo of wheat bound to Syra or the Pyreus of Athens, with orders to call at Constantinople, and at the time of her capture she was steering to Odessa as a port of refuge for the preservation of the ship and cargo, and the lives of those on board. The ship was sent to Constantinople, where her cargo was sold.

The case was twice argued before the Court below: first, on the ship's papers and depositions, when the Court decreed further proof, and subsequently on further proof.

Upon the first occasion, a claim was made for restitution of the ship by Cosmas Tandarius, described as of Tully Acarnania, in Greece, but then residing at Wellclose Square, in the County of Middlesex, on behalf of Constantine Fachary, of Syra, then residing at Galatz, as sole owner. A separate claim for the cargo was also made by the Appellant on behalf of Gregoria John Cuppa, an Ionian subject, resident at Constantinople, for one moiety, and on behalf of himself, and his two other partners of the same name, Merchants in London, for the other moiety. The evidence of a witness who was examined at Malta, was produced before the Court: the Master and the rest of the crew of the captured vessel having, it appeared, been left on account of sickness at Constantinople. From the evidence of this witness it appeared, that the real owner of the ship was not Constantine Fachary, the then Claimant, but Tandarius himself. It appeared also from the papers on board, that a fictitious sale had been entered into between Fachary and Tandarius at Galatz. It appeared also that the Master of the ship had entered into an engagement not to deliver the cargo [170] to a Power at war with Russia. The cargo papers were all in blank. There was no log, but one mutilated sheet of paper was produced, apparently torn from a log-book. At the hearing it was admitted that Tandarius was the true owner. Upon this state of facts the Captors prayed for condemnation of the ship and cargo. The Claimants prayed that the claim of Cosmas Tandarius for the ship and freight, and for costs and damages, and of the Appellant for the cargo laden on board, with costs and damages, might be admitted.

The Judge (the Right Hon. Dr. Lushington), after argument, granted further proof to both parties; to Cosmas Tandarius (the Claimant for the ship), to show that the attempt to enter Odessa was the result of imperative and overruling compulsion. This he considered as great concession, but held he was justified by reason of a latitude having always been extended to merchants in that part of the world, who were not presumed to be as cognizant of the law of nations as merchants of other States, who were known to be familiar with the practice of the law. It was also allowed to the Appellant, the Claimant for the cargo, to give further proof as to



the property, and also to the Captors to produce further proof that the state of the vessel was not such, from a leak or otherwise, as to render the entrance of a blockaded port a matter of imperative necessity.

The cause came on for hearing a second time, upon such further proof, on the 30th of July, 1857. The further proof, on the part of the Claimants, consisted of, first, an amended claim of Tandarius, with two affidavits on behalf of the ship; second of an affidavit from the Appellant on behalf of the cargo. [171] The affidavit of Tandarius stated that he encountered adverse winds, that the vessel had grounded upon the Sulina bar, and that the water which she had made from the beginning had increased upon her, and that it was necessary for saving the lives of those on board either to run her on shore or let her drive before the wind to Odessa. On behalf of the Captor, a joint affidavit of Paul, a midshipman, and of two seamen of Her Majesty's ship *Dauntless*, and a translation from the Greek papers of the engagement of the Captain of *The Panaghia Rhomba*, were brought in. The affidavit of Paul and others stated that the leak was above water-line, and that the vessel had only about fourteen inches of water in the hold, and made about two inches per hour. They deposed that there was no necessity of her going into any port whatever; that, supposing the leak had been sprung in crossing the Sulina bar, she might have been safely conducted to Constantinople, or some other Turkish port.

After a full argument, the Judge (the Right Hon. Dr. Lushington), on the 30th of June, 1857, condemned the ship and cargo as lawful prize. The material part of his judgment, so far as related to the cargo, was as follows:—"The question for the Court then to determine is, whether the excuse set up by the Claimants for entering a blockaded port is proved by clear and decisive evidence. The *onus probandi* is upon the Claimants, and they are bound to make out the affirmative to the satisfaction of the Court: for if there be any principle of maritime law more important or more firmly established than another, it is that the presumption is against a vessel captured in entering a blockaded port, and that an imperative and overruling necessity for so doing must be established. I [172] will not cite cases to prove a position so universally acknowledged. It has been urged that it is improbable that the Master would voluntarily go to Odessa, having a cargo of wheat on board, that port being a well-known port of exportation of cargoes of that description. I am of opinion that that argument is not without weight so far as relates to the motives by which the Master might be governed, but it has little bearing upon the true question in this case. The question is not what was the opinion of the Master as to there being a necessity for going into a blockaded port, nor whether his conduct was *bona fide* or not; it is impossible for the Court to try a question of that description: the Court cannot try motives and convictions depending on the peculiar character and temperament of the Master. The true and only question for consideration is, whether the necessity is proved by the evidence to have existed; and the necessity being proved, it excuses an attempt to enter a blockaded port: the apprehension of necessity not proved, works no such effect. I am of opinion, that the evidence produced in this cause does not prove such necessity; that it is not shown that either the leak or the state of the wind compelled the Master, for the safety of the ship and the lives on board, to go to Odessa; and that it is not proved that he could not have gone to another port not blockaded. I, therefore, condemn the ship. I believe such decision to be in strict conformity with the course of practice pursued and sanctioned by Lord Stowell and those who then sat in the Privy Council. It is vain, indeed I may say it is worse than useless, to assert in law the maintenance of the right of Great Britain to blockade in time of war, and yet, when cases arise [173] which call for the enforcement of that right, so to diminish the stringency of the rule to be applied as to render the right itself, as to operation and effect, wholly nugatory. The last question for consideration is, whether the conduct of the ship, to use Lord Stowell's words, will affect the cargo? The general, but not the universal, rule is, that when the ship is condemned for breach of blockade, the cargo must follow the same fate. I say not the universal rule, for in some cases, which I must presently advert to, the cargo has been restored, though the ship has been condemned. I now purport to examine the cases, and to extract if I can the principles acted upon by Lord Stowell, for those principles which have formerly been acted upon will be my guide. The first case is that of *The Mercurius*, reported in 1st

Robinson, and the important passages are to be found at page 84. 'On the third point' (Lord Stowell says) 'to maintain that the conduct of the ship will affect the cargo, it will be necessary either to prove that the owners were, or might have been, cognizant of the blockade, before they sent their cargoes; or to show that the act of the Master of the ship personally binds them. In America, there could not have been any knowledge of the blockade. The cargo is innocent in its nature, and sets out innocently: the Master certainly is the agent of the owner of the vessel, and can bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them. In cases of insurance, and in revenue cases, where, it is said, the act of the Master will affect the cargo, it is to be observed, that the ground on which they stand is wholly different. In the former, it is in virtue of an express contract [174] which governs the whole case: and in revenue cases it proceeds from positive laws, and the necessary strictness of all fiscal regulations.' Then he goes on to observe upon the argument of an attempt at fraud, by throwing the blame on the carrier-master, and proceeds:—'If such an artifice could be proved it would establish that *mens rea* in the neutral merchant, which would expose his property to confiscation.' Lord Stowell, in that case, restored this cargo *ex necessitate*, on the ground that the Claimants of the cargo could not have known of the blockade. That is a case of restitution of the cargo. It is to be observed, that, in that case, the innocence of the owner was beyond all question, and he was held not bound by the act of the Master; that his innocence being patent on the face of the proceedings, did not require any evidence whatever to establish it. Now, the present case clearly cannot be governed by the case I have cited, because that was a case of invincible ignorance, which this case is not, for the blockade of Odessa dates from February, 1855, and consequently was known, or might have been known, to the Claimants. The true question I have to consider is this; whether,—the Court having determined that the Master has been guilty of a breach of blockade, and the ship, therefore, subject to condemnation,—the Claimants of the cargo are at liberty to prove that they were innocent of any intention to violate the blockade. That is the true question in this case. It is a question of very great importance: for, on the one hand, to condemn the property of an innocent Claimant through the misconduct of the Master, not his appointed agent, is undoubtedly a measure of severity; and on the other hand, to receive proof of the entire innocence of the Claimant may [175] introduce a laxity into the law of blockade, which might defeat that most important right of Great Britain during war. I will assume that the Claimant in this case, and I think I may fairly assume it looking at all the circumstances, was innocent of all intention to break the blockade. I do not think it necessary to go into the facts, because I assume, looking at all the correspondence, that there is not the slightest ground for supposing that Baltazzi, the owner of the cargo, intended to commit any breach of blockade whatever. I give him the benefit of that presumption; and, I might say, if it were necessary, that it is the conclusion I draw from all the evidence in the case. Then comes the question of law: and am I at liberty, except in the case of invincible ignorance, to enter upon that inquiry? The first case I wish to notice is that of *The Alexander* (4 Rob. 93). In that case the ship had been condemned for breach of blockade. It was argued, on the part of the Claimants of the cargo, that they were not bound by the act of the Master deviating into a blockaded port, and it was prayed that they might be permitted to give further proof to establish the innocence of the owners. This is a very important judgment, though not so important as some to which I am about hereafter to refer. 'I think this case is in effect decided by the decree which has pronounced the ship subject to condemnation for fraudulently attempting to go into a blockaded port.' Now, I pause here for a moment. Lord Stowell on that occasion had come to the conclusion that the Master had fraudulently gone into a blockaded port under pretence of being in want of provisions. Now, I hold that I cannot look into the question of whether the Master went [176] into the blockaded port fraudulently or not fraudulently; what I have to look to is to see whether he went there with the pressure of necessity, or without the pressure of necessity: for, as I have said in a previous part of this judgment, it is utterly impossible for me to dive into the motives and reasons in a man's mind. Lord Stowell proceeds to say, 'For when the Court decided that, it did, in effect, decide,



that the vessel was so going to dispose of this cargo, the inference in all cases being, that a ship going into a blockaded port is going with an intention of disposing of the cargo. The Court has already decided, that the ship was going in, and that the excuse assigned was a frivolous pretence. The Master makes no distinction.' Then he goes on to other matters and says, 'It is true, that the owners of the cargo are not, in general cases, held to be affected by the Act of the Master, unless he is specially appointed their agent. But, it would be impossible to maintain a blockade in cases of this nature, which is directed more against the cargo, than against ships, if the Court did not draw the inference that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner. If any inconvenience arises to the Claimants of the cargo, from this necessary conclusion, the owners of the vessel or the Master, are the persons to whom they must look for indemnification.' Now, the next case is that of *The Adonis* (5 Rob. 256). The part I have to allude to, commences at page 259. The ship had been condemned before, and it was contended, in the same way as it was in the previous cases, that the condemnation of the ship would not inure to the condemnation of the cargo, and that the Master was not the agent of [177] the owner. 'This is a case,' said Lord Stowell, 'in which I have taken some short time to deliberate, being unwilling to press, with any unnecessary degree of severity, the effect of presumption against this class of cases, more especially, because it is one in which the principle of law, though unquestionably built upon the just rights of war, must be allowed to operate with some hardship upon neutral commerce; and because it is a class of cases on which the Court has little authority to resort to, but has to collect the law of nations from such sources as reason, supported in some slight degree by the practice of nations, may appear to point out. In the present case, it is now to be assumed, that the ship was taken in a course to Havre. I collect that from the strange and incredible account of the Master, which, I have already said, in my opinion, cannot be true. It is to be inferred also, I think, that the Master was induced to make this deviation from some sinister intention, and I may be warranted to presume that all this would not have been resorted to, but in the service of the cargo.' Now, it must be observed that in this judgment, Lord Stowell builds up presumption upon presumption; and he says, these are presumptions which must necessarily arise, and by which he must be governed. He then goes on:—'It has happened in other blockade cases, that excuses have been set up from want of water and provisions, or from other occasions; but when the Court pronounces these excuses to be not real, a presumption necessarily arises that it was for the delivery of the cargo that such a fraud had been attempted, since there is scarcely any other adequate motive which can be supposed to induce a Master to hazard the interests of his vessel.' Then he goes on to say, [178] 'There is a presumption also in such cases, that this is done with the knowledge, and at the instigation, of the owner of the cargo; because, although it is not an impossible thing that Masters may be guilty of barratry, it is not a natural conduct, nor what is gratuitously to be supposed. These are, I think, just inferences; and the only question can be as to the effect of the presumption arising from them, whether it shall exclude all contrary averment, or whether it shall operate only as matter of evidence, in concurrence with other proof, as to the guilt of the intention. It must undoubtedly bind the owner; but the question is, whether it shall do so presumptively, or conclusively, and whether the party shall be let in to prove a contrary intention. I am of opinion, that he cannot.' Then Lord Stowell states his reasons. He says, 'I will not say that the fact may not exist, that a Master should commit a barratry in a case of this kind; but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy at any time to set up the pretence, and equally impossible on the other side to detect it. For what would be the ordinary test?—Letters sent to correspondents elsewhere, and insurances—measures wholly in the power of the parties, and capable of being made, at their pleasure, a complete *recipe* for a safe traffic with a blockaded place. When this consequence is duly weighed on one side, and when it is considered on the other, what few inducements a Master can have to go to any other port.' Then he says it is impossible to say the owner of

the cargo cannot be bound, and he enters further into the [179] question; but all his argument tends exactly to the same point. There is one more case which I must refer to, and then I shall have finished the examination of these cases; that is, the case of *The James Cook*, which is reported in 1 Edwards' Reports. At page 263, Lord Stowell says,—'With respect to the cargo, I do not see how it is to be exempt from the fate of the ship: the Master, who is also the owner of the ship, can hardly be supposed to have risked his vessel without the privity of the owner of the cargo, and in its service; but the fact is not very material, as the owners of cargoes must at all events answer to the country imposing the blockade for the acts of the persons employed by them, where, as in this case, the blockade is known at the port of shipment; otherwise, by sacrificing the ship, there would be a ready escape for the cargo for the benefit of which the fraud was intended.' Now, I can say with truth that I have exercised all my ingenuity to avoid, if possible, applying the principles laid down in the cases which I have cited, to that now under consideration; and I have done so because, looking at the whole case, I have no reason to believe that the Claimants of the cargo had any intention of breaking the blockade. It is my duty, however, to declare that, according to past decisions, that consideration is not open to me, that I am forbidden to make an exception which, if once admitted, would in all cases of blockade call on the Court to consider the guilt or innocence of the owners of the cargo, a proposition which Lord Stowell declared to be fraught with danger: indeed, I believe it to be utterly impossible to enforce the belligerent rights of this country except upon general principles, and that all attempts to go [180] upon purely equitable principles, particular decisions and particular cases, without regard to the great principles, can only have the effect of destroying the right, and rendering it no longer worth the exertion which Great Britain used in times past for the purpose of protecting it. I have now carefully investigated the decisions of Lord Stowell, and I have asked myself how Lord Stowell would have determined this case; and the conclusion I have arrived at is this, that the cargo must follow the fate of the ship. If, in pronouncing this judgment, therefore, I have erred, I have either misunderstood the judgments of Lord Stowell, or they no longer have the force of law. In all cases which it has fallen to my lot to decide during this war, those judgments have been my guide, and in this, probably the last decision I may have to pronounce upon a question of prize law, they will be my guide also. I have endeavoured not only to uphold and maintain the principles enunciated by that great Judge, but also, what is little less important, to carry out the practical application of them. I must condemn the cargo."

From this sentence the present appeal was prosecuted on behalf of the Claimant of the cargo.

Dr. Addams, and Dr. Twiss, for the Appellant.—This is a case *primæ impressionis*. There is no decision of Lord Stowell's directly in point. The decision the Court below has arrived at was founded upon the supposed authority of Lord Stowell in the cases of *The Alexander* (4 Rob. 93), *The Adonis* (5 Rob. 260), and *The James Cook* (1 Edwards, 261). It must be borne in mind that these cases [181] were decided without further proof. The principle to be gathered from the judgment of the Court below is, first, that whenever a ship is captured going into a hostile port, it is to be presumed to be so going in for the benefit of the owners of the cargo; and, secondly, therefore, with their knowledge, which is to be assumed a guilty knowledge. This is a gratuitous assumption, as Lord Stowell in his judgments never laid down so universal a proposition. On the contrary, in *The Neptuneus* (3 Rob. 174), he held, that there might be circumstances to exempt the cargo, although the ship be condemned. So, in *The Mercurius* (1 Rob. 80), the same learned Judge determined that a violation of blockade by the master affected the ship, but not the cargo, unless the owner of the cargo was cognizant of the intended violation. Proof of innocence of the owners of the cargo was received by the Court in *The Shepherdess* (5 Rob. 263). This case clearly shows that the rule of Prize Courts is to allow further proof to except the owners of the cargo from condemnation, if they establish their innocence. But, the most rigorous application of the principles of Prize Law by which the cargo is to be affected by the conduct of the ship cannot apply to the facts of the present case. We admit that the ship



was captured going into Odessa, at a time when that port was in a notoriously subsisting state of blockade, but the running into that port was a matter of imperative necessity, arising from the ship having sprung a leak. Though the ship may have been justly condemned, yet as the owners of the cargo are free from blame, the Court ought to have decreed restitution of the cargo. The Master cannot be deemed [182] the agent of the owners of the cargo.—[Sir John Coleridge: Suppose the Master of a ship, not being the agent of the owner of the cargo, goes into a hostile port, how would that affect the cargo?—From what Lord Stowell says in *The Atalanta* (6 Rob. 460), if there was no direct guilty participation of the owners of the cargo, restitution would follow as of course. There may be fraud on the face of proceedings so as to induce the Court to arrive at a different conclusion and condemn the cargo. So in the case of egress a vessel coming out of a blockaded port, if the owner of the cargo give satisfactory proof of his innocence he would be entitled to restitution, *The Frederick Molke* (1 Rob. 86), *The Juffrow Maria Shraeder* (note to *The Potsdam*, 4 Rob. 89).

The Queen's Advocate (Sir John Harding), and the Admiralty Advocate (Dr. Philimore), for the Respondents.—No case or reference to text writers on Prize Law has been cited to support the Appellants' argument, which impugns the opinion of Lord Stowell, referred to by Dr. Lushington in his judgment in this case. Now, we challenge the Appellants to produce any authority by which the cargo in such a case as this can be excepted from condemnation with the ship. The rule of Prize Courts is, that where deviation into a blockaded port takes place, it is to be presumed to be in the service of the cargo, and that, therefore, the owner of the cargo is bound by the acts of the Master of the ship. Story, "On Prize Courts," p. 72 (Pratt's Edit.). The presumption of law is, that it was done with the privity [183] of the owner of the cargo. *The Alexander* (4 Rob. 93), *The James Cook* (1 Edwards, 260), *The Adonis* (5 Rob. 260), *The Exchange* (1 Edwards, 43). The case of *The Mercurius* (1 Rob. 80), relied upon by the Appellants, is distinguishable. There the innocence of the owner of the cargo was beyond all question; the owner at the time of shipment not being cognizant of the blockade. All the facts in this case prove the guilty knowledge of the owner of the cargo. Odessa was blockaded on the 1st of February, 1855: *The Panaghia Rhomba* shipped her cargo of wheat in September of that year at Galatz. The owners of the cargo must have known six months before shipment the fact of the port of Odessa being blockaded. There is no evidence to justify the case put by the owners of the cargo, that the state of the vessel from leakage was such as to render the entrance of a blockaded port a matter of imperative necessity. The vessel in fact, after seizure, got in safely to the port of Constantinople. Again, Odessa was a port for sale of wheat, and that fact renders the case more suspicious as showing the original destination of the ship.

Dr. Twiss, in reply.

The consideration of their Lordships' judgment was reserved, and now delivered by

The Right Hon. T. Pemberton Leigh (July 9, 1858).—This case involves a general principle of so much importance that their Lordships thought it desirable to take time for its consideration, although they had [184] a strong impression at the hearing as to the decision at which they must arrive.

*The Panaghia Rhomba* took in a cargo of wheat at Galatz, in the month of September, 1855, to be conveyed to the Piræus or Syra, on the joint account of Signor Cuppa, an Ionian Merchant, resident in Constantinople, and of Messrs. Baltazzi, British Merchants, resident in London.

In the month of November following, the vessel was captured by Her Majesty's ship *Duuntless*, for an attempt to violate the blockade of the port of Odessa, which had subsisted from the month of February, 1855, and was then continuing.

The ship has been condemned by the Court below upon evidence which quite satisfies their Lordships of the propriety of the sentence; and the question now raised is, whether it is competent to the Claimants of the cargo to protect their property from condemnation by showing their innocence in the transaction: or whether, under the circumstances of this case, the owners of the cargo are con-

cluded by the illegal act of the Master, though it may have been done without their privity, and even contrary to their wishes.

It has been held by the Court below, that the owners are so concluded, and that the rule upon the subject is established by authority not now to be questioned.

The first case to which we have been referred is *The Mercurius* (1 Rob. 80), which came before Lord Stowell in 1798. There a cargo had been put on board *The Mercurius* in America, at a time when it could not have been known in that country that a blockade of the Texel had been established. The Master, after warning, attempted to enter the [185] Texel, and the ship was condemned, because the owner was bound by the act of the Master; but the cargo was restored, because, as Lord Stowell observes, the shippers at the time of shipment could not have known of the blockade, and the Master, though he was the agent of the owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo, unless expressly so constituted by them. Lord Stowell, in that case, addressed himself to the argument of the Captors, that to exempt the cargo from condemnation would open a door to fraud, if neutrals were allowed to trade with blockaded ports with impunity, by throwing the blame upon the carrier-master; and, in answer to that objection, he observed, that "if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation, and it would be at the same time sufficient to cause the Master to be considered in the character of agent, as well for the cargo, as for the ship."

In that case Lord Stowell seems to have thought that the owners of the cargo were not bound by the act of the Master without their authority, and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, "Violation of blockade by the Master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner is cognizant of the intended violation."

Now, in the present case, Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of *The Mercurius* [1 Rob. 80], their Lordships [186] would have great difficulty in assenting to the decision now under review.

But, the subsequent cases appear to have carried the rule much further, and to have established, that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the Master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment, and the additional authorities mentioned at the bar.

In the case of *The Alexander* (4 Rob. 94), which occurred in 1801, Lord Stowell held that, in cases of breach of blockade, the Court must infer "that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner."

In the case of *The Adonis* (5 Rob. 259), which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could not be let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses, therefore, all the authority which the decisions of the Tribunal of a single country can give in a law in which all civilized countries are concerned.

The same doctrine is laid down by the same great Judge in the case of *The Exchange* (1 Edwards' [187] Rep. 42), in 1808, and in *The James Cook* (1 Edwards, 261) in 1810.

We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which, nevertheless, may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to



violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the Claimants, are British subjects.

The propriety, or rather the necessity, of acting upon these rules, is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade, the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the Master, it would always be easy to manufacture evidence for the purpose, which the Captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the Master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the Master or the owners of the ship, if, in reality, the penalty was incurred without any privity on their part.

It is impossible not to feel the force of this reasoning; it rests on the same grounds with another rule of the Prize Courts, which treats as invalid the sale [188] of a ship *in transitu*; a point upon which we have had very recently to examine the law (in *The Baltica*, 11 Moore's P.C. Cases, 141).

Against a rule, acted upon and promulgated to the world for so many years, the Counsel for the Appellants, though challenged to do so by the Respondents, have not produced a single decision or *dictum* by any one Judge or Jurist in any part of the world. Under these circumstances, their Lordships must consider it as a settled principle of Prize law by which they are bound.

Holding themselves to be precluded by the rule of law from looking into the evidence in this case in order to judge of the guilt or innocence of the Claimants, they can express no opinion upon this subject. But they think that, as the learned Judge in the Court below has declared his conviction of their entire innocence, and his reluctance to pronounce the sentence complained of, the Claimants may fairly be considered to have been invited to bring this appeal, and that in affirming the sentence, Her Majesty should be advised to make the Order without awarding costs against the Appellants.

[Mews' Dig. tit. SHIPPING, A. XI. CHARTER PARTY, 5. *Performance*, b. *Hostile and Blockaded Ports*; tit. WAR, 3. PRIZE OF WAR, a. *Rights as to*. Cf. 3 Jur. (N.S.), 23; 5 W.R. 104. See Scrutton on *Charter Parties*, 4th ed. p. 11.]

## [189] ON APPEAL FROM THE VICE-ADMIRALTY COURT OF THE BAHAMAS.

GORE and Others,—*Appellants*; BETHEL and Others,—*Respondents* \*

[June 24, 1858].

THE "INCA."

In no instance, however meritorious the service performed, does the Court of Admiralty in England decree more than a moiety for salvage [12 Moo. P.C. 195].

Derelict being "*sine spe recuperandi*" is distinguishable from salvage in the amount awarded [12 Moo. P.C. 196].

Decree of the Vice-Admiralty Court of the Bahamas awarding seventy-six per cent, in kind, for a most meritorious salvage service, attended with loss of life, varied upon appeal, by reducing the amount to fifty per cent upon the whole cargo, stores, and materials [12 Moo. P.C. 198].

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\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Lawrence Peel, the Right Hon. Sir John Taylor Coleridge, and the Right Hon. Sir Cresswell Cresswell.

Decree of Court below carried into effect, pending an appeal, upon the Respondents giving security to abide the event of the appeal.

This was a cause of salvage brought in the Vice-Admiralty Court of The Bahamas, under the following circumstances:—

[190] On the morning of the 22nd of December, 1856, a fleet of schooners belonging to The Bahamas, twenty-two in number, engaged in the occupation of looking out for and rendering assistance to vessels in distress on the reefs and keys in that neighbourhood, discovered the United States merchant-ship, *Inca*, laden with a cargo of cotton, and bound from New Orleans to Boston, on shore on the Riding rocks. The vessel was boarded, and assistance rendered, which resulted in the saving of a large part of the cargo and some of the stores and materials of the ship, which were brought to the port of Nassau, in The Bahamas, on board the schooners. There were upwards of three hundred men on board the schooners, and one of them was drowned while engaged in the salvage service. The Master and crew had quitted the ship, and sought refuge in a neighbouring bay, while the salvors were engaged in saving the cargo. No question was raised as to the meritorious nature of the salvage rendered: the only point in dispute being the proportion of the property saved to which the salvors were entitled. The Judge of the Vice-Admiralty Court (The Hon. J. C. Lee), by a decree, dated the 20th of January, 1857, awarded salvage in kind. The decree was in the following terms:—"The salvors to be paid in kind, at the rate of sixty-six per cent on the dry, and seventy-six on the wet cotton, and seventy per cent on the net sales of the materials and stores. The wharfage, storage, and labour hire to be borne by each party in proportion to their respective interests. Ten pounds to Bethel, the wreck-master, to be borne by each party [191] in proportion to their respective interests. The costs to be paid by the owners." (a)

(a) The following reasons were transmitted to the Privy Council by the Vice-Admiralty Judge in support of the decree:—First. It has been considered by myself, and I believe by the previous Judges of the Vice-Admiralty Court of this Colony, that the circumstances under which property is saved here, are so widely different from those under which property is saved about the coasts of Great Britain, that the amount of salvage remuneration awarded by the Court of Admiralty in England would be quite inadequate to remunerate the wreckers of The Bahamas. The difference consists in this. In England property is, in every instance, saved by vessels in the prosecution of some other business; whatever salvage remuneration, therefore, may be decreed to them is, deducting perhaps some loss for detention, clear gain. Not so The Bahama wreckers; these vessels are built, manned, provisioned, and fitted out for the express and sole purpose of saving the property so frequently wrecked on the numerous and dangerous banks, reefs, and shoals, everywhere abounding among The Bahama group of Islands, extending about 500 miles from north-west to south-east. These vessels have no other employment, and the very heavy expenses of their cost, repairs, outfit, and wear and tear, have to be deducted from the salvage remuneration before there can arise any profit whatever to their owners. Should a vessel sail, say on a three months' cruise, and not meet with a wreck, the whole expense of the outfit, etc., would be an entire loss to the owner; if, therefore, anything like the scale of salvage remuneration acted on by the Court in England should be adopted here, these vessels could not be fitted out, the wrecking system would cease, and in almost every case the owners or underwriters of the wrecked property, instead of getting what they now receive, after deducting the salvage decreed by the Vice-Admiralty Court, would get nothing at all: the property would be utterly lost, and often valuable lives also. If it be asked why such property cannot be saved, as in Europe, by vessels in the prosecution of some other employment, I answer:—First, that there are comparatively so few vessels passing near the shoals, etc., where vessels are driven by winds or currents and lost, that a large majority of ships on shore would not be seen. Second, that in such places few, if any, vessels, not expressly employed for the purpose, would endanger their own safety by getting among the dangerous reefs, etc., with strong varying currents to contend with. Third, that if they did, they would be of comparatively little



[192] Notice of an appeal against this decree was given, when the promoters' proctor moved that the decree of the Vice-Admiralty Court be carried into effect, upon his parties entering into the necessary bonds to abide the event of the appeal, and to pay what should be adjudged, with expenses, in case the decree of the Court should be reversed. The Marshal of the Court having reported as to the sufficiency of the bail offered, the Court directed the same to be accepted, [193] and ordered that the decree should be carried into effect, which was accordingly done. The present appeal was from the decree of the 20th January, 1857.

As the decree of the Vice-Admiralty Court was for a proportion of the property saved, to be taken "in kind," and that no *constat* appeared of the value of the cotton which formed the cargo, difficulty and delay was anticipated by the owners, in the event of its being judged necessary to obtain the precise value of the cotton. Both parties, therefore, agreed, that their Lordships' decree should be of the same character, namely, in kind.

Dr. Addams and Dr. Spinks for the Appellants. Nothing can justify the proportion awarded by the Court below to the salvors. Such award is erroneous and unprecedented, and is made upon a principle unknown to any Admiralty Court in the world. It is founded upon the fact of the number of vessels and persons employed in the salvage services, which has nothing whatever to do with the rate of remuneration to be awarded. The usual proportion given, is from one-third to one-fifth. Even in cases of derelict, the former practice of awarding a moiety is now abandoned by the Admiralty Court. Without in any manner detracting from the very meritorious services of the salvors, we submit, that a smaller proportion of the property saved ought to be given to the salvors, than the proportion awarded by the decree of the Vice-Admiralty Court of The Bahamas.

The Queen's Advocate (Sir John Harding), and Mr. Kingdon, for the Respondents. There was no contest in the Court below, therefore we are taken by surprise by the objection now urged, [194] for the first time, that the proportion awarded by the decree of the Vice-Admiralty Court is contrary to the principles by which the Court of Admiralty in England has regulated the remuneration in cases of salvage. This was a case of extraordinary merit, accompanied with loss of life, entitling the salvors to the highest possible rate of reward. There were twenty-two vessels, and upwards of three hundred men employed. The cargo being cotton, required all the hands and vessels to tranship the same. No objection was taken at the time by the owners to the number of hands employed, nor is the value of the service rendered denied. A case cannot be imagined deserving higher remuneration: in effect, from the nature of the services, the ship is to be treated as

use. The Masters of the wrecking vessels are men who have been brought up to the business; they are thoroughly acquainted with the passages, the sets of the currents, and other local circumstances, the want of a knowledge of which would frequently render nautical skill of a general description, of little avail. Very frequently, too, the saving of the vessel or cargo depends upon the expertness of divers. The crews of the wrecking vessels are nearly all excellent divers, being accustomed to it from their infancy. They frequently dive under the bottoms of vessels and stop holes, remaining for wonderfully long periods under water; they also commonly dive into holds of sunken vessels, at very great risk of their lives, and extricate the cargo with excessive exertion and much skill. I repeat my opinion, that were the salvage remuneration now given to these men to be materially diminished, their occupation would cease to exist, and that in consequence large quantities of merchandise, and probably many lives, would annually be lost. Looking, then, to the facts, I can arrive at no other conclusion than that this case is one of extraordinary merit, entitling the salvors to the highest possible rate of reward, consistent with a due regard for the interests of the owners of the property. However dissatisfied the owners or underwriters may be with the amount they may receive after the payment of the salvage, etc., it is clear to me, that without the services of the promoters they would have received nothing whatever, for the cargo would in all human probability have been totally lost. The Master and his crew had quitted the ship, and sought refuge in one of the neighbouring bays, while the salvors exposed and hazarded their lives to the violence of the wind and waves."

derelict, in which case the Admiralty Court awards a larger remuneration. In *The Jubilee* (note to the *Thetis*, 3 Hagg. Adm. Rep. 43), salvage to the extent of two-thirds on the property saved was awarded. *The Jonge Bastiaan* (5 Rob. 322). *The Frances Mary* (2 Hagg. Adm. Rep. 89), *The Reliance* (2 Hagg. Adm. Rep. 90, Note).

Judgment was delivered by

The Right Hon. Dr. Lushington.—It will not be necessary to enter into any minute examination with respect to the circumstances of this case, because it is admitted on all hands that a most meritorious service has been performed by the salvors; meritorious in every respect, for no doubt can be entertained that the property was in a state of very great danger, and that risk of life occurred to the salvors, one of the salvors being actually lost in the per-[195]-formance of that service. Unless that service had been effectually performed, the whole of the property would undoubtedly have been lost. The sole question is, therefore, what is the amount of the remuneration, which, under circumstances like these, ought to be allowed to the salvors?

The decree is to the following effect.—[His Lordship read it—*ante*, 12 Moo. P.C., p. 190.] The question, then, assumes this shape only: whether the decree of the Court below is in conformity with the rules and principles which have governed the Court of Admiralty in this country, or whether there are any particular circumstances which ought to induce their Lordships to come to the conclusion that an exception exists in this case.

Now, as to general rule, we apprehend that little doubt can be entertained, for we find Lord Stowell expressing himself in the case of *L'Esperance* (1 Dod. 49) in these words:—"In no instance (except where the Crown alone has been concerned, and where no claim has been given for a private owner) has more than one-half been decreed by way of salvage." And, in a subsequent case (though it occurred many years after) he adhered to the same rule. He said in the case of the *Frances Mary* (2 Hagg. Adm. Rep. 90), "the fund is unfortunately small, but it is a case of extraordinary merit, and the Court should be liberal. I incline to decree £350, and if an instance can be produced in which, in a case of this description, the Court has exceeded a moiety, I will allow the sum I have mentioned: but if not, I shall direct a moiety to be paid to the salvors." Then there is this note to the case, "On the 18th of May a moiety was decreed to the salvors, their expenses being first paid out of the other moiety."

[196] It appears, therefore, to be perfectly clear, after an examination of all the previous cases, that no instance can be found in which salvors have had decreed to them a sum exceeding a moiety of the proceeds.

Her Majesty's Advocate cited several cases, but they were cases of derelict, which have always been considered as distinguished in principles (in the Court of Admiralty especially) from cases of salvage: because in cases of derelict, as the word itself necessarily imports, the property had altogether been abandoned by the owners, or the Master and crew representing them, and that "*sine spe recuperandi*."

But, even in the cases which have been cited, their Lordships find, on examining them, that they were all of such a stringent and peculiar nature that they cannot by possibility afford any assistance, or operate as a guide in the determination of this case. Because in one of those cases (*The Reliance*, Note to *The Frances Mary*, 2 Hagg. Adm. Rep. 90) the salvors were occupied no less than thirty-five days, and great risk of life incurred; and in another of those cases (*The Jubilee*, Note to *The Thetis*, 3 Hagg. Adm. Rep. 43) the vessel was hired and the crew were employed, the service occupying several months, a service of a totally different kind from that which is now under consideration.

If, then, the decree of the Court below be not in conformity with the rule which has generally been adopted in the Court of Admiralty, and which has been supported by their Lordships in this Court, the question is, whether the reasons (*ante*, p. 191) assigned by the learned Judge of the Vice-Admiralty Court are sufficient [197] to induce us to say that he was justified in adopting a different rule.

His statement is this: he says, "It has been considered by myself, and I believe



by the previous Judges of the Vice-Admiralty Court of this Colony, that the circumstances under which property is saved here, are so widely different from those under which it is saved about the coasts of Great Britain, that the amount of salvage remuneration awarded by the Court of Admiralty in England would be quite inadequate to remunerate the wreckers of the Bahamas. The difference consists in this. In England property is, in every instance, saved by vessels in the prosecution of some other business; whatever salvage remuneration, therefore, may be decreed to them is, deducting perhaps some loss for detention, clear gain. Not so the Bahama wreckers."

Now, it really must be observed, that here the learned Judge of the Court of Vice-Admiralty has made a statement with reference to the mode in which salvage is usually performed in this country, and the consequences resulting therefrom, which is not quite consistent with the fact, because it is not at all true, and it is not consistent with our daily experience, that property is in every instance saved by vessels in prosecution of some other business; on the contrary, the truth and the fact is, that throughout the whole of the coasts of this country, or the coasts of the greater part of it, there are Companies established for the purpose of rendering salvage-service, who build vessels particularly fitted and appropriated to that service, and who go out for the sole and express purpose of rescuing vessels in distress. And, as for the difficulties and dangers attending the particular locality, we think it [198] can hardly be said there is much greater danger or much greater difficulty in salving vessels at the Bahamas, fearful as the difficulty may be, than there is in salving vessels on the coasts of this country, more particularly on the north and east coasts, and the sands adjacent to those coasts.

Their Lordships are of opinion, therefore, that the circumstances stated, are not sufficient to sanction any departure from that which has been hitherto the uniform practice, and, reluctant as they are to interfere with the decree of a Vice-Admiralty Court in what is, generally speaking, a matter of discretion, they feel themselves under the necessity of varying the decree on the present occasion.

It must be remembered, that if too large a rate of salvage is decreed many other evils may result from such a practice, because, I regret to say, in this country, as in most other countries, as some Courts have observed, there will be an disinclination on the part of the Masters of vessels to accept the assistance of salvors, even in case of danger to life, where the cost of salvage is likely to be so great as to cause a serious deduction from the value of the property under their care.

Their Lordships further think it would be exceedingly dangerous in the case of any Vice-Admiralty Court, for that Court entirely to relieve itself from adhering to all the rules laid down by their Lordships in this Court, and by the Court of Admiralty. Therefore, the decree their Lordships will make, or rather the variation in the decree, will be, that they will allow fifty per cent. upon the whole dry and wet cotton and the stores and materials, instead of seventy-six per cent., leaving the decree in other respects to [199] stand exactly as it was pronounced, giving the salvors their costs below. With respect to the costs of this appeal, their Lordships are of opinion that no costs should be given on either side.

[Mews' Dig. tit. SHIPPING; A. XVIII. SALVAGE; 13. *Award*; a. c. S.C. Swab. 370. See *The Amerique*, 1874, L.R. 6 P.C. 468; *Cargo ex Woosung*, 1876, 1 P.D. 270; *The Mariposa* (1896), P. 273.]

## ON APPEAL FROM THE ROYAL COURT OF APPEAL OF MALTA.

ANTONIO DIMECH.—*Appellant*: THOMAS CORLETT.—*Respondent* \* [June 22, 1858].

It is important not to give to mercantile instruments, such as a charter-party, an unnecessary strict construction; but such a construction as, with reference to the context, and the object of the contract, would effectuate the obvious and expressed intention of the parties [12 Moo. P.C. 224].

*Semble*.—There is no difference between the law of Malta and the English law regulating the construction of mercantile contracts, and the remedies for breach of them [12 Moo. P.C. 227].

By a charter-party made at Malta, dated the 24th of February, 1854, the chartered ship was described as "coppered, A. 1. of Malta," of a certain measurement, "now at anchor at this port," and it was agreed that she being tight, staunch, and strong, and properly manned, and every way fitted for the voyage, should with all convenient speed proceed in ballast to Alexandria, in Egypt, and there load from the charterer, a cargo of beans, wheat, etc. Forty working days were to be allowed for loading and unloading, the lay days to commence when the vessel should be ready to receive her cargo at her port of loading, and ten days on demurrage, over and above the lay days, at £8 sterling, the penalty for non-performance of this agreement to be the amount of freight. At the date of the charter-party the ship was not coppered, nor was she lying at anchor in port, nor had she obtained her register. She was an entire new vessel, still in dry dock, her coppering being in course of completion. The ship was not ready to sail until the 28th of March following, when, from the state of the weather, she did not sail until the 30th of that month, and reached Alexandria on the 12th of April, 1854. No objection was made by the charterer at the time of the delay. On her arrival, the Master gave notice to the charterer's agent there, that he would be ready to receive cargo on the 14th of that month. Before the ship's arrival at Alexandria the charterer's agent had made a cession of the charter-party, and the agent referred the Master to the cessionary, informing him that his principal had nothing more to do with the charter-party than to guarantee the solvency of the cessionary. Freight had fallen considerably below the rates named in the charter-party between the date of the charter-party and the date of the cession. The cessionary sought to invalidate the cession on account of the delay in the arrival of the ship, and on that ground refused to give the Captain any cargo. The Captain refused to acknowledge the cessionary, or to release the charterer; but at the same time expressed his readiness to receive a cargo from any one under the order of the charterer's agent. The ship lay at Alexandria waiting for cargo the whole of her lay days and the ten demurrage days, but received no cargo from the charterer. The Captain afterwards took a small cargo and returned to Malta.

In an action brought by the shipowner against the charterer in Malta, the Royal Court of appeal determined, that as the ship was not coppered and afloat at the date of the charter-party, and did not sail with convenient speed, and the Captain having refused to accept a cargo from the cessionary, the charterer was not on these grounds liable. Upon appeal, held by the Judicial Committee of the Privy Council, reversing that sentence.

First. That upon the true construction of the charter-party, it was unnecessary to determine, whether the completion of the coppering of the ship was a condition precedent or not to the maintaining an action against the charterer, as it was clear, that that statement had reference to the time of sailing, and not to the date of the charter-party [12 Moo. P.C. 223]; and

Secondly. As to the stipulation, that the ship should sail "with all convenient

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Cresswell Cresswell, and the Right Hon. Sir John Taylor Coleridge.



speed," that as the parties had not expressly stated for themselves in the charter-party, that unless the ship sailed on a specified day, the charter-party was to be at an end; and as the charterer resided at Malta, and had made no objection at the time to the delay, or had given evidence that any other loss than that occasioned by the falling of freights had taken place in consequence of the delay, his position was not thereby altered, and an action was, therefore, maintainable against the charterer upon the charter-party [12 Moo. P.C. 225].

Held further, that as one of the parties to the charter-party had not the power, without the privity or consent of the other, to substitute a third person in his place, simply on condition of being responsible for the solvency of that third person; the change of the party on the one side, even with a guarantee, altering the condition of the other party, as affected the remedy, so as to make the contract a new one; the Captain, therefore, was justified in refusing to accept the cessionary in lieu of the charterer [12 Moo. P.C. 223].

Principle of assessment of damages for non-performance of the conditions of the charter-party, considered [12 Moo. P.C. 222, 229].

This appeal arose out of the following circumstances:—

The Respondent, a merchant resident at Malta, on [200] the 24th of February, 1854 chartered a vessel, named *The Sextus*, then belonging to the Malta Navigation Company, of which Company the Appellant was administrator. The charter-party was effected at Malta, through the medium of Messrs. Eynaud [201] and Pariente, ship-brokers in that Island. The contracting parties were, Giuseppe Barbara, the Master of *The Sextus*, who was described as of the good ship or vessel called *The Sextus*, coppered A. 1, of Malta, of the measurement of 423 tons register, or thereabouts, "now at anchor in this port," and the Respondent, a Merchant at Malta. By the charter-party it was agreed that the ship, being tight, staunch, and strong, properly manned, and in every way fitted for the voyage, should, with all convenient speed, proceed in ballast to Alexandria, in Egypt, and there load from the charterer a full cargo of beans, wheat, Indian corn, other grain, seeds, or any other lawful merchandise, and therewith proceed to Cork or Falmouth, for orders, the freight to be at the rate of 11s. per imperial quarter delivered of beans, wheat, or Indian corn, and for other grain or general merchandise at certain rates therein specified: forty working days were to be allowed for loading and unloading, the lay days to commence when the vessel should be ready to receive her cargo at her port of loading, and ten days on demurrage over and above the lay days, at £8 sterling per day; the penalty for non-performance of the agreement was to be the amount of freight.

At the date of the charter-party, *The Sextus* was neither at anchor in port, nor entirely coppered. She was then in a dry dock, being coppered. Shortly [202] after the execution of the charter-party, the Respondent advised his son, John Corlett, his agent at Alexandria, that he had chartered the vessel, and forwarded the charter-party to him.

On the 10th of March, 1854, by an instrument of cession executed at Alexandria, John Corlett, without the privity of the Captain or the owners of the ship, assigned and ceded the charter-party to one Antoniades, of that place (a Russian subject, then under the protection of the Austrian Consulate), who "received it *tale quale*, such as it was, binding himself to fulfil all the clauses and conditions stipulated in the same, just as if he were the original charterer." The freight to be paid by Antoniades to John Corlett was to be 10s. 6d. per quarter; and the difference between the freight stipulated in the charter-party at 11s., and that fixed in the act of cession, was to be paid by John Corlett to Antoniades, after the completion of the loading.

The rates of freight had fallen at Alexandria between the date of the charter-party and that of the cession, and about the 19th March, 1854, a further fall took place in the price of freights.

On the 22nd of March, 1854, Antoniades entered a formal protest at the Chancery of the Austrian Consulate, in Alexandria, against John Corlett and everybody whom it might concern, alleging that although it was agreed in the charter-party that the vessel should, with all convenient speed, proceed in ballast to Alexandria, it had come

to his knowledge that she had not yet left the Island of Malta when the last Alexandria mails were dispatched thence, and that this delay had not arisen from impediments of superior force, many other vessels having begun their [203] voyage, and that Captain Barbara, had, therefore, not fulfilled the agreements of the charter-party. On the 27th of the same month, the Respondent entered a protest in the Commercial Court of Malta against Captain Barbara and the shipowners, alleging that he had just discovered that the vessel was still at Malta, and claiming for all damages, interests, and expenses suffered, and to be suffered, by means of the delayed departure of the vessel. A counter protest was filed by the Captain, stating that when the Respondent entered into the charter-party he knew the vessel had only just been launched, and that she was then being coppered.

On the 28th of March, 1854, *The Sextus* was ready for sea, but on that day and on the 29th she was prevented putting to sea by bad weather. On the 30th of March, 1854, she sailed from Malta, and reached Alexandria on the 12th of April, 1854. On the day of her arrival Captain Barbara wrote to John Corlett, the charterer's agent, advising him thereof, and informing him that, on the 14th instant, he would be ready to receive cargo. John Corlett forwarded a copy of the letter to Antoniades as his cessionary, and the latter wrote to John Corlett in reply, that the "immense delay" had destroyed the validity of the cession to him.

In consequence of Antoniades disputing the validity of the cession, John Corlett commenced proceedings against him before the Austrian Consul in Egypt; and on the 18th of April, 1854, it was decided by the Chancellor of the Austrian Consulate in Egypt, that the cession was valid and irrevocable, and Antoniades was condemned to the fulfilment of all the obligations resulting from the cession; and it was [204] declared that John Corlett was bound to lend Antoniades his name and assistance, in case the latter should intend to use against Captain Barbara, of *The Sextus*, his right to recover damages caused him through the fault of the Captain.

After a week's delay, John Corlett wrote to the Captain, stating that Antoniades had been recognized and condemned by the Consulate of Austria, as the Captain's charterer, and requesting the Captain to apply to Antoniades concerning all that regarded his cargo. On the day following, the Captain replied to this letter, that it was superfluous for him to apply to Antoniades, he (Antoniades) having already received a copy of the letter sent to advise Corlett that the vessel would be ready to receive cargo on the 14th, adding, "I shall be ready to receive the cargo, upon an order from you, from any one who will consign, and certainly shall not refuse to receive it from Antoniades."

On the 29th April, 1854, Corlett demanded the convocation of the British commercial Tribunal, "in order that the adversary might be declared bound to accept and respect the cession of the charter-party of the 24th of February, made by the charterer in Malta to Antoniades, and to act accordingly; also, if necessary, intimating officially, and condemning the cessionary designated to him to the consignment of the cargo, or relative damages, and holding regularly against him all reasonable protests; and also to hear it declared, that the cession being once signified, Corlett of Malta, the original charterer, had no other obligation, except to guarantee the shipowner the solvability of the cessionary."

In consequence of the foregoing demand, the Tribunal of the British Consulate in Alexandria was duly [205] convoked, and on the 2nd of May, 1854, gave judgment against Corlett's claim that Captain Barbara should be bound legally to oblige Antoniades, as possessor of the charter-party, to the consignment of the cargo, on the ground, that Captain Barbara was in duty bound to wait for the consignment of the cargo during the whole time granted in the tenor of the charter-party, and that the cession of the charter-party could not change the duties of the Captain.

On the 11th of May, 1854, Antoniades gave notice to the Captain "that he was ready to consign to him the cargo of *The Sextus*, provided that the difference between them for the indemnification which the Captain owed him on account of the delay in Malta was settled between them."

Within three or four days afterwards, Antoniades laid a claim before the Tribunal of the British Consulate, demanding that the charter-party of the 24th of February, 1854, might be annulled; but on the 23rd of May, that Tribunal declared its incompetence to decide the case.



On the 31st of May, which was the last of the forty lay days (after deducting eight holidays), Captain Barbara addressed a protest to the British Consul at Alexandria, stating that the demurrage days, at the rate of £8 sterling, would commence on the following day, the 1st of June, protesting against damages, expenses, and loss of profits, to arise from the charterer's failure to furnish cargo, and announcing his intention to demand the full penalty for non-performance, with the daily expenses of the ship, after the expiration of the ten demurrage days, at the rate of £25 per day. Corlett was served with a copy of this protest. Three days afterwards, Captain [206] Barbara made a claim against Corlett before the Tribunal of the British Consulate, claiming £16 for two days' demurrage; and on the 5th of June, that Tribunal, having regard to its former declaration of incompetency to decide upon the merits of the circumstances causing the demurrage, rejected the demand of Captain Barbara.

On the 6th of June, before the expiration of the stipulated demurrage days, Messrs. Fowler and Co., of Alexandria, offered to charter *The Sextus* to a port in the United Kingdom. Captain Barbara informed them that, as the vessel was chartered and was still undergoing demurrage, he had not power to re-charter it; and that it was for the charterer's agent, Corlett, to accept or not the offer of Messrs. Fowler and Co. He also at the same time applied to Corlett, to know whether he should accept the charter-party for the interest of whom it might concern. On the same day, Corlett, in answer said that the possessor of the charter-party was the agent of the charterer, and that Antoniadès was the possessor of the charter-party, and that he, Corlett, had nothing to do with Captain Barbara. Under these circumstances, the offer made by Messrs. Fowler and Co. remained unaccepted.

On the 14th of June, 1854, the Captain gave notice that he was ready to take on board a full cargo for Malta, whither he would sail about the 24th instant, and that, in the absence of a full cargo, he would receive and take such goods and passengers as might be found for that port; and on the 24th of June, 1854, *The Sextus* sailed for Malta with a small cargo, and earned on that voyage, £77 14s. 1d. net freight.

On the 21st of July, 1854, the Appellant, as administrator of the Malta Navigation Company, [207] presented a petition to the Commercial Court of Malta, alleging the transactions above stated, and grounding thereon a claim as against the Respondent for the sum of £2016 8s. 7d., being the amount of penalty, costs, damages, and expenses, less the sum of £77 14s. 1d. net freight from Alexandria to Malta.

Before any answer was put in, on the 8th of September, 1854, the Appellant was, at the instance of the Respondent, cited before the same Court, to show cause why the Court should not order Antoniadès, as cessionary of the charter-party, to be made a party in the cause, the Court appointing curators to represent and defend him in his absence. On the 30th of September, 1854, this demand of the Respondent was rejected by the Court; and this decision was, on the 11th of November, 1854, confirmed by the Royal Court of appeal at Malta.

The preliminary objection having been disposed of, the Respondent put in his answer; the defence being, in substance, that the stipulation contained in the charter-party, that the vessel should, with all convenient speed, proceed in ballast to Alexandria in Egypt, was a condition precedent to the Appellant's right to recover.

On the 30th of December, 1854, the Royal Commercial Court gave judgment, and decided that the Respondent was not liable to pay as penalty the full amount of the freight demanded by the Appellant, on account of the non-fulfilment of the charter-party by the Respondent; that Captain Barbara ought not to have refused the freight offered him by the cessionary of the Respondent, and that the freight so offered ought to be deducted from the freight agreed [208] upon by the contending parties; and the Court appointed surveyors to fix and regulate the freight due, and make other inquiries, reserving to itself to pronounce definitely after the surveyor's report should have been presented.

From this decision both parties appealed to the Royal Court of appeal of Malta.

On the 14th of March, 1856, the Royal Court, consisting of Dr. Paolo Dingli (President), Dr. Francesco Chapelle, the Hon. Dr. A. Micallef, C.M.G.; Consuls, the

Merchants F. Sav. Farrugia, Andrea G. Calvocoressi, pronounced their decision, revoking the sentence of the Commercial Court, and deciding for the exclusion of the Appellant from the demands advanced in his petition. The judgment of the Court, after recapitulating the nature of the action, proceeded as follows:— The Court, considering that it is not in dispute between the parties that the Defendant on the 24th of February, 1854, through the medium of the public brokers Eynaud and Pariente, chartered the Maltese vessel *Sertus*, belonging to the Malta Navigation Company, of which the Plaintiff is the administrator, and commanded by Captain Giuseppe Barbara, to transport a full cargo from Alexandria in Egypt to Cork or Falmouth for orders, hence to discharge at a port of Great Britain or Ireland, or on the Continent between Havre and Hamburg, at 11s. freight per imperial quarter, and £1 10s. per hundred quarters gratification to the Captain, with forty working lay days, and ten days on demurrage, with the express clause that the said vessel being tight, staunch, and strong, properly manned, coppered, and in every way fitted to undertake the voyage, should, with all convenient speed, start from this Island in ballast for [209] Alexandria, with the obligation to be consigned to the agents of the charterer at the ports of loading and discharging, and under the penalty of the amount of freight in case of non-performance of the charter-party. That neither is it disputed between the parties that the transport of the cargo from Alexandria to any of the places indicated in the charter-party, did not take place. The only question is, whether the Defendant has incurred the obligation to pay the penalty, and the damages and interest for not having fulfilled the contract, or whether the action undertaken for that object is inadmissible, upon the argument that the non-performance of the charter-party took place, not by the default of the Defendant, but that of the Plaintiff and of the Captain. Considering, that it is evident that *The Sertus*, chartered to the Defendant under the above conditions, was not registered as a British vessel until the 24th of March, 1854; and that the vessel did not start from his Island for Alexandria until the 30th of March, 1854, and that the arrival at Alexandria took place on the 12th of April, 1854. That it is also evident that the Captain of *The Sertus* refused to recognize as agent of the Defendant, Antoniades, to whom John Corlett, son and agent of the Defendant, and recognized as such by Captain Barbara, had ceded the charter-party. That, although Antoniades pretended not to be bound to the fulfilment of the charter-party on account of the delay of the Captain in starting from this Island, yet the cession was declared valid on the 18th of April, 1854, by the Austrian Consulate, to which John Corlett had directed himself. That, besides the decision, by which the cession was declared valid, John Corlett repeated [210] to Antoniades his orders for the consignment of the cargo, with the knowledge of the Captain. That also Antoniades on the 11th of May, 1854 (and, therefore, before the termination of the lay days, which began on the 14th of April, 1854), declared to the Captain that he was ready to give him the cargo, provided that he should first regulate the indemnification which Antoniades pretended to be due to him for the delay of the vessel. That, although the Captain thought proper to communicate the offer to Corlett, yet he took no further steps, either to receive the cargo upon the conditions imposed upon him, nor to have it declared by the competent authorities that the conditions were inadmissible, and that notwithstanding the speed and diligence used by Corlett for that object. That, although Antoniades did his best to get the question between himself and the Captain of the vessel settled in Alexandria, in spite of the opposition of some, who had excepted the incompetency of the British consulate to decide upon a charter-party stipulated in Malta, the diligence of Antoniades also remained useless and fruitless. That it does not appear that the Captain adopted any measures to effect the voyage contemplated in the charter-party, excepting by addressing himself to Corlett of Alexandria, or had recourse to any authority, excepting by protesting to have Corlett declared responsible, or to be declared free from his obligations, or took any steps to get a cargo from other persons for the place of his destination, for account of whom it might concern; but it also appears that the Captain took no legal steps with the competent authorities for the definition of the controversy which had arisen between himself and Corlett, regarding the acceptance of freights offered [211] him by other persons, and in which Corlett pretended that he ought not to interfere, on account of the



cession made by himself of the original charter-party to Antoniades. That it appears, finally, that the Captain upon his own authority took upon himself to dispose of the vessel, and instead of making the voyage agreed upon, to dissolve the charter-party, and to return to this Island on the 24th of June, 1854. Considering, that no freight is due, when it happens by the fault of the Captain or of the owner of the vessel that the charterer did not make use of the same, and that the cargo did not arrive at the place where the Captain or the owner had bound himself to transport it; in such a case no penalty is due, and much less are damages and interest due besides the penalty. Considering, that it is not disputed by the Plaintiff, but is even admitted, that the vessel at the time of the stipulation of the charter-party was not tight, staunch, and strong, properly manned, coppered, and every way fitted to undertake the voyage, notwithstanding the declaration made by him in the charter-party, that the vessel was already fitted to navigate, even if it might or ought to be said, according to the testimony produced by the Plaintiff, that the Defendant knew at the time of the stipulation of the charter-party that the vessel was not in a state to be able to undertake the voyage, notwithstanding the declaration made by the Plaintiff, it results from the same testimony that the Defendant was in the belief that the vessel would have been able to start for her destination in a few days. That this was the idea of the Defendant results from the letter written by him on the 26th of February, 1854, to his son, John Corlett of Alexandria, [212] with which he transmitted him the copy of the charter-party, and informed him, that he expected that the departure of the vessel from this Island would take place in the course of the next week from then. That the work necessary for the vessel to be put in a state fit to navigate could be done in a few days. That it does not appear that the Plaintiff was impeded by any just cause from doing the work. That it also appears that the Plaintiff did not procure the register of the vessel until 24th of March, 1854, that is, one month after the stipulation of the contract. That a delay for thirty-four days from the date of the charter-party up to the departure, in the particular circumstances of the case, amounts to a fault on the part of the owner of the vessel, and to the violation of the obligation assumed by him, to make her start with all convenient speed. That by the same nature of the contract, the charter-party in question was a stipulation of the Plaintiff towards his cession, which did not suffer an extraordinary delay at the departure of the vessel, in consequence of which delay room was made for a considerable alteration and reduction in the freights, as the same Plaintiff admitted, and ultimately, in support of documents, adduced circumstances and facts not to be imputed to the Defendant. Considering, that there was no reason why the agent of the Defendant might not cede the charter-party under the legal guarantee of the solvability of the cessionary; that the agent of the Defendant never denied, but always expressly declared that he was responsible for the cessionary, and moreover took legal steps in the British Consulate on the 29th of April, 1854, against the Captain, 'to hear himself declared bound to accept and respect the cession of [213] the charter-party made to Antoniades, and to act accordingly; also, if necessary, intimating officially and condemning the cessionary to the consignment of the cargo, or relative damages; and also to have it declared that the cession, being once signified, the original charterer has no other obligation than to guarantee to him the solvability of the cessionary.' That, although the agent of the charterer was rejected from the demand for the reason that the lay days were still in progress, yet the Captain took no legal steps after the completion of the lay days, either against Antoniades, or against the agent, for the consignment of the cargo. Considering, that the Captain had no right, in the particular circumstances of the case, to resolve the charter-party on his own authority, and to return to this Island from Alexandria without first calling at least the agent of the Defendant before judgment, and obtaining against him a sentence declaring that, having failed to load the vessel within a certain time, he was permitted to set sail, on the occasion of which the demand perhaps might have been discussed and settled the question of the validity of the cession; that relative to the damages pretended on account of the delay, and that respecting the regularity of the offers of other charters, or at least the competent authority could have made such provisions as might have been thought useful or necessary to diminish as much as possible the damages of those interested—decides

for the exclusion of the Plaintiff from the demands advanced in the petition, and consequently for the revocation of the sentence pronounced by the Royal Commercial Court on the 30th of December, 1854."

The appeal was from this judgment.

[214] Mr. Bovill, Q.C., and Mr. Archibald, for the Appellant.—This is a question respecting the validity of a charter-party effected in Malta, on a ship registered as a British ship, entered into by parties resident within and subject to the jurisdiction of the Courts of that Island. There is no difference between the law of England, and the law in force in Malta, in respect to shipping transactions upon the question at issue. Consulate de Marie, cap. 260, pars. 870, 9; Compendio di Diritto Commerciale, p. 96 (Malta, 1844). The case, therefore, must be decided by the same rules as prevail in Westminster Hall. Two points only are material to be considered. First, whether, in the circumstances, an action would lie against the charterer; and if that is decided in the affirmative, then, secondly, a further question arises, upon what principle the damages for the non-performance of the contract by the charterer are to be assessed. In the first place we object to the judgment of the Royal Court of appeal, as it contains erroneous statements and conclusions. Thus, in respect of the facts, the judgment states that the charter-party contained an express clause, "that the vessel being tight, staunch, and strong, properly manned and coppered, etc., should, with all convenient speed, start," whereas, the words of the charter-party are, that the vessel "shall, with all convenient speed, proceed in ballast to Alexandria." Again, it is assumed by the Court, that by the charter-party it appeared that the vessel was at the date thereof fit to start; but no such declaration is to be found in it. Then as to the law applicable to the case, the Court below has assumed that there was no reason why the agent of the charterer could [215] not cede the charter-party, under the legal guarantee of the solvability of the cessionary, a position which we contend cannot be sustained. Further, the Court assumed that the Captain refused to recognize Antoniades as agent of the charterer; whereas, the letter of the Captain shows that he was willing to recognize him as the agent to fulfil the charter, and only refused to recognize him as principal. So again, it was assumed by the Royal Court, that it was the duty of the Captain to obtain an adjudication of the matter in dispute, by some Tribunal at Alexandria; and that he was guilty of neglect in not doing so. Now, it is clear, that in law, no such duty existed, and that any attempt to obtain an adjudication at Alexandria would have been fruitless, as the Tribunal of the British Consulate had, in the proceedings by Antoniades against the Captain to have the charter-party annulled, pronounced itself incompetent to adjudicate on the question in dispute.

Upon the first ground, then, the misconstruction of the charter-party, we submit, that the decision appealed from cannot be upheld. The stipulation "that the said ship, being tight, staunch, properly manned, and in every way fitted for the voyage, shall, with all convenient speed, proceed in ballast to Alexandria," did not imply that she was then fit for the voyage.—[Sir John T. Coleridge: The charter-party says, "Now at anchor in this port." Surely, that must refer to the date of the execution of that instrument.]—The fitness for the voyage was not a condition precedent to the performance of the contract to load on the part of the charterer, nor could the shipowner mean to represent that she was so fit at the date of the charter-party: all he could mean was, that the [216] vessel should be fitted, within a reasonable time, for the voyage. The ship, it cannot be denied, was, within a reasonable time, so fitted, and did, with all convenient speed, proceed in ballast to Alexandria, according to the terms, and, as we insist, within the true meaning of the charter-party. Even supposing that the ship did not "with all convenient speed" proceed in ballast to Alexandria, yet the delay was not of such a character that the object of the charter-party and of the voyage was thereby frustrated. The delay from the 24th of February to the 30th of March is satisfactorily accounted for, as the weather was so bad that the work could not go on. But the delay was in reality of no importance, for if the vessel had been actually at anchor in port, as the charter-party represented it to be, and had sailed a few days afterwards, it would have completely satisfied the requirement of sailing "with convenient speed." This being so, the mere fact of failing to sail within a reasonable time was no answer to the action, *Cliphsham v. Vertue* (5 Q. B. Rep. 265). Lord Denman there says, "The Plaintiff's neglect shall



not exonerate the Defendant, unless it precludes him from making use of the vessel." So, in *Tarrabochia v. Hickie* (1 Hurlst. and Nor. 183), the stipulation in the charter-party was, that the ship was to sail with all convenient speed, and Chief Baron Pollock held that such stipulation was not a condition precedent. *Hurst v. Usborne* (18 Com. Ben. Rep. 144), is an authority that the fact of a vessel not having arrived at port in consequence of sea perils, until the grain export trade was over, did not exonerate the charterer from loading a cargo. *Bornmann v. Tooke* (1 Campb. 377), *Freeman v. [217] Taylor* (8 Bingham 124), *Havelock v. Geddes* (10 East. 555), *Glaholm v. Hays* (2 Man. and Gr. 257, S. C. 2 Scott, N. R. 471), *Ollive v. Booker* (1 Exch. Rep. 416), *Hall v. Cavenoze* (4 East. 477), *Constable v. Clobherie* (Palm. 397), all illustrate the principle that the stipulation "to sail with convenient speed" does not create a condition precedent, Abbott "On Shipping," p. 221 (9th Edit.). This rule of English mercantile law is founded upon just principles, and is in every respect so consonant to justice, that in the absence of authority of the law of Malta to the contrary, it must be assumed to be the mercantile law in force in Malta. The charter-party was binding upon the charterer, and ought to have been fulfilled by him, and there was a clear breach of it on his part by his default, as he was bound to put on board a full cargo, *Hunter v. Fry* (2 Bar. and Ald. 421). Such omission was without any lawful excuse. The charterer cannot uphold the assignment by his agent to Antoniadès, as the charter-party could not be ceded to him without the shipowner's consent. Cession by an agent is a personal contract only, *Lennard v. Robinson* (5 Ell. and Bla. 125). In fact, the charter-party was not ceded or assigned by the charterer, so as to discharge him from the responsibility of performing its conditions. Again, the Captain was not bound to accept the offer made by Messrs. Foster and Co., and, at all events, he could not properly have accepted the same without the sanction of Corlett, the charterer's agent, which was withheld.

Assuming then, that the action was maintainable against the charterer, the only question left to consider is the measure of damages for not loading pursuant to the conditions in the charter-party. There has been a [218] breach of the charter-party by the charterer, therefore, the ship owner is entitled to the penalty therein provided. The damages are assessed at £1628 11s. as the amount of full freight that might have been earned, but from that amount we are willing to make a deduction of the sum of £77 14s. 1d., for the freight earned on the return voyage from Alexandria to Malta. In addition to this amount we claim to recover, first, the sum of £80, for ten days' demurrage at £8 per day, provided for by the charter-party; secondly, the sum of £325 for demurrage on demurrage consumed at Alexandria, being at the rate of £25 per day for thirteen additional days, during which the ship lay for cargo; and, lastly, we claim the sum of £61 1s. 8d., the expenses the Captain was put to, while the ship was waiting for a cargo. Upon the question of damages they cited Devilleneuve's Dict., verb "Fret," No. 56, citing Dageville, Tome II. p. 350.

Mr. Wilde, Q.C., and Mr. Honyman, for the Respondent.—We admit that the charter-party must be construed according to English mercantile law, though the mode of pleading in the Courts of Malta is different from that in practice here; but we do not insist on any objection on that score. First. By the terms of the charter-party, the vessel ought, at the date thereof, to have been actually coppered and "at anchor in this port," and to have proceeded "with all convenient speed" to Alexandria. Now, the due performance by the Master and shipowners of these warranties were, in law, a condition precedent to their right to call upon the Respondent, the charterer, to provide a cargo for the ship. The time at which a [219] vessel sails is a most important matter in contracts of affreightment, and the charterer was not bound to complete his part of the engagement, as this condition was not performed. In *Ollive v. Booker* (1 Exch. Rep. 416), it was held that the time when the vessel sailed was material, and that the statement in the charter-party amounted to a warranty. So, in *Glaholm v. Hays* (2 Man. and Gr. 257), the date mentioned in the charter-party, for sailing, was held to be a condition precedent. Mr. Justice Maule (ib. 263) there says, that if the sailing on a particular day "is a condition precedent in this case, the sailing within a reasonable time would also have been held to be a condition precedent. There is a difficulty in saying that the one is a condition precedent, and not the other." The same principle was laid down and acted upon in *Thompson v. Gillespy* (5 Ell. and Bla. 209). The case of *Hurst v. Usborne* (18 Com. Ben. Rep.

150) does not apply. There the vessel met with bad weather and sustained much damage, but that contingency was foreseen and provided for by the charter-party. By reason of the delay that took place in the present case, the object of the charterer in effecting the charter-party was wholly frustrated. The non-fulfilment of the charter-party was solely attributable to the default of the Master and shipowners. A cargo would have been loaded in the first instance, but for the refusal of the Captain to recognize Antoniades as holder of the charter-party, by virtue of the cession, and to accept the cargo offered to him by Antoniades on the 11th of May, 1854, before the expiration of the lay days; and again, in refusing the charter-party offered him by Messrs. Fowler and Co., for a cargo to England.

[220] Secondly. Upon the question of the damages. In no case could the claim advanced by the Appellant, be sustained. It is for consequential damages. At any rate, the sum of £77 14s. 1d., earned on the return voyage, is to be deducted from the claim for freight. So also must be deducted the freight which might have been earned, if the Captain had accepted the offer made by Messrs. Fowler and Co., for the goods to be conveyed to England. The claim for the personal expenses of the Captain cannot be admitted. If he chose to stay after the expiration of the demurrage and lay days, in the face of the positive refusal of the charterer's agent to put a cargo on board, it was his own fault.

Their Lordships' judgment was delivered by

The Right Hon. Sir John T. Coleridge (July 14, 1858).—Two questions substantially were raised in the argument before us: the first, whether, under the circumstances, the Plaintiff could maintain any action against the Defendant; and the second, supposing the first to be answered in the affirmative, on what principle the damages recoverable should be assessed.

The facts were shortly these: the Respondent on the 24th of February, 1854, chartered a vessel called *The Sextus*, belonging to a Company whom the Appellant represents. In the charter-party she was described as "The good ship, or vessel, called *The Sextus*, coppered, A. 1. of Malta, of the measurement of 123 tons register, or thereabouts, now at anchor in this port." It was stipulated that she "being tight, staunch, and strong, and properly manned, and every way fitted for the voyage, should [221] with all convenient speed proceed in ballast to Alexandria in Egypt, and there load from the charterer a full and complete cargo of beans, wheat, Indian corn, other grains, seeds, or any other lawful merchandize." Being so loaded, she was "to proceed to Cork or Falmouth, for orders, to discharge at a safe port afloat in low tide in the United Kingdom of Great Britain and Ireland, or at a safe port on the Continent between Havre and Hamburg (both inclusive), orders to be given by return of post from London, or lay days to commence." The rates of freight and other usual matters were then stated, and the charter-party went on to provide thus: "forty working days are to be allowed the said merchant (if the ship is not sooner dispatched), for loading and unloading the ship: the lay days to commence when the vessel shall be ready to receive her cargo at her port of loading, to cease when loaded, and to recommence when ready to discharge at her port of unloading: the time spent in going from port to port not to be included in the said lay days: ten days on demurrage over and above the said lading days at £8 sterling per day. Penalty for non-performance of this agreement, the amount of freight." This was signed by the Captain, Giuseppe Barbara, and the Respondent.

At the date of the charter-party *The Sextus* was not coppered. She was not lying at anchor or afloat, nor had she obtained her register. She was an entirely new vessel, still in a dry dock, her coppering being in course of completion. She was not ready to sail until the 28th March, and being prevented by the state of the weather, did not in fact sail till the 30th of that month, and she reached Alexandria on the 12th of April 1854. On that day Barbara gave notice [222] of his arrival to John Corlett, the Respondent's agent at Alexandria, and informed him that he should be ready to receive cargo on the 14th.

Meantime, on the 10th March 1854, John Corlett had made a cession of the charter to one Antoniades at Alexandria, and on the arrival of the vessel, he referred the Captain entirely to the cessionary, affirming that his principal (the Respondent) had nothing more to do with the charter-party than to guarantee the solvency of



the cessionary. The cessionary having first sought in vain to invalidate the cession as between himself and Corlett, on account of the delay in the arrival of the vessel, refused on the same ground to give the Captain any cargo. Barbara refused entirely to acknowledge the cession, or release the charterer; at the same time expressing his readiness to receive a lawful cargo from any one, under order of John Corlett.

Freights had fallen very considerably below the rates named in the charter-party, between the date of the charter-party and that of the cession; and they fell again still lower on the 19th of March, and so continued.

The vessel lay at Alexandria, waiting for cargo for the whole of her lay days and her ten demurrage days, but received none.

These are the circumstances on which their Lordships are to determine whether an action can be maintained; and we think it better to separate them from the remaining circumstances on which the principle of assessment of damages will depend, if it should become necessary to consider that.

It may serve to clear the case if we state at once, that we attach no importance to the cession. It [223] appears to their Lordships not easily reconcilable to reason or justice, that one party to a mercantile contract should have the power, without the privity or consent of the other, to substitute a third person for himself and in his place, simply on condition of being responsible for the solvency of that third person. The circumstances and the qualifications of the parties between whom a contract is made, are always material, in a greater or less degree. A change of the party on one side, even with this guarantee, alters the condition of the other party, affects the nature of his remedy, and makes the contract a new one. Some well-known exceptions in the general mercantile law have been recognized, as in the case of negotiable or transferable instruments; but we are not aware that charter-parties have ever been included among these; and though some evidence may appear of a custom of this kind prevailing at Alexandria, yet nothing is shown as to the circumstances of its extent, notoriety, or qualifications; and there is nothing to show that it could bind the Appellant, a Maltese shipowner. We think, therefore, the case is to be considered as if no such cession had been made.

The case for the Respondent, then, rests on this ground, that it was a condition precedent to any liability attaching upon the charterer, that the vessel should have been at the date of the charter-party actually coppered and at anchor in the port, or, at all events, that she should have proceeded with all convenient speed to Alexandria; and that the Appellant had failed in these respects.

It is unnecessary to determine whether the completion of the coppering of the vessel was a condition [224] precedent or not to the maintaining an action on the charter-party, because it seems clear that the stipulation has reference to the time of the sailing, and not to the date of the charter-party. It is important not to give to mercantile instruments, such as this, an unnecessarily strict construction, but such a one as, with reference to the context, and the object of the contract, will best effectuate the obvious and expressed intent of the parties. The term "coppered" is, indeed, in the same branch of the sentence with the words "at anchor in the port," which point to a time then present; but it is more nearly united to the words "A. 1," and the words describing her measurement; and it is followed by the words "tight, staunch, and strong, and properly manned, and every way fitted for the voyage." Now, all these point to matters which are of importance only with reference to the time of taking in her cargo, and sailing, and with reference to these only is the completion of the coppering material. It would be unreasonable so to construe this stipulation, therefore, as to make the whole contract fail, if a single sheet of the coppering should have been incomplete at the date of it, which yet would be the consequence of holding the construction contended for by the Respondent.

We have intimated that the words "now at anchor in the port" are not to be disposed of on the same ground; they certainly refer to the time of the execution of the charter-party; but still, to make the whole force of the instrument depend on a literal compliance with this unimportant stipulation, would be unreasonable. If, indeed, by the failure in this respect of the shipowner, the object of the charter-[225] party had been frustrated, a different conclusion might have been proper.

We come, therefore, to the stipulation that she should sail "with all convenient

speed," which raises a much more material question. In the first place, we cannot doubt that it was the object of the charterer that the vessel should sail promptly: the language itself points to this. The expression "now at anchor in the port," we have just been considering, has the same bearing. A letter of the 26th of February, from the Respondent to his agent at Alexandria, shows the understanding and expectation of the former; and the specific object of the adventure makes this the most reasonable view to be taken. The vessel was to go to Alexandria, chartered at certain rates of freight agreed on: unless freights could be procured there at an advance on those rates, the object of the charterer would be defeated. It is to be supposed that he had made his bargain at Malta, with knowledge of a then existing state of freights at Alexandria, or in expectation of one at no remote period; and when, in addition, it is considered how liable to fluctuation the rate of freights is from a variety of causes, it seems to follow that time must be a most important element in the formation and completion of such a contract as the one before us.

Now, the facts appear to be, that the contract having been made on the 24th of February, the vessel represented in it as then lying at anchor was not made fit to sail until the 28th of March, did not sail till the 30th, and was not ready to receive cargo at Alexandria until the 14th of April. More than a calendar month was, therefore, expended, and it is immaterial to the charterer whether necessarily or [226] unnecessarily, in making her ready for the voyage: over this he had no control, and it does not lie in the shipowner's mouth to say that the time was idly thrown away: it is said that many of these days were, either by reason of the weather, or from other causes, days on which no work could be done; but it is not said that this number was greater than persons entering into a contract of this kind at Malta might reasonably have anticipated. Sixteen days and a half are admitted to have been actually expended in working on her to make her fit for the voyage: and, looking at all the circumstances, it appears to us that the shipowner has failed in the performance of a very material stipulation of the contract.

But, then, it was contended, that the delay in the present case had been, in fact, of no importance, for that if the vessel had been actually floating at anchor, as represented, at the date of the contract, and sailed in so few days after, as to have completely satisfied the requirement of sailing with all convenient speed, she could not have been ready to receive cargo until beyond the middle of March: but that the evidence showed that freights had fallen considerably at Alexandria before the 10th of March, the date of the cession, and that they fell still lower on the 19th of that month, that no other loss but by the falling of freights had been alleged, nor was it shown that the charterer had taken up any other vessel, or declined any cargoes, or in any way altered his position in consequence of the delay.

Under such circumstances, it was contended that had this been an English contract, it was clear that the mere failing to sail within a reasonable time, or with convenient speed, was no answer to an action [227] on the contract. *Clipsham v. Vertue* (5 Q.B. Rep. 265) and *Tarrabochia v. Hickie* (1 Hurlst. and Nor. 183), with several other cases, were cited in support of this doctrine: and it was further contended, that this rule of our mercantile law was founded so manifestly on good sense and equity, effectuating so generally the probable intentions of the parties, that, in the absence of any express authority to the contrary, it was to be presumed to be the law governing the mercantile contracts of Malta. Limiting ourselves to the facts of this case, and to the extent to which it is necessary to go for the present judgment, we agree to both parts of this argument: the parties have not expressly stated for themselves in the charter-party that, unless the vessel sailed by a specified day, the charter-party should be at an end: and Courts ought to be slow to make such a stipulation for them. It is to be presumed that the Respondent, residing at Malta, knew of the delay in the completion of the vessel, and of the time when it was ultimately in a condition to sail: if so, and he had intended to insist that the charter-party was no longer binding, nothing would have been more easy or just than to give notice to the Appellant that he so regarded it. The object of the charter-party is, indeed, frustrated, but not by any delay in the ship's sailing, such as the charterer had a right to complain of: that which defeated his speculation was the fall in the rate of freight: it was, therefore, for him to show that had the shipowner performed his contract in time, the ship would have arrived before the fall had occurred: this he has failed to do.



There is no evidence that he might not have procured freight when she did arrive, at as good a rate as [228] that at which it might have been procured on the day when, according to his own calculation, the vessel ought to have arrived.

A doubt, indeed, was expressed by Mr. Justice Maule, as to this doctrine, in *Glaholm v. Hays* (2 Man. and Gr. 257), that if a stipulation that a vessel should sail on or not later than a day named, amounted to a warranty as to the time of sailing, and made her so sailing a condition precedent to any action on the charter-party, it rather appeared to him, that, on the same principle, a stipulation that she should sail with all convenient speed, which the finding of the jury would convert into a time certain, should be equally considered a warranty, and should make her sailing a condition precedent to a recovery on the charter-party. But the question in those cases arises on the intention of the parties: and in determining this it is impossible to exclude the nature of the thing stipulated for. A contract that a thing shall be done on a day named is in itself certain and defined; it excludes all consideration of the influence of future circumstances; but a contract that it shall be done with all convenient speed necessarily admits a consideration of them all; and then what, under the circumstances, is "convenient speed," may plausibly enough be judged differently by different minds. It is, therefore, not unreasonable to hold, that in the former case the stipulation was intended to be a warranty, and yet to consider a failure in the latter as only entitling the party to a cross action, or allowance from the damages, whenever the consequence of the failure has only been partially injurious, and has left the main object of the contract still attainable.

We agree, too, that no difference has been shown [229] to exist between the mercantile law of Malta and our own in this respect, and we feel that it is extremely desirable that the law regulating the construction of mercantile contracts and the remedies for breach of them should, as much as possible, proceed on the same principle in all parts of the world, and especially that this uniformity should prevail in respect of this country and its dependencies. Their Lordships think, therefore, that this action was maintainable.

We are then to determine on what principle the damages are to be ascertained. According to the words of the charter-party, the penalty for the non-performance of the agreement was to be the amount of freight, and accordingly the present Appellant in his original suit claimed against the Respondent the sum of £2016 8s. 7d., being the amount, as he calculated it, of the full freight, with costs, damages, and expenses, after deducting from the freight, a sum of £77 14s. 1d., for freight earned by the ship, as hereinafter mentioned.

The law of this country on the question of penalty, or liquidated damages, may now be considered, after a great number of decisions, not perhaps all of them strictly reconcileable with each other, to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term "penalty," or the term "liquidated damages," does not determine that intention. but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; [230] if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages. Now, when this charter-party is looked at, it will be found that it contains, as might be expected, many stipulations of greater or less importance, the breach of any one of which, however minute, would, in one sense, be a non-performance of the agreement; it can hardly be supposed that the whole amount of the freight could be intended to be forfeited for any one breach: and the true sense seems to be that, for any minor breach, the damages to be recovered within the amount of freight are the damages actually sustained; though it is not inconsistent with this, that in case of an entire non-performance, such as a neglect or refusal to put any cargo on board so that no freight could be earned, the parties had agreed that the damages should be the full amount of freight stipulated for in the instrument.

The Appellant appears, in substance, to have so construed the instrument. He

contends that there has been a non-performance, total in amount, except in respect of a small portion of freight earned on the return voyage from Alexandria to Malta, to the extent of £77 14s. 1d., for which he is content to give credit, deducting it from £1628 11s., the calculated amount of the full freight, which leaves a balance of £1550 16s. 11d. But the Respondent seeks further to deduct in respect of the freight which might have been earned, by accepting a charter-party offered by certain brokers, Messrs. Fowler and Co., [231] for goods to be conveyed to England. This offer was distinctly disclaimed by the Respondent's agent, as having proceeded from, or having been authorized by, him. It was made before the expiration of the demurrage days stipulated for in the charter-party, during the time, therefore, for which the Captain of the vessel, who insisted on the liability of the Respondent to perform the charter-party, was bound to keep the vessel ready to receive cargo offered by him. We think, therefore, that the Captain was not bound to accept this charter, and that nothing can be deducted from the Appellant's claim on account of it. The Appellant, therefore, is entitled to recover the sum of £1550 16s. 11d.; and his offer to deduct for the freight earned, makes it unnecessary to consider whether that deduction could strictly have been insisted on; on which, therefore, their Lordships express no opinion.

But, in addition to this, the Appellant claims to recover three sums: £80, for ten days' demurrage, at £8 per day, as agreed on by the charter-party; £325, for what he calls demurrage on demurrage, that is, for thirteen additional days, during which the vessel lay for cargo, at £25 per day; and £61 1s. 8d. for expenses incurred by the Captain. There appears to be no ground whatever for the claim of these two last sums. When the ten days' demurrage had expired, the obligation of the Captain to wait for cargo was at an end; the charterer's agent had given him no reason to expect that he would furnish any; he had peremptorily disclaimed the charter-party; the waiting, therefore, by the Captain was purely voluntary, and in his own wrong. Nor in an action on the charter-party could the shipowner recover ex-[232]-penses incurred by the Captain under the circumstances of this case.

As to the £80 for demurrage, the clause which makes the amount of freight to be the penalty for non-performance, appears to have been intended to make that sum the limit of damages to be recovered, and to exclude any demand beyond that amount.

Upon the whole, therefore, their Lordships are prepared to advise Her Majesty that the appeal be sustained, and the judgment of the Court below reversed: but that the amount to be recovered by the Appellant be reduced to the sum of £1550 16s. 11d., with costs of the appeal.

[Mews' Dig. tit. COLONY. II. PARTICULAR COLONIES. 15. *Malta*; tit. PENALTY. A. NATURE OF. 2. *Penalty or Liquidated Damages*, a. *General Rules*; tit. SHIPPING. A. XI. CHARTER PARTY, 2. *The Contract*, c. i. *Form of Construction*, e. iii. *Position and Sailing*. On point (i.), as to construction of charter parties, see *Sailing Ship "Garston" Co. v. Hickie*, 1885, 15 Q.B.D. 580; (ii.) as to condition precedent (12 Moo. P.C. 223), see *MacAndrew v. Chapple*, 1886, L.R. 1 C.P. 643; and see *Behn v. Burness*, 1863, 3 B. and S. 751; and *Bentsen v. Taylor, Sons, and Co.* (1893), 2 Q.B. 274.]

## ON APPEAL FROM THE COURT OF APPEALS OF THE PROVINCE OF CANADA, FORMERLY CALLED LOWER CANADA.

The QUEBEC and RICHMOND RAILROAD COMPANY.—*Appellants*: EDWARD QUINN,—*Respondent* \* [June 23, 1858].

When the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, by the law in force in

\* Present: The Right Hon. Dr. Lushington, the Right Hon. T. Pemberton Leigh, the Right Hon. Sir Lawrence Peel, the Right Hon. Sir Cresswell Cresswell, and the Right Hon. Sir John Taylor Coleridge.



Lower Canada the party originally authorized as the agent may appoint a deputy [12 Moo. P.C. 265].

By an Act of the Canadian Legislature, 13th and 14th Vict., c. 116, a Company were incorporated for the purpose of making a Railway, with power to purchase and take land required for the Railway, either by agreeing with the owners of the land for the price and compensation to be given, or, if the matter could not be settled, by referring to arbitration. A contract was afterwards entered into between the Company and certain contractors for completion of the Railroad; by this contract it was agreed that the contractors were to complete the Railroad at their own expense and charges, and pay any claim which might be made against the Company, including the purchase of lands required, and the Company were to exercise, or permit the contractors to exercise, as the case might be, any of the powers vested in them by the Act of Incorporation as fully, amply and effectually, as if the Company itself had exercised such powers and performed the works; and, in the exercise of such powers, the contractors were to use the name of the Company, if deemed necessary. The contractors, who resided in England, afterwards, by a power of attorney which recited the above contract, deputed R. as their agent, with full power, on their behalf, to construct the Railroad and to enter into contracts for the purchase of land, and to settle any claim for land or other damages, and generally to execute and perform all such acts and things in reference to the purchase of land as fully and effectually as the contractors might do. The Company required part of Q.'s land, and before the contract for the completion of the Railroad, had been in treaty with him for the taking such land, but could not agree upon the terms. Q. had, in consideration of the Company's compulsory power of purchase under the Act, let them into possession. An agreement, or bond of arbitration, was afterwards entered into by R. and Q. to refer the matter to arbitrators, "*amiables compositeurs*," to ascertain the amount that the Company should pay to Q. for the land. In this agreement R. was described as the agent and attorney of the contractors for the works upon the Railroad, "acting in this behalf in the name of the Company under authority to that effect contained in the contract between the Company and the contractors." The arbitrators awarded a certain sum for land and for damages sustained by Q. to be paid by the contractors. Q. applied to the Company for payment, who referred him to the contractors, who refused to pay the amount. Q. then brought an action against the Company in the Superior Court in Lower Canada to recover such amount. The Company pleaded in defence that the contractors, by the contract, were alone liable, and that R. had no authority either from them, or the contractors, to refer the matter to arbitration of "*amiables compositeurs*."

Upon appeal held (affirming the judgments of the Courts below),

First, that the contractors, both by the express language and the necessary effect of the contract with the Company, were to be considered as agents of the Company, with authority to exercise the powers vested in the Company by the Act of Incorporation, in the name of the Company, and to buy lands, and to make the Company liable to third parties with whom they had contracted in the name of the Company, to the performance of any engagement entered into on their behalf, although, as between the contractors and the Company, the former were bound to supply the necessary funds [12 Moo. P.C. 263].

Second, that the contractors under the contract had power to delegate to an agent, powers similar to those vested in them by the Company, and that under the power of attorney executed by the contractors, R. possessed the same powers of acting and rendering the Company liable, as the contractors themselves had under the contract [12 Moo. P.C. 265].

Third, that the Company had no power to transfer their rights created by the Canadian Act, 13th and 14th Vict., c. 116, to the contractors, so as to relieve themselves from the responsibility which the Legislature had attached to the exercise of their powers.

Fourth, that the action was properly brought against the Company upon the award, as the contract with the contractors in no degree altered the position of the Company with third parties, and that the agreement with R. was made on the Company's behalf, for although the Company had a right, as between themselves and the contractors, to require the contractors to make payment, yet, as the contractors' agent, R., had entered into no personal engagement with Q., the contract with the Company was *res inter alios acta*, with which Q. had nothing to do [12 Moo. P.C. 255, 256].

Fifth, that the submission to arbitration of "*amiables compositeurs*" was the proper course to pursue [12 Moo. P.C. 258, 264].

The Appellants in this case were the Defendants in an action brought against them by the Respondent [233] in the Superior Court of Lower Canada, to recover the sum of £3000 currency, the amount fixed by an award made by arbitrators, "*amiables Compositeurs*," under a submission to them to ascertain the compensation to be given for land taken for the purpose of "The Quebec and Richmond Railway."

The Quebec and Richmond Railroad Company was incorporated in the year 1850, by an Act of the Legislature of Canada, 13th and 14th Vict., c. 116, which authorized the Company, among other things, by themselves, their deputies, agents, officers, workmen, and servants, to make and complete a Railroad, to be called "The Quebec and Richmond Railroad." Section 2, authorized and empowered the Company, their deputies, servants, agents, and workmen, to enter into and upon any lands and grounds of any person or persons, bodies politic, or corporate, or collegiate, or communities or parties whatever; to survey and take levels of the same, or any part thereof; and to set out and ascertain such parts thereof as they should think necessary and proper for making the intended Railroad and other works thereby authorized. Section 4, enacted, that, for the purposes of the Act, the Company should and might, by some sworn land surveyor for Lower Canada, and by an engineer or engineers, by them to be appointed, cause to be taken and made surveys and levels of the lands through which the [235] intended Railroad was to be carried, together with a map or plan of such Railroad, and of the course and direction thereof, and of the lands through which the same was to pass, and the lands intended to be taken for the several purposes authorized by that Act, so far as then ascertained; and also a book of reference for the Railroad, in which should be set forth a description of the several lands, and the names of the owners, occupiers, and proprietors thereof, so far as they could be ascertained by the Company, and in which should be contained everything necessary for the right understanding of such plan or map; which plan or map and book of reference should be examined, certified, and deposited as therein mentioned. Section 15, enacted, that it should be lawful for the Company to apply to the several owners of the estates, lands, and grounds through which such Railroad was intended to be carried, and to agree with such owners respectively touching the compensation to be paid to them by the Company for the purchase thereof, and for their respective damages; and in case of disagreement between the Company and the owners, or any of them, then all questions which should arise between the Company and the several proprietors of, and persons interested in, any estates, lands, or grounds, that should or might be taken, affected, or prejudiced by the execution of any of the powers thereby granted, or any indemnification for damages which might or should be, at any time or times, sustained by any bodies politic or corporate, or communities, or any other person or persons, respectively, being owners of, or interested in, any estate, lands, or grounds for, or by reason of, the making, repairing, or maintaining the Railroad or other works, or machines incidental [236] or relative thereto, or connected therewith, should and might be settled by agreement of the parties, or by arbitration; or if either of the parties should not be inclined to make an agreement or to appoint arbitrators, or by reason of absence should be prevented from treating; or through disability by nonage, coverture, or other impediment, could not treat or make such agreement, or enter into such arbitration, or should not produce a clear title to the premises which they claimed an interest in; then, and in every such case, the Company might make application to the Superior Court, stating the grounds of such application; and such Court was thereby empowered and required, from time to



time, upon such application, to issue a warrant, directed to the Sheriff of the District for the time being, commanding such Sheriff to empanel, summon, and return a jury, as therein mentioned, for the assessment of the like compensation. Section 17, enacted, that, upon payment or legal tender of such sum or sums of money, or annual rent, as should be contracted or agreed for between the parties, or determined by arbitrators, or assessed by such juries, in manner respectively as aforesaid, to the proprietors thereof, or other person or persons entitled to receive the same, or to the principal officer or officers of any such body politic, corporate, or collegiate community, at any time after the same should have been so agreed for, determined, or assessed, such lands, grounds, or hereditaments, or property, respectively, might be entered upon or taken possession of by the Company, and applied to the purpose of making and maintaining the Railroad and other works and conveniences thereto appertaining. Section 18, enacted, that all agreements, sales [237] and conveyances, and all determinations by arbitration as aforesaid, or notarial copies thereof when the same might be passed before notaries, and also the verdicts and judgments thereupon, should be transmitted to, and kept by, the Prothonotary of the Superior Court in the District of Quebec, to be kept among the records of the Court; and the same, or true copies thereof, should be allowed to be good evidence in all Courts whatsoever in that Province: and immediately on such payments of purchase-money, or rent as aforesaid, and entry of such agreements, sales, conveyances, determinations by arbitration, verdicts, judgments, and other proceedings of the Court and juries, and all the estate, right, title, interest, use, trust property, claim and demand, in law and equity, of the person or persons for whose use such money or rent should be paid into and out of the lands, grounds and tenements, hereditaments and premises, should vest in the Company: and the Company should be deemed in law to be in actual possession and seizen of the same, to all intents and purposes whatsoever, as fully and effectually as if every person having an estate therein had been able to convey, and had actually conveyed the same to them by effectual legal conveyance; and such payment should bar all right, title, interest, claim and demand of the person or persons to whose use the same should be made, bodies politic, corporate or collegiate, ecclesiastical or civil communities.

The Respondent was the owner of certain land in the parish of Notre Dame de la Victoire, in the District of Quebec, through which the Railroad was intended to be carried. The Appellants entered into negotiations with him for obtaining the land so re-[238]-quired, and sent Patton, a land agent employed by them, to endeavour to purchase it. Patton could not, however, agree upon terms with the Respondent, and introduced Reekie, of Quebec, to the Respondent, for the purpose of carrying on the negotiation for the sale of the land. The Respondent, in consideration of the Appellants' powers of compulsory purchase, was prevailed upon by Reekie and Patton to agree to have the value of the land required for the Railway estimated by arbitration. Upon the faith of this agreement, the Respondent, without waiting for the valuation, gave up possession of the land in question to the Company.

By a contract executed at Quebec on the 20th of October, 1852, between Messrs. Jackson, Peto, Brassey and Betts, Railway contractors, resident in England, hereinafter called the "contractors," of the one part, and the Quebec and Richmond Railroad Company, of the other part, the contractors undertook to construct and complete, and equip with locomotives and cars, the Railway, and to erect the requisite stations and other erections. The contract also provided that the contractors should, for and in the name and for the use and benefit of the Company, purchase the land necessary for the Railway, and for the stations along the same, and for the terminal points at either end thereof, which might not already have been purchased by the Company, at the contractors' own costs, charges, and expenses. That the contractors should, at their like costs, charges, and expenses, settle for, pay, and discharge any claim or claims which might be made against the Company, for and by reason of any land damages, or any other damages occasioned by the road, from which damages the contractors should [239] keep the Company free and harmless. That the contractors should use for making the Railway the best materials, and such as the principal or chief engineer and Commissioners should approve of. That the contractors should finish the Railway and works, and deliver them to the Company on or before the 31st of December, 1855, in complete working order, but with power to the engineer of the Company, with the approbation of the Commissioners, to extend the time.

That the contractors should pay for the chief engineer and other engineers of the Railway until it should be open for traffic, and that such other engineers should be engaged by the contractors; but that the chief engineer should be engaged by and be in all things subject to the orders, control, and direction of the Company. That the contractors should likewise pay the Company's secretary, treasurer, clerks, agents, directors, and others, what might thereafter become due until the opening of the road for traffic, such payments being limited to £2000. That the contractors should pay the interest as therein mentioned of certain debentures, upon which part of the funds necessary for the construction of the Railway was to be raised; also interest on certain stock subscribed for and paid up in Great Britain, and interest on the paid-up shares of the shareholders of the Company in Canada, till the opening of the line for traffic. That the contractors duly performing all things to be by them performed, the Company should pay to them, their executors, administrators, or assigns, £6500 sterling for every mile of the Railway, in a certain manner therein provided. That the Company should, when required so to do by the contractors, exercise for and on behalf of the contractors, or permit the [240] contractors to exercise, as the case might be, any of the powers vested in the Company, by the Act, 13th and 14th Vict., c. 116, as fully, amply, and effectually, to all intents and purposes, as if the Company itself exercised such powers and performed the works; and, in the exercise of such powers, to use the name of the Company if deemed necessary. That the contractors, in the execution of all and each and every of the matters and things to be by them done and executed under and by virtue of the contract, should comply with all the requirements of the Act, 13th and 14th Vict., c. 116, and the obligations thereby imposed upon the Company in the making of the Railway.

By a power of attorney, bearing date the 4th of February, 1853, and executed in London by the above-named contractors, after reciting the above contract, and that the contractors, having their engagements in England, were desirous of deputing Reekie, of Quebec, their agent, with full power, on their behalf, to construct the Railway and stations, and to buy the land and make all other necessary arrangements, duly appointed him their agent to purchase the necessary land for the Railway which had not been already purchased, and to enter into any contracts and agreements for the purchase thereof, and to settle any claim for land or other damages, and to complete and finish the Railway, and to provide all necessary materials for the completing the Railway to the satisfaction of the Company's chief engineer and the Commissioners of public works for the Province, and generally to execute and perform all such acts and things in reference to the purchase of the lands, and the management and construction of the Rail-[241]-way until its completion, as fully and effectually as the contractors might do personally.

On the 11th of March, 1853, an agreement or Bond of arbitration was entered into between Reekie and the Respondent. In this agreement, Reekie was described as the "agent and attorney, duly constituted, of Messrs. Jackson, Brassey, Peto, and Betts, contractors for the works upon the Quebec and Richmond Railroad, acting in this behalf in the name of The Quebec and Richmond Railroad Company, under the authority to that effect contained in the contract entered into between the Company and the contractors." The agreement then, after reciting that the Company required and must purchase for the purpose of building and running the Railway, a strip or lot of ground belonging to the Respondent, and reciting that Quinn was unwilling to sell the other portion of the property to the Company, he requiring it for the purpose of carrying on his business of a lumber merchant, which would be injured by his property being so dismembered; but as by law he could be compelled so to do, he was desirous of avoiding litigation; and reciting that a difference of opinion existed as to the damage suffered by Quinn by the sale of portion of his property, and as to the value of the property so required for the Railway; and further reciting that it had been agreed between the parties to refer to the award, order, and determination of Henry Pemberton and John Bonner, Esquires, of Quebec, merchants, arbitrators, and "*amiables compositeurs*," indifferently elected and chosen between them, to arbitrate, award, and determine of and concerning the loss, and the value of the aforesaid portion of the land of Quinn, so [242] required, or the increase of value of the remainder of the property, and the amount which the Company should pay for the land and loss; it was agreed to refer all the disputes touching and concerning the



premises aforesaid, as to such loss, if any there were, and as to the value of the property, due regard being had to the increase of the remaining portion of the Cove, if any such increase there were, to the award, order, arbitrament, final end and decision of Henry Pemberton and John Bonner, arbitrators, and "*amiables compositeurs*," and, in case they differed in opinion, of such third person as the arbitrators and "*amiables compositeurs*" should indifferently choose for umpire, as therein mentioned, so that the same were made in writing, and signed by them, or the majority of them, within such reasonable time as the same could be accomplished. And Quinn undertook forthwith, upon the report of the arbitrators or "*amiables compositeurs*" being made and rendered, to sell, convey, transfer, and make over unto the Company, with warranty from all incumbences, the strip or lot of land; and the Company were to be bound and obliged to accept the same for the price or sum which should be fixed by such arbitrators: the price or sum to be paid upon the execution of the deed of sale. Bonner was the arbitrator appointed on behalf of the Respondent, and Pemberton the arbitrator appointed on behalf of the Appellants.

The arbitrators appointed as umpire, John Jameson. On the 12th of May, 1853, Pemberton and Jameson (Bonner disagreeing with them) made their award as follows:—"That the value of the aforesaid strip of land or property of Quinn so required by the Company for the Railroad, due regard being [243] had to all matters in the premises, is the sum of £3000, current money of this Province; and that they, Pemberton and Jameson, did and do hereby award the sum last aforesaid, to be paid by Messrs. Jackson, Brassey, Peto, and Betts, to Quinn, in full, as well for the value of the strip of land as for all loss and damage suffered and to be suffered by Quinn in the premises, for and by reason of the line of Railroad as marked off, according to the tenor of the arbitration bond, and any other damage of whatsoever nature, kind, or description soever the same may be, according to the bond." Bonner, disagreed with the award, because he considered the sum awarded to the Respondent too small. This award was signed by the parties in the presence of a notary, and deposited with him.

The Respondent offered to execute a conveyance of the land in question in favour of the Appellants, and the latter having refused to take the same, or to pay the amount awarded, referring him to the contractors, and they having refused payment, the Respondent, by his notaries, made a formal protest against the Appellants.

The Respondent then brought his action against the Appellants in the Superior Court of Lower Canada, praying that they should be compelled to pay him the sum of £3000, with interest. The action was defended by the instruction of Reekie, as agent of the contractors. To this action the Appellants pleaded a *defense au fonds en fait*, and a perpetual and temporary exception. The substance of the defence was, first, that the Company were not bound by anything which had been done in their name by Reekie: second, that the contractors had no authority to pledge the liability of the Company, or to enter into any arbitration, [244] or at all events such an arbitration as had been agreed to; and lastly, they pleaded that if the contractors had such authority, Reekie had no such authority. The Respondent took issue by general answers and a general replication.

Evidence on the part of the Respondent was adduced to show that the Appellants were in possession of the plot of ground mentioned in the award, and Reekie was produced as a witness, and stated that he signed the arbitration deed as the agent and attorney of Messrs. Jackson, Brassey, Peto, and Betts, under the before-mentioned power-of-attorney from them, which he produced, and that the land in question was in the possession of the contractors. Other witnesses were examined on the part of the Respondent to prove that the land in question had been taken possession of for the purpose of making the Railway, which was not then complete, and that Reekie was the agent and attorney of Messrs. Jackson, Brassey, Peto, and Betts. The protest and tender was proved, and one of the notaries who received the award was examined, and stated that the original award was in his possession as a notary, signed by the parties in his presence. The Appellants did not go into evidence.

On the 6th of May, 1854, the Superior Court, consisting of Bowen, Chief Justice, and Duval and Meredith, Justices, (Meredith, Justice, *dissentiente*) pronounced the following judgment:—"Considering that the Plaintiff has adduced sufficient legal

evidence in support of the allegations of his declaration, and that the award alleged in the declaration is legal and binding on the parties, and cannot be set aside by reason of any of the causes set forth in the Defendants' plea of perpetual exception, doth overrule the plea of pe-[245]-remptory exception, and doth condemn 'The Quebec and Richmond Railroad Company,' a body politic and corporate, duly acting as such, to pay and satisfy to the Plaintiff the sum of £3000, with legal interest thereon from the 17th of June, 1853, till paid, and costs."

From this judgment the Appellants appealed to the Court of appeals of that part of the Province of Canada, formerly called Lower Canada. It was contended by them at the argument upon the appeal, first, that Reekie, the agent of the contractors of the Railway, had no power, proceeding either from his principals or from the Appellants, to refer the matter to arbitrators, or at least to such arbitrators as are designated in the French law by the name of "*amiables compositeurs*;" and, secondly, that the reference to arbitrators and "*amiables compositeurs*" by the arbitration deed of the 11th of March, 1853, was contrary to the provisions of the Acts, 13th and 14th Vict., c. 116, sec. 15, and 14th and 15th Vict., c. 51, secs. 11 and 13, and to the established law of Canada, by which arbitrators cannot proceed in any case unless they have been previously duly sworn, whereas the arbitrators called "*amiables compositeurs*" were subject to no such formalities, and were neither sworn nor bound by the rules of evidence, nor were they empowered to administer an oath to the witnesses examined before them. Thirdly, it was contended, that there was no legal proof of the award, according to the law of Canada, since two arbitrators and an umpire had been appointed, and two of them (namely, one of the arbitrators and the umpire) had gone before a notary, who had received their award and delivered a copy to be filed in the cause. Fourthly, it was argued, that the [246] copy of a deed, not executed in the presence of the parties, and of the other arbitrator, was no evidence of an award, and no proof that it had been given, concurred in and signed by the persons alleged to have made the same, and that the notary had no authority to receive or certify an award as he had done; that the award should have been made before notaries or witnesses in triplicate, one copy to be served on the Appellants, another copy on the Respondent, and a third copy to be kept by the party receiving the same, and that in that case any such copy bearing the signature of the arbitrators ought to have been produced; in other words, that the original award should have been produced, and this not having been done it was submitted by them that the Respondent had failed to prove his case. Lastly, it was contended, that the award was null and void by reason of the absence of one of the arbitrators when it was made.

The appeal was heard before Sir L. H. Lafontaine, Chief Justice, and the Justices, Aylwin, Morin, and Badgley, on the 7th July, 1856; when the Court took time to consider its judgment, and on the 11th of October, 1856, that Court pronounced judgment, confirming the judgment appealed from, with costs: Aylwin and Badgley, Justices, dissenting.

The present appeal was from this judgment of affirmance.

Mr. Bovill, Q.C., and Mr. F. Lawrence, for the Appellants.—First. The action was wrongly brought against the Company. They had no interest in the matter, and were improperly made parties to the action. The con-[247]-tractors, who are in possession of the land in question, alone were liable. There is an absence of any contract or privity between the Appellants and Respondent. In fact the Appellants knew nothing of the proceedings, or of the award, until the Respondent's demand was made upon them for the amount found due to him by the award of the arbitrators. By the law of England such an action would not lie. In *Reedie v. London and North Western Company* (4 Exch. Rep. 244), that Railway Company were empowered, as in this case, to construct a Railway, and had contracted with certain persons to make a portion of the line, reserving to themselves the power of dismissing the contractors' workmen for incompetence. The workmen, in making a bridge over the public highway, negligently caused the death of a person passing, and it was held, in an action against the Company by the administration of the deceased, that they were not liable. So again in *Allen v. Haywood* (7 Q. Ben. Rep. 960), an action was brought against Commissioners for improving a navigation, to recover damages for unskilfully and negligently performing the work; the Court



of Queen's Bench held that the contractor was not the agent or servant, for whose misconduct the Commissioners were liable, at the suit of the parties injured by the negligent working. *Peachey v. Rowland* (13 Com. Ben. Rep. 182), and *Knight v. Fox* (5 Exch. Rep. 721), recognize the same principle. Another objection is, that the award discloses no cause of action against the Company. The amount awarded by the arbitrators is directed to be paid by the contractors; therefore, no action could lie against the Appellants upon the award. The contractors had no authority, under their contract with [248] the Company, to bind or pledge their liability for any purchase of land they might make. We admit they had by that instrument authority to buy land for the Railway purposes, but the contractors, clearly, were to pay the purchase-money.—[Sir Cresswell Cresswell.—The true construction of the contract appears to be this: the contractors had authority to make the Company liable to third parties, with whom they contracted in the name of the Company, although as between the contractors and the Company, the former were bound to supply the necessary funds.]—Put the ordinary case of a landowner who contracts with a builder to build a house at a certain sum: surely he could not be held liable to those who supplied the materials to the builder, or to the workpeople engaged. Such an illustration is in point. But, secondly, our contention is, that the agreement by Reekie to refer the matter to arbitration, was made on behalf of the contractors and not of the Company. No authority, whatever, was given by the Company to him to execute such an agreement. He had no power emanating either from his principals, the contractors, or from the Appellants, to refer the matter to arbitration. In order to sustain this action, it is necessary, by the law of Lower Canada, for the Respondent to prove that a power of substitution and delegation of Reekie, in the place of the contractors, was given to them by the Appellants which has not been established. The French authorities upon this point are to be found in Pothier, "*Traité du Mandat*," and Troplong "*Traité du Mandat*;" and we submit, that even if the contractors had any authority to bind the Appellants, which we deny, by referring the matter to arbitration, they had not the power to delegate such [249] authority to Reekie. But, thirdly, assuming that Reekie had any power or authority, either derived from the Appellants or the contractors, to execute the deed referring the matters in dispute between the Appellants and Respondent, such arbitration could only be according to the form and rules provided by the law of Lower Canada, applicable to such a case. The reference to arbitrators and "*amiables compositeurs*" was improper and illegal, Ferrière's *Dict. de Droit, verb "Compromis*;" La Billenerie, "*Traité de l'Arbitrage*," Tome I.; as the arbitration contemplated and directed by the Canadian Acts, 13th and 14th Vict., c. 116, and 14th and 15th Vict., c. 51, secs. 11 and 13, was a reference to arbitrators sworn before a Justice of the Peace, and empowered to administer an oath to witnesses; whereas the arbitrators called "*amiables compositeurs*" are not sworn, nor have they any power to administer oaths. Again, the award is defective, for the arbitrators acted improperly and illegally in going before a notary to deliver their award, and taking his certificate. The authority of a notary in Canada does not extend to such a case. There was no proof that the award was rendered and concurred in by the arbitrators. The mere certificate of a notary of an award, supposed to have been made and delivered to him in the absence of the parties interested, is, according to the law of Canada, no evidence of the rendering of such award.

Mr. Rolt, Q.C., Mr. Montague Smith, Q.C., and Mr. Homersham Cox, for the Respondent.—The technical objections raised to the formalities in the proceedings respecting the award, although [250] ingenious, cannot be sustained, as the proceedings both with respect to the award and the action founded thereon, were perfectly regular according to the law prevailing in Lower Canada. "*Traité des droits des notaires*" de Langloix, *Recueil des Chartres*, tit. I. p. 51. Denisart, *mot "Arbitrage"*, p. 243, No. 6. Ferrière "*Science des Notaires*," Tome II. p. 428 (Edit. 1771). Pigeau, "*Procédure Civile*," Tome I. p. 25. *Collection des Décisions des Tribunaux du Bas Canada*, Tome V. p. 219. That being so, the submission to arbitration, the award made thereunder, and the delivery of the award before a notary, must be held binding on the Appellants and the Respondent. It cannot be denied that the Respondent's land was taken possession of by the Appellants under

the powers conferred upon them by the Canadian Act, 13th and 14th Vict., c. 116, the Appellants having powers similar to those conferred upon Railway Companies in this country. The Appellants were undoubtedly liable by the law of Canada for the price and damage, as the proceedings taken to ascertain the compensation and damages, under this Act of the Canadian Legislature, were in their name and by their authority. But it is urged by the Appellants that the procuration by the contractors to Reekie cannot bind them. Such a position is contrary to the law in force in Lower Canada. Troplong, "*Traité du Mandat*," Nos. 275, 319. The contractors in the procuration specially authorize Reekie to buy and purchase land for the use of the Company, and to enter into any agreement for the purchase thereof, and when the Respondent's terms were not accepted and Reekie referred the question of damages to "*amiable compositeurs*," he expressly represented himself, in the deed of reference, [251] as "the agent and attorney of the contractors acting in that behalf in the name of the Quebec and Richmond Railroad Company, under authority to that effect contained in the contract." The liability of the Company is, therefore, clearly identified. It was no defence to the action for the Company to avoid payment by pleading that the sum awarded ought to be paid by the contractors. The Company rendered themselves personally liable to pay the money. In fact the contractors were defending the Company. Neither can the objection to the reference to the "*amiable compositeurs*," be sustained. Guyot, "*Repertoire de Jurisprudence*," Tome I., mot "*Arbitrage*," expressly recommends that course. They knew that Reekie as their agent was negotiating with the Respondent, and having recognized him, his acts were binding on them. It cannot be successfully urged that Reekie ought not to have referred the matter to arbitration, as it is a principle of law of universal application, that where an agent had acted in good faith, and within the supposed limits of his authority, the principal is bound. Story, "On Agency," sec. 74. Neither can the Appellants avoid the consequences of the reference to arbitration, even if Reekie was out of the case, by treating it as the act of the contractors. *Semple v. The London and Birmingham Railway Company* (1 Railw. Cases, 480) is an authority that a contractor for the execution of Railway works is the agent of the Company. It follows as a necessary consequence, therefore, that the award must be binding upon the Company. The Appellants could have compelled the Respondent to have performed the award, and, therefore, they must be reciprocally bound by it; and [252] must carry out the agreement entered into by Reekie on their behalf with the Respondent, on the faith of which he gave up possession of the land for the use of the Railway Company. Moreover, the Appellants acquiesced in the award, for they took possession of the land after they had notice of the execution of the arbitration bond, and thereby ratified and adopted the acts of Reekie, and assumed to themselves its obligations; which are binding on them. Troplong, "*du Mandat*," Nos. 601, 2, and Nos. 610, 11, 12, 13. Dalloz, "*Dictionnaire General de Jurisprudence*," mot "*Acquiescement*," Tome I. No. 366, p. 28.

Mr. Bovill, Q.C., in reply.

Their Lordships' judgment was delivered by

The Right Hon. T. Pemberton Leigh (14th July, 1858).—The Appellants, in this case, are a Railway Company, who have been ordered to pay to the Respondent a sum of £3000 currency, as the value of certain land belonging to him, which has been appropriated to the use of the Railway. The Appellants deny their liability to the payment of any part of this sum, insisting that the contract for the purchase of this land was not intended to subject them to any liability, and that if such was the intention, the persons who assumed to act on their behalf had no authority to bind them.

It becomes necessary to examine the facts of the case with some minuteness, in order to ascertain what are the rights and obligations of the parties.

[253] In the year 1850, by an Act of the Canadian Legislature, the Appellants were incorporated into a Company, for the purpose of making a Railway from Quebec to Richmond, and were armed with powers of purchasing land similar to those which are contained in the Railway Acts in England. By means of these powers, the Company were enabled to take the lands required for the Railway, either



by agreeing with the owners of the land, as to the price and compensation to be paid, or, if the matter could not be settled by agreement, by referring it to arbitration. If, by the refusal or disability of any of the parties interested, neither of these modes of arrangement could be adopted, then the price and compensation were to be settled by a jury, to be empanelled by the Sheriff, and upon payment or legal tender of the price and compensation so ascertained, the Company were to be at liberty to enter upon the lands so required.

Under the provisions of this Act, the Appellants purchased certain lands, and took possession of them, and entered into contracts for performance of part of the works.

The Respondent was the owner of a plot of land lying in the line of the Railway, and which it is proved, was absolutely necessary that the Company should take for the purposes of their works. They employed a gentleman of the name of Patton, as their agent, in making the necessary purchases from the land-owners, and in the year 1852, Patton, on behalf of the Company, endeavoured to agree with the Respondent as to the price to be paid for his land, but was unable to come to any settlement of the terms, though the Company had already, as it [254] appears, been permitted to take, and had taken possession of the land.

In the month of October, 1852, the Appellants entered into an agreement with four English gentlemen, Messrs. Jackson, Brassey, Peto, and Betts, Railway contractors, that they should undertake to make the Railway, and pay all the expenses of every kind, including the purchase of lands, out of their own moneys, and should be paid by the Company at the rate of £6500 per mile, for the whole length of the Railway. It is obvious, that unless the contractors were invested with all the rights of taking land which the Railway Company possessed, it was utterly impossible for them to proceed with the undertaking; for any single land-owner might have obstructed the work, by refusing his consent to sell. But the Company had no power of transferring their rights to the contractors: the Legislature had not given them the power of relieving themselves from the responsibility which attached to the exercise of their powers. They could not compel a sale, nor permit their compulsory powers to be exerted or held out to intimidate owners into a sale, except upon the terms of incurring all the liabilities which belonged to the character of purchasers; they could, indeed, authorize the contractors, on their behalf and in their name, to exercise these powers, but in such case the contractors became their agents, with a necessary authority to bind the Company to the performance of any engagement entered into on their behalf.

The contract in question, which was made on the 20th of October, 1852, at Quebec, by Jackson on behalf of himself and his co-contractors, is based upon these principles:—It provides that the con-[255]-tractors shall make the Railway entirely at their own expense, and supply the necessary funds for that purpose, and shall also, for and in the name, and for the use and benefit of the Company, purchase the land necessary for the Railway, etc., which may not already have been purchased by the Company, at their, the contractors', own costs, charges, and expenses; and shall pay, at their own costs and charges, any claim which may be made against the Company for damages, and shall indemnify the Company against the same. The contract also contains this clause:—"It is also covenanted and agreed between the parties hereto, that during the execution of the said works the Company shall and will, when required so to do by the contractors, exercise for and on behalf of the said contractors, or permit the said contractors to exercise, as the case may be, any of the powers vested in the said Company by the said Act of the 13th and 14th Viet., c. 116, as fully, amply, and effectually, to all intents and purposes, as if the Company itself exercised such powers and performed the said works; and in the exercise of such powers to use the name of the Company if deemed necessary."

It seems very difficult to raise a question as to the effect of this contract. It in no degree whatever altered the position of the Company towards third persons. Such persons might, indeed, if they were so advised, deal with the contractors personally, and content themselves with their liability: the liability of persons resident in a distant country, of whom the Canadians would probably know nothing. In that case they would have no demand against the Company. But, on the other hand, they had a clear right to deal only with the Company, and insist on [256] the liability of the Company, and this liability the contractors had a right to pledge by the authority

expressly given to them by the contract to buy in the name and on behalf of the Company, and to use and exercise the powers vested in the Company by the Act, 13th and 14th Vict., c. 116, in the name of the Company.

The contractors, who were all resident in England, had no intention of personally acting in the performance of their engagements, and on the 4th of February, 1853, they executed a power of attorney in London, by which, after reciting the contract with the Appellants, and reciting that they, the contractors, having other engagements in England, were desirous of deputing to Reekie of Quebec, their agent, full power and authority as their agent and on their behalf, to construct the Railway and stations, and to buy the land, and to make all necessary arrangements, they appointed Reekie to be their attorney, to purchase the necessary land for the Railway and stations, and to enter into any contracts and agreements for the purchase thereof, and to do all that might be necessary for the performance of the engagements of the contractors with the Company. It is obvious that it was the intention of the parties to this instrument that Reekie should possess the same power of acting, in the name or on behalf of the Company, which the contractors had.

Reekie being thus authorized by the contractors to perform their engagements, endeavoured, with the assistance of Patton, to conclude the negotiations for the purchase of the Respondent's land, which Patton had commenced. They were unable, however, to agree upon terms, and it was resolved to have [257] the value of the property required settled by arbitration.

It appears that the Respondent was not disposed to sell the land which the Company required, and consented to do so only because if he did not consent the Company had the power under their Act, of compelling him to do so. This appears by the evidence of Stuart, who at the date of the transaction in question, was Vice-president and one of the Directors of the Company, and by the instrument which we are now about to state.

In this condition of affairs the agreement was made upon which the argument in the case has principally turned. It is dated the 11th of March, 1853, and is made between Reekie and the Respondent. Reekie is described as "agent and attorney of Messrs. Jackson, Brassey, Peto, and Betts, contractors for the works upon the Quebec and Richmond Railroad, acting on their behalf, in the name of the Quebec and Richmond Railroad Company, under the authority to that effect contained in the contract entered into between the Company and the contractors by deed executed at Quebec, the 20th of October, 1852."

It is plain, therefore, that, either with or without authority, Reekie affected to enter into the agreement in the name of the Company.

The agreement recites that the Company require and must purchase, for the purposes of the Railway, a strip of land (describing it), the property of the Respondent; that he is unwilling to sell that portion of his property, he requiring it for the purpose of carrying on his business of a lumber-merchant; but, as by law, he can be compelled to do so, he is desirous of avoid-[258]-ing litigation; that a difference of opinion as to the damage suffered by the Respondent, and the value of his property, has arisen between the parties, it being pretended and asserted by the Company that the cove is increased in value by the Railroad, and that the Respondent will suffer no damage therefrom; that it has been agreed between the parties to refer to the award of two gentlemen, as "*amiables compositeurs*" to determine concerning the aforesaid loss and value of land. It is then agreed between the parties to refer all disputes touching the premises, and the loss and value aforesaid, to the arbitration of the two gentlemen named, and any umpire whom they may appoint. The parties then engage to abide by the award of the arbitrators, or their umpire. Then there is an engagement by the Respondent "forthwith, on the report of the arbitrators being made, to sell and convey to the said Company, with warranty from all incumbrances, the before-mentioned piece of land, which sale, transfer, or conveyance shall be so made, and the said Company shall be bound and obliged to accept the same for the price or sum which shall be so fixed by the said arbitrators, the said price or sum to be paid upon the execution of the said deed of sale; the said Edward Quinn declaring that he hath a knowledge of the said centre line of the said railroad, the same having been set out, and the works upon the said road, being already in the course of execution."



Whether Reekie had authority to enter into this agreement on behalf of the Company, we will presently consider. But the meaning and intention of the agreement, and the parties between whom it professes to be made, are matters which can admit of no doubt.

[259] It is an agreement which purports to be made in the name of the Company, which shows that the Respondent had only consented to sell, because, by reason of the powers possessed by the Company, to them he could be compelled to sell; that the sale was to the Company, and to nobody else; that the conveyance was to be made to the Company and to nobody else; and that the price was to be paid by the Company, and nobody else. Under this agreement, the Respondent had not the least right to look to the contractors. His demand was against the Company only. The Company indeed had a clear right, as between themselves and the contractors, to require the contractors to pay the price. But the contractors had entered into no obligation personally to the Respondent, and their engagement with the Company was *res inter alios acta*, with which the Respondent had nothing to do, and of which he could, under no circumstances, have availed himself.

The arbitrators having accepted the reference, appointed an umpire. The umpire so appointed, and the arbitrator who had been named on behalf of the Company, agreed in fixing the amount to be paid to the Respondent, at the sum of £3000 currency; the arbitrator who had been named by the Respondent was so dissatisfied with what he considered the inadequacy of this sum, that he refused to join in the award; but it is not pretended that this circumstance at all affects its validity.

On the 12th of May, 1853, an award was made, by which the two gentlemen who signed it, reported the value of the land required by the Company for the Railroad, due regard being had to all matters in the premises, to be the sum of £3000 currency, and [260] they proceeded to award that sum, to be paid by the contractors, Messrs. Jackson, Brassey, Peto, and Betts. Within a few days after this award was made, the Respondent called upon the Company to pay the sum thus awarded, and tendered to him a conveyance of the land. The Company referred him to the contractors; the contractors did not pay, and the Company would not pay, and, under these circumstances, the Respondent was driven to institute the action, out of which the present appeal arises.

He filed his plaint on the 1st of July, 1853, stating the facts which we have detailed, alleging that he had ever been, and still was, ready and willing to sign the deed of sale, and in all things to do and perform the obligations entered into towards the Company, but that the Company refused and neglected to sign the bill of sale, or to pay the sum of £3000; and he, therefore, prayed that the Company might be compelled to pay the sum of £3000, with interest, from the 12th of May then last.

It is not easy to see what interest the Railway Company had in defending the suit. It is not pretended that the Respondent is not entitled, both legally and morally, to receive the value of his land which has been taken from him; it is not pretended that the price which has been fixed is excessive. As between the Company and Messrs. Jackson, Brassey, Peto, and Betts, the latter were beyond all doubt liable, and if they were solvent (of which no question has been raised) the Company, on making the payment, would be entitled to credit for it in their accounts with the contractors. The Railway had not been made at this time, as appears by [261] the evidence; whether it has ever been completed, does not appear.

On the other hand, as the contractors were clearly subject to this liability, though not directly to the Respondent, yet indirectly through the Company, it is equally difficult to understand upon what grounds, consistent with reason or with justice, they could resist a demand which ultimately they were bound to satisfy.

It is alleged by the Respondent that these gentlemen are really defending the suit in the name of the Company, as they have acted throughout in their name, and there seems much reason to believe that such is the case.

It appears from the evidence, that when the demand was made on the Company, it was sent to the office of the contractors by the Company; that when the plaint in this suit was filed, it was sent to the office of the contractors by the Company; and that this suit is now defended by the instructions of Reekie, the agent of the contractors.

However this may be, a defence was put in to this action by the Appellants, or at all events in their name, relying upon various objections, which all resulted in this conclusion; that the Company were not bound by anything which had been done in their name; that the contractors had no authority to pledge the liability of the Company; that they had no authority to enter into any arbitration; and that, at all events, they had no authority to enter into such an arbitration as was actually agreed upon; that if the contractors had any such authority, Reekie had no such authority. Several other objec-[262]-tions were raised, of a nature too frivolous to be insisted on at our Bar.

The Respondent went into evidence in support of his case: he proved the several facts and documents which we have mentioned, and he was obliged to call, or at all events, did call, Reekie, the person who had signed the agreement of the 11th of March, 1853. This witness swore that he bought the land in question as agent for Messrs. Jackson, Peto, and Co.; he stated that the land was now in the possession of the contractors, and the Railway partly made over it, but not completed; that the contractors had been in possession about six months, but he was not aware whether they had been in possession of a portion of it before the deed of arbitration. He was then asked whether he had had any conversation or correspondence with Messrs. Jackson and Co., or any of them, on the subject of the claim and arbitration, and whether he had any written correspondence with those gentlemen on the subject of the arbitration; but to these questions objections were taken, and allowed by the Court. He then stated the facts to which we have referred, that the action was defended by his instructions, and that the declaration was sent to the contractors' office by the Company; and he swore that the Company was not in possession of the land in question, or of any portion of the Railway.

No evidence was produced on the part of the Appellants, and the cause came on for hearing before the Superior Court, on the 6th of May, 1854, when judgment was pronounced in favour of the Respondent, one Judge (Meredith) dissenting, for the sum of £3000 currency, with interest and costs.

[263] On a review of this judgment by the Court of Appeals, on the 7th of July, 1856, the Judges were equally divided, and in conformity, therefore, with the custom in such cases, the judgment was affirmed, and from this last judgment the present appeal is brought.

The main points argued at the Bar on behalf of the Appellants were, that the contractors had no authority under their contract with the Company to bind the Company, or pledge their liability for any purchase which they might make; that they had authority, indeed, to buy land, but were to provide for the payment out of their own pockets.

Their Lordships have already expressed their opinion, in commenting upon the document in question, that the contractors had a clear authority, both by the express language and necessary effect of their contract with the Company, to bind the Company, and make them liable to third persons with whom they contracted in the name of the Company, although, as between the contractors and the Company, the former were bound to supply all the necessary funds.

In the argument, the case was assimilated to those in which it has been held that, when a land-owner contracts with a builder to build him a house at a fixed price, he is not liable to the tradesmen who have supplied goods, or the artisans who have performed work for the builder. But those cases proceed on this principle, namely, that the person who has contracted with the tradesmen and artisans is alone answerable to them for their demands. Here, if the Respondent has made his agreement with the contractors, and trusted to their responsibility, [264] he must look to them, and can have no remedy against the Company. If, on the other hand, he has agreed with the Company, and trusted to their responsibility, he is entitled to sue them, and has no demand against the contractors under the agreement.

And, this brings us to the second point urged, namely, that the agreement of the 11th of March, 1853, was really made by Reekie on behalf of the contractors, and not of the Company, and was known to be so by the Respondent.

We have already stated our opinion of the effect of this agreement: that not only its terms, but its intention, was to bind the Company. It was said that the Respondent must be held to have had notice of the agreement between the contractors



and the Company. No doubt he must; but of what had he notice? He had notice that, as between the contractors and the Company, the former were to pay the price, but that the contractors had full authority to engage in the name of the Company, and to pledge their liability; in other words, to do what the agreement professed to do.

It was then contended, that the contractors had no power to enter into any arbitration on behalf of the Company, or, at all events, not into such an arbitration as they actually did enter into.

But the answer to this is, that the Company had substituted the contractors in their place, trusting them with all the powers of the Company, and had left them to purchase on the best terms they could, the Company having no interest whatever in the matter. The contractors had a right to settle the price in any manner which they might think most advisable, [265] indemnifying the Company against all consequences. To this indemnity the Company thought fit to trust; and they incurred no great risk in doing so. The contractors who, as long as they were solvent, were alone interested in the matter, were sure, with a view to that interest, to make the best bargain which they could, and the Company had the remedy in their own hands, inasmuch as they had always the power over the funds which were ultimately to be paid to the contractors, and out of which they could secure their indemnity.

It is then said that, if the contractors had such authority, they could not delegate it to Reekie; but the answer to this objection is given by what has already been said. No doubt we must not permit ourselves to be influenced by the character of such a defence on the part of those by whom this action is defended. The Company must be treated as the real Defendants, but is the objection available on their part? The objection is that the contractors were agents of the Company, and that an agent cannot delegate his authority.

Their Lordships are of opinion that, under the circumstances of this case, the objection is wholly untenable in point of law, by the Company. They gave their powers to individuals who they knew would exercise them only by deputy; they knew that Reekie in this very matter was acting and negotiating with the Respondent by the authority of the contractors, but in the name of the Company. When the power given by a person is of such a nature as to require its execution by a deputy, the attorney may appoint such deputy according to the law in force in Lower Canada. [266] The authorities referred to in the argument at the Bar are conclusive upon this point.

It was then said, that no action could be maintained on the award, because it directs the money to be paid by the contractors and not by the Company.

But it is a total misapprehension of the case to regard the Respondent's right to this money as founded on the order to pay contained in the award.

The case is one of a contract for sale between the Respondent and the Appellants, in which the Appellants had taken possession of the property, and in which nothing remained to be fixed but the price. That price has been fixed in a manner agreed upon by those who had authority to fix it in any manner they might think fit. That the arbitrators by the award, after fixing the price, have directed that it shall be paid by the contractors, does not invalidate their report of the sum to be paid. By whom the payment is to be made is a matter not referred to them, and with respect to which they had no authority.

But, in truth, all these objections are really wide of the merits of the case. One thing is perfectly clear, that it is only under this agreement, and on the terms of paying the purchase-money, that the Company have any shadow of right to retain possession of this land. If they had objected to the mode in which the price had been fixed, and were entitled to make any such objection, they should have objected on that ground. But this would not have suited their purpose, for it is not pretended that the price is excessive; it is not that they object to pay this sum, but they object to pay anything. If they [267] repudiated the contract, and were entitled to repudiate it, they should have given up the land. This, of course, they could not do, for its possession is essential to their works. It is idle to say that the Appellants are not in possession of the land, but that the contractors are: the possession of the contractors is their possession; for this purpose the Company and the contractors are identified; and what is really contended by this

appeal is, that they are to keep the land, and that neither the Company nor the contractors are to pay one farthing of the purchase-money.

It is impossible to view without feelings of pain and regret the proceedings which have taken place in this case, and the injustice to which, under colour of law, the Respondent has, for so many years, been exposed. Upon whom the blame ought to fall, it is not their Lordships' province to decide. They must deal with the parties on the record. All that they can do is to afford to the Respondent such relief as it is in their power to give, by advising Her Majesty, as they will do, to affirm the judgment complained of, with all the costs incurred by him in the Courts below and upon this appeal.

[Mews' Dig. tit. COLONY, II. PARTICULAR COLONIES, 4. *British North America*; tit. PRINCIPAL AND AGENT, I. AGENCY GENERALLY, D. *Rights and Liabilities of Principal and Agent*, 2. *Delegation of Authority*.]

[268] ON APPEAL FROM THE COURT OF CHANCERY OF THE  
ISLE OF MAN.

MARK HILDESLEY QUAYLE, and Others.—*Appellants*; PHILIP LEWIS  
DAVIDSON,—*Respondent* \* [Nov. 30, 1858].

A Court of Equity will look at the circumstances existing at the date of a Will and, if necessary, construe words importing a trust, as an expression of hope or confidence.

A Testator devised real estate in the Isle of Man, consisting of a Farm, to his wife for life, and after her death to D. "in trust for his son being brought up to work the Farm," with a gift over in the event of D. having no male issue. D. had no male issue at the date of the Will, but had a son born after the Testator's death. Held, that under the Will, D.'s son did not take any beneficial interest in the real estate, the words "in trust for his son being brought up to work the Farm," being a mere recommendation, or expression of hope or confidence, that his eldest, or only son, should be brought up to work the Farm.

If D.'s son had been born before the date of the Will, whether he would have taken an interest under it.—*Quære?*

In reversing the decree of the Court below, without costs, the Judicial Committee ordered the costs of mortgagees, who were made parties to the suit, to be added to their security.

In this case, the question turned upon the construction of certain provisions contained in the Will and Codicil of Philip Lewis, late of Glenmoye or Creggan Ashen, in the parish of Patrick, in the Isle of Man. The Appellants were mortgagees, and contended that under the Will, David Harris Davidson, therein named, took a beneficial interest in the real estate thereby devised, and claimed the benefit of certain charges on such real estate, created in their favour by David Harris Davidson. The Respondent, who was the eldest son [269] of David Harris Davidson, insisted, that David Harris Davidson took the real estate under the Will as trustee only for his benefit, and that he was entitled to the equitable fee in the same, and to the rents, issues, and profits thereof, freed and discharged from the mortgages charged thereon by David Harris Davidson.

The Will in question, dated the 25th of September, 1813, was as follows:—  
"Know all men by these presents, that I, Philip Lewis, proprietor of the estate called Glenmoye Farm, otherwise Creggan Ashen, in the parish of Kirk Patrick, in the Isle of Man, do make and declare this to be my Will and Testament. First, I give

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, and Sir Lawrence Peel.



and bequeath unto my dear wife, Jane Lewis, the whole of my property of what nature soever and wheresoever for her sole use and support during the term of her natural life. Secondly, after the death of the aforesaid Jane Lewis, I give the above estate of Glenmaye Farm or Creggan Ashen unto her son, David Harris Davidson, in trust for his son being brought up to work the farm [*subject, however, from the time of the death of the aforesaid Jane Lewis to the payment of £12 British, to be made yearly at Easter unto his aunt, Ann Callow, spinster, for her life*]. Thirdly, provided the aforesaid David Harris Davidson should have no male issue, then my will is that after his death the above estate of Glenmaye Farm or Creggan Ashen shall be let by public auction for twenty-one years, from time to time, as the lease shall transpire, subject to such clauses and restrictions as shall be judged most proper for keeping the said land and premises in good heart and thorough repair, first, for the benefit of the widow, if any, of the aforesaid David Harris Davidson, during her life, and secondly, for the joint benefit of the lawful female chil-[270]-dren of him, the aforesaid David Harris Davidson, and on their death, or failing them, for the joint benefit of my two sisters, Matilda and Sarah Lewis, their heirs, etc.;" and the Testator appointed his wife executrix, and Crawford Davidson, executor.

On the 12th of April, 1814, the Testator by a Codicil altered his Will, by erasing certain words in the above Will, being the bequest of an annuity of £12 a-year to his aunt which occurred between the words, "to work the farm" and the word "Thirdly." The Testator writing in the margin of the Will, opposite the words so erased, "Erased in consequence of her marriage, this 12th of April, 1814. P. L." The Testator afterwards, on the 31st of August, 1815, made a further Codicil to his Will, which was as follows: "Provided the aforesaid David Harris Davidson shall not choose to work the farm himself during the lifetime of his mother (Jane Lewis), and for her sole benefit, then my will is that she shall have liberty to sell or let the said farm immediately, and appropriate the proceeds, together with all other my property whatsoever and wheresoever, after paying all my debts, to her own use, without any restraint or control."

The Testator died on the 16th of September, 1815, and the Will and Codicils were proved by Jane Lewis.

Upon the death of the Testator, Jane Lewis entered into possession of the farm, and she continued in such possession until her death in 1827. David Harris Davidson, from the time of the decease of the Testator until the time of the decease of Jane Lewis, resided on the farm with her, and worked the farm for her benefit.

At the date of the Will, David Harris Davidson [271] had not any child, but in the year 1819, the Respondent, Philip Lewis Davidson, was born: and he afterwards had another son, Frederick William Davidson, born in the year 1825.

The estate was incumbered at the time of its purchase by the Testator, and Jane Lewis, on the 26th of September, 1818, paid off to the person then entitled, the sum of £100, secured by a deed of Bond and security dated the 12th of August, 1801; and on the same day, she paid off to William Clark, of Ballawillin, the sum of £100, secured to him by a deed of Bond and security, executed by the Testator and his wife, and dated the 8th of September, 1813, also charged upon the Testator's estate.

Upon the death of Jane Lewis in 1827, David Harris Davidson took possession of the farm as his own property, and continued in such possession until the month of January, 1850.

The Respondent lived with his father until he was about fourteen or sixteen years of age, and sometimes worked on the farm. When he was about fourteen or sixteen years of age, he left the Island, and afterwards went to reside in America.

By two Bonds and securities, dated respectively the 11th of December, 1830, and the 3rd of December, 1831, David Harris Davidson charged the estate with the payment to Robert Douglas Clague and Matthias Kelly, as trustees for Dinah Greaves, of the principal sums of £200 and £100, respectively, and interest, and by certain mesne assignments, and ultimately by a deed of assignment, dated the 9th September, 1839, the two several Bonds and securities were in consideration of the sum of £405, the amount then due, assigned with the estate granted in security, [272] to Eleanor Wilson, her executors, administrators or assigns, until payment of the same. By another Bond and security, dated the 22nd of March, 1839, David

Harris Davidson created a further charge on the estate, in favour of Eleanor Wilson, for the sum of £95.

Eleanor Wilson died in the month of February, 1852, having made her Will, whereby she appointed the Appellants, Mark Hildesley Quayle and Ann Wilson, executor and executrix. By a deed of assignment, dated the 21st of May, 1852, the Appellants, Mark Hildesley Quayle and Ann Wilson, assigned the three Bonds and securities to one Eliza Wilson, who had since died intestate, and letters of administration of her estate and effects were granted to the Appellant, Senhouse Wilson.

By an indenture of settlement made on the marriage of David Harris Davidson with his wife, then Isabella Brew, dated the 7th of December, 1833, David Harris Davidson settled upon her one-half of the estate for her natural life, from the day of his decease.

By a Bond and security dated the 1st of April, 1839, David Harris Davidson further charged the estate with the payment of £70 and interest to Isabella Farrant, who died some years ago, having made her Will, whereby she bequeathed to William Farrant the Bond and security. He proved the Will and died, and Susannah Farrant took out administration to his estate.

In the month of January, 1850, Eleanor Wilson obtained an order of possession of the estate. The Appellants, or those whom they represent, had been, subsequently to the date of the order, in receipt of the rents, issues, and profits.

[273] The Respondent then set up a title, that upon the decease of Jane Lewis he became entitled to the equitable fee in the estate, lands, and premises, and that David Harris Davidson took no interest therein, save only as trustee for him, and insisted that he had no power to charge or incur any part of the estate; and on the 2nd of October, 1851, the Respondent filed a bill in the Court of Chancery in the Isle of Man, against David Harris Davidson and Isabella his wife, Frederick William Davidson, and against the Appellants, Mark Hildesley Quayle, Ann Wilson and Senhouse Wilson, and Susannah Eleanor Farrant, whereby, after stating the facts before mentioned, he prayed that he might be declared entitled to the equitable fee of and in the estate, as from the decease of Jane Lewis, and that David Harris Davidson might be declared a trustee of the same for the Respondent, and ordered to convey the legal estate to him; and that the Bonds and securities of the 12th of December, 1830, and the 3rd of December, 1831, and assignments and conveyances of the instruments to Eleanor Wilson, and Bond and security to Eleanor Wilson of the 22nd of March, 1839, and Bond and security to Isabella Farrant of the 1st of April, 1839, and the indenture of the 7th of December, 1833, might all be set aside and declared null and void as against the Respondent, and the estate, lands, and premises given in security and charged thereby, and that an account might be taken of the rents, issues, and profits of the estate, lands, and premises, which had been received by the Defendant, David Harris Davidson, or which without default might have been received since the death of Jane Lewis, up to and until the time when possession [274] of the estate, lands, and premises was obtained by Eleanor Wilson, and that David Harris Davidson might be charged with an occupation rent for such part of the estate as might have been in his own possession during the time aforesaid; and that a further account might be taken of the rents, issues, and profits which had been received, or without default might have been received respectively by Eleanor Wilson, and since her decease by the Appellants, Mark Hildesley Quayle and Ann Wilson, as executors of Eleanor Wilson, and by Eliza Wilson, and by the Appellant, Senhouse Wilson, as her administrator, and that David Harris Davidson and the Appellants, Mark Hildesley Quayle and Ann Wilson, as executors of Senhouse Wilson, as administrator of Eliza Wilson, might be ordered to pay over to the Respondent such sum or sums of money, rents, issues, and profits aforesaid, which they and the estates respectively represented by them, should be found to have received.

The Appellants, Mark Hildesley Quayle, Ann Wilson, and Senhouse Wilson, filed their joint and several answer to the Bill, admitting, for the most part, the statements contained in the Bill, and relying for their indemnity on the order of possession granted in consequence of the interest upon the Bonds being in arrear. Frederick William Davidson also filed his answer and disclaimer to the Bill; and



David Harris Davidson, by his answer, insisted that he was entitled under the Will, to the estate for his own use, or, at all events, to a life interest, and was not liable to account.

Witnesses were examined, and the cause being at [275] issue, came on to be heard at an adjourned Chancery Court held in the Island on the 3rd of October, 1856, when the Court was of opinion, that the Respondent was entitled to the estate from the date of the death of Jane Lewis, freed and discharged from all Bonds and securities granted thereon by David Harris Davidson and all assignments thereof, but subject to any claim of the representatives of Jane Lewis for any incumbrances thereon which she might have paid off, and it was ordered that the order of possession granted in favour of Eleanor Wilson should be set aside, and that David Harris Davidson should account for the rents of the property from the death of Jane Lewis, and that an account should be taken between the Respondent and the Appellants of all moneys received by the Appellants under the order of possession, but that the Appellants should be entitled to set off against such receipts up to the date of the filing of the Bill, any money due to them by David Harris Davidson under the Bonds aforesaid, and it was referred to the first Deemster to take and state the account between the parties.

The Respondent presented a petition of re-hearing to the Honourable Charles Hope, Lieutenant-Governor and Chancellor of the Isle of Man, submitting that the part of the decree which declared that the Appellants were entitled to set off against their receipts up to the date of the filing of the Bill any moneys due to them by David Harris Davidson under the before mentioned Bonds, was erroneous, and submitting that he was entitled to have the same reviewed, reversed, and varied. And, also submitting, that the decree was further erroneous, in so far as it did not declare David Harris Davidson to be a trustee [276] for the Respondent of the estate, or direct him to convey the same to the Respondent.

By a decree of the Court of Chancery of the Island on the re-hearing, dated the 5th of March, 1857, it was declared, that the Court was of opinion that David Harris Davidson took the estate in question after the death of Jane Lewis, as a trustee for the Respondent, who then became entitled to the equitable fee in the estate, and to the rents, issues, and profits thereof: and that the Respondent was then entitled thereto, freed and discharged from all Bonds and securities purporting to have been granted thereon by the Defendant, David Harris Davidson, and all assignments thereof, but without prejudice to any claim of the representatives of Jane Lewis, for any incumbrances on the same, which she might have paid off. And, David Harris Davidson was thereby ordered to convey to the Respondent the legal estate in the property in question. That the order of possession granted in favour of Eleanor Wilson should be set aside, and that the Defendant, David Harris Davidson, account to the Respondent for the rents of the property, from the death of Jane Lewis; and that an account should be taken between the Defendant, David Harris Davidson, and the other Defendants, of all the moneys received by the Defendants, or by Eleanor Wilson, and Eliza Wilson, under the order of possession, but that the Defendants should be entitled to set off against such receipts, up to the date of the filing of the Bill, any money due to them by the Defendant, David Harris Davidson, under the Bonds aforesaid.

Against this decree the present appeal was brought by the mortgagees, Quayle and Wilsons, and now came on for hearing.

[277] The Solicitor-General (Sir Hugh M. Cairns), and Mr. E. F. Smith, for the Appellants.—According to the true construction of the Will and second Codicil the estate in question was devised, after the death of Jane Lewis, to David Harris Davidson absolutely for his own benefit. *Gilbert v. Bennett* (10 Sim. 371), *Hammond v. Neame* (1 Swans. 35), *Bird v. Hunsden* (2 Swans. 342), *Webb v. Wools* (2 Sim. N.S. 267), *Bowden v. Laing* (14 Sim. 113). The words “In trust for his son being brought up to work the farm,” did not create a trust.—[The Lord Justice Knight Bruce: Can you go on without making the heir-at-law of Philip Lewis a party?—It has all along been taken that the devise is good if intelligible. Having the heir before the Court would be no benefit if it is unintelligible. David Harris Davidson not having at the date of the Will and Codicils any son, those words pointed only to a wish of the Testator as to the occupation to which any son which Davidson might

afterwards have should be brought up: such son was clearly not the direct object of the Testator's bounty. By the Will the Testator imposed a pecuniary charge on David Harris Davidson, and gave the estate to him, subject to an onerous condition as to working the farm during his mother's lifetime for her benefit, with which condition he fully complied. In the alternative, we submit, that if the estate was not devised absolutely to David Harris Davidson, the same was devised to him at least for his own life. Secondly, by the law of the Island, real estate upon which any sum is charged by way of mortgage, upon the death of the mortgagor [278] is primarily liable to payment of the amount secured by such mortgage. Now Jane Lewis was not bound to pay off the two sums of £100, charged on the estate by the deeds of Bond and security of the 12th of August, 1801, and the 8th of September, 1813: but having done so, the estate remained liable to repay the same sums to her, or after her decease to David Harris Davidson, as her legal personal representative. If the securities of the 11th of December, 1830, the 3rd of December, 1831, and the 22nd of March, 1839, are not available to any greater extent, the securities ought to be held at least to operate as assignments or charges of the two sums of £100. The Appellants are not liable to account to the Respondents for any moneys received by them or by Eleanor and Eliza Wilson respectively under the order of possession. The money received was in respect of the interest of David Harris Davidson in the estate, and they ought not to be held accountable to the Respondent, between whom and themselves there is no privity.

Mr. Rolt, Q.C., and Mr. Osborne, for the Respondent.—Whatever interest David Harris Davidson has under the Will, it is as a trustee only: he does not take any beneficial interest in the estate. Immediately upon the birth of the Respondent the equitable fee simple in the remainder of the estate expectant on the decease of Jane Lewis vested in him under the Will, *Powell v. Davies* (1 Beav. 532), and David Harris Davidson became a trustee for him accordingly. Estates tail are not recognized by the law of the Isle of Man. The [279] words "provided the aforesaid David Harris Davidson should have no male issue," contained in the Will, have no other effect, when considered with reference to real estate in the Isle of Man, than to express the event upon which the gift over of the estate was to take effect, and on the birth of the Respondent, such event becoming impossible, the words ceased to have any effect or operation in the construction of the Will. Neither do those words operate to pass any estate by implication to David Harris Davidson, inasmuch as no beneficial interest is given to him by the Will. The words "being brought up to work the farm," do not import a condition, or, if they do, such condition is not a condition precedent to the vesting of the estate: the Respondent was, in fact, brought up to work the farm. *Clavering v. Ellison* (3 Drewry, 451). All that those words mean is, that after the death of Jane Lewis, the tenant for life, the Respondent was to take a beneficial interest in the estate.

The consideration of their Lordships' judgment was reserved, and now delivered by

The Lord Justice Knight Bruce (Dec. 2, 1858).—The principal or sole question in this appeal is upon the construction of the Will of Philip Lewis, so far as it related to a landed estate in the Isle of Man, belonging to him, and called Glenmaye Farm, otherwise Creggan Ashen. His testamentary instruments are in these words:—[His Lordship here read the Will and second Codicil, *ante*, p. 269 and p. 270, and proceeded.] The Testator died in the year 1815: his wife, Jane [280] Lewis, in the year 1827. She was survived by her son, David Harris Davidson, mentioned in the Will, who does not appear to have had any issue before the year 1818: between which year and the year 1827, two sons were born to him, namely, Philip Lewis Davidson and Frederick William Davidson. Of these, the elder, Philip Lewis Davidson, is the Plaintiff in the suit, and Respondent here, who seems at his birth to have been, and to be now, his father's heir-apparent.

And the point, or the main point, for decision, is the presence or absence of a gift in the Will, of a beneficial interest in Glenmaye Farm or Creggan Ashen, to the Respondent. In one view, the latter, the Bill should have been dismissed. The decree proceeds on the other.

The instruments must of course be read, not without attention to the circum-



stances that have been stated. From which it obviously follows, that, humanly speaking, we must take it to have been, when the Will was made, and afterwards throughout the life of the Testator, possible, that David Harris Davidson might have many sons, or might never have a child.

Still it is contended for the Respondent, that the words, "In trust for his son being brought up to work the farm," show that the Respondent was intended to take, after the death of the Testator's widow, a beneficial estate in it. Their Lordships, however, do not so understand these words. If not uncertain, if not incomprehensible, they import, in their Lordships' opinion, not a trust of the land for any son of David Harris Davidson, but merely a recommendation to him, or an expression of hope or confidence, that his eldest, or only son, or one at [281] least of his sons (if any), should be "brought up to work the farm," or would be so. Neither of these views, however, enables the Respondent to claim an interest as a devisee; upon which alleged title alone he sues.

This conclusion appears to their Lordships to be rendered, if not more clearly, yet not less clearly right, by the provisions to take effect after the death of David Harris Davidson, in the event of David Harris Davidson having "no male issue," which the Will contains, and by the last Codicil. The intention imputed by the Respondent to the Testator is, so far as their Lordships have the means of forming an opinion, one of an eccentric and improbable kind. That, however, is of course far from sufficient to defeat the suit. Testators have a right to be eccentric, and to make startling and extraordinary dispositions. Here, however, it is not the singular or unlikely nature of the design attributed by the Respondent to the Testator, but his language, coupled with the circumstance, that David Harris Davidson must be taken never before the Testator's death to have had issue, that induces their Lordships to consider the claim made by the suit as groundless. They wish, however, to be understood as not intimating any opinion whether, if the Respondent had been born before the making of the Will, he would have taken an interest under it. Their Lordships' humble advice to Her Majesty will be, that the Bill should have been, and should stand, dismissed; but that the case is not one for costs, either in the Isle of Man or here. Their Lordships do not, however, doubt the right of the mortgagees to add their costs to their security.

[Mews' Dig. tit. WILL.; IX. CONSTRUCTION; K. 6 b. *Precatory Trusts*. S.C. 7 W.R. 164.]

## [282] ON PETITION FROM THE SUPREME COURT OF JAMAICA.

THE CHURCHWARDENS of the parish of ST. GEORGE, in the Island of JAMAICA,

—*Appellants*: CHARLES TUTHELL MAY, Clerk,—*Respondent* \* Dec. 1, 1858.]

In circumstances, showing that a question of importance, and the sum involved uncertain in value, leave was given to appeal from an Order of the Supreme Court of Jamaica refusing such appeal, although the amount of the verdict was under £300, the appealable value limited by the Order in Council of the 14th of April, 1851.

Security for Respondent's costs directed to be lodged in the Council Office within three months from the date of the Order giving leave to appeal.

This was a petition by the Churchwardens of the parish of St. George, in the Island of Jamaica, for leave to appeal from an Order of the Supreme Court of that Island, refusing to allow an appeal to the Queen in Council, the amount of the

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir Lawrence Peel.

verdict in the action being under £300, the appealable value limited by the Order in Council of the 14th of April, 1851.

The petition stated that an action of assumpsit was brought in the Supreme Court in the Island of Jamaica, by the Reverend Charles T. May, Clerk, Rector of the parish of St. George, against the peti-[283]-tioners, to recover the sum of £360 claimed to be due to him as such Rector for two years' compensation at a rate of £180 sterling, per annum, in lieu of a glebe and parsonage house, upon a contract alleged to have been made with him and the Justices and vestry of the parish. That the action was tried at the Surrey Assizes in the Island in the year 1858, when a verdict was found for the Plaintiff for the sum of £285 12s., subject to points reserved at the trial. That an Order *nisi* was obtained by the Petitioners for setting aside the verdict, and that on the 6th of October, 1858, the Order *nisi* was after argument discharged by the Supreme Court, the Plaintiff undertaking to reduce the damages to the sum £270 3s. 2d. for which sum final judgment was entered up. That the Petitioners applied for leave to appeal to Her Majesty in Council from this Order, but the Supreme Court refused leave, on the ground that the Court had no power to grant such leave, as the verdict was under the sum of £300. The Petitioners submitted that the Court was in error upon their construction of the Order in Council of the 14th of April, 1851, and that in fact the matter in issue did exceed the sum of £300, and that the judgment did involve "directly a question to, or respecting property in a civil right amounting to or to value of £300." That the action was brought by the Plaintiff, and defended by the Petitioners, not for the purpose of ascertaining the amount of a mere money demand, but in order to try the rate at which the Justices and vestry claimed to assess the amount, which they should judge adequate as compensation for the glebe and parsonage house. That on the one hand the Plaintiff contended that he, as the present Rector, and his successors, the [284] Rectors for the time being, were entitled to a perpetual fixed and invariable compensation of £180 sterling a-year, in lieu of glebe and parsonage, and that, on the other hand, the Petitioners contended that the Justices and vestry had a discretionary power in fixing the amount of such compensation. That independently of the amount at issue, the question was one of great importance, depending upon the construction to be put on certain Statutes of the Island, which also affected similar claims and rights of Rectors, and the Justices and vestries of the other parishes in the Island, and the petition prayed for leave to appeal from the Order of the 6th of October, 1858.

The petition was heard *ex parte*.

Mr. Mackeson, for the Petitioners.—The Order in Council of 14th of April, 1851, which regulates appeals from the Supreme Court of Judicature at Jamaica, provides for the allowance of an appeal to Her Majesty in Council, "in case any judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of £300 sterling, or, in case such judgment, decree, order, or sentence shall involve directly or indirectly any claim, demand or question to or respecting property in any civil right amounting to or to the value of £300 sterling." Here the claim in the first instance was for a sum exceeding £300, and though the verdict is for less amount, yet it cannot be contended that the civil right which involves the annual value of the glebe house and the compensation to be paid to the Rector for the same, is not a civil right exceeding the [285] value of £300, even if it be limited to the amount recovered in the action, which is but for two years' compensation. If the application is granted, we also ask that the security for costs be entered into in the Court below.

Lord Kingsdown.—Their Lordships will grant this application for leave to appeal, upon condition of the Petitioners lodging in the Registry of the Privy Council, within three months, the sum of £200, sterling, to meet the costs of the Respondent in the appeal, in case the same should be affirmed.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to Appeal*.

As to special leave to appeal in civil cases generally, see note to *Retemeyer v. Obermüller*, 1837, 2 Moo. P.C. at p. 125].



## ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

HELEN HODGSON,—*Appellant*; ELIZA ANNE CONSTANCE DE BEAUCHESNE,—*Respondent* \* [July 7, 10, and 14, 1858].

H., a domiciled Englishman in the military service of the East India Company, came to England from India in the year 1829, upon furlough. By the rules of the service, H. was liable at any time to be recalled to India on active service. In the year 1838, he acquired the brevet rank of Major-General in Her Majesty's army. While on furlough, and in the year 1832, he went to France, where he resided with his wife and daughter, and died there in 1855. He occupied lodgings during that time in Paris. He also purchased a burial-place for his wife, who died and was buried there, and purposed to be buried there himself. His residence in Paris was not continuous, as he frequently came to England and Scotland upon visits, but he had no permanent abode in either of those countries, nor did he give up his lodgings in Paris during these visits. All his property, except the furniture of the lodgings in Paris, was in England. Held (reversing the decree of the Prerogative Court),

First. That it was not competent to H. to acquire a domicile in a foreign State, as such domicile was incompatible with the obligations and duty of an Officer in the military service of the Queen and the East India Company [12 Moo. P.C. 319].

Second. That the presumption of law arising from his profession and *status* was against any intention by H. to abandon his original domicile and acquire a new domicile in a foreign State, as it would be inconsistent to presume an intention contrary to his duty as an Officer in the military service of Her Majesty and the East India Company [12 Moo. P.C. 319].

Third. That England being the domicile of origin of H., the *onus probandi* was upon the party who alleged H. had abandoned it and had acquired another domicile, to establish that proposition [12 Moo. P.C. 323]; but

Fourthly. That the presumption raised by H.'s residence in France, of his intention to acquire a French domicile, was rebutted by the facts proved in evidence [12 Moo. P.C. 320, *et seq.*].

The presumption of law is against the intention to abandon the domicile of origin.

Length of residence in a foreign country *per se*, according to time and circumstances, raises a presumption of intention to abandon the domicile of origin, and to acquire a new domicile; but such presumption may be rebutted by facts, showing that there was no such intention.

A change of domicile is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicile, it must be *animo et facto*.

Lieutenant-General Hodgson, in the military service of the East India Company, and having a brevet rank of Major in Her Majesty's army, the [286] deceased, died in Paris in the year 1855, where he had principally resided since the year 1832. While resident in Paris, he executed a Will and two Codicils in the English form. Probate was, in the first instance, taken out in England by the Appellant, his widow, but shortly afterwards the Respondent, the wife of Hyacinth Alcide de Beauchesne, a daughter of the deceased by a former marriage, instituted proceedings in the Prerogative Court to have the probate recalled and the deceased declared to have died intestate, on the ground that at the time of his decease, he was domiciled in France, and that the Will and Codicils were invalid, not being made in conformity with the [287] requisites prescribed by the law of France in respect to testamentary dispositions. The case of the Appellant was, first, that the deceased being in the

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military service of the Crown and the East India Company was incapacitated from acquiring a foreign domicile: and, secondly, independent of that objection, that his domicile at the time of his death was England.

The circumstances of the case were these:—

Lieutenant-General Hodgson was born in 1781, at Astbury, near Congleton, in Cheshire, and passed the earlier years of his life in England. In the year 1799, he went to India as a cadet in the service of the East India Company. In 1811, he married at the Mauritius, where he was serving with his regiment, a daughter of a French gentleman named de Fouchy. In 1816, he came to England on furlough, and in the year 1829, he again returned to England on furlough, having attained the rank of Colonel, and thenceforward continued until the time of his death in the military service of the East India Company, as Colonel of the 12th Regiment of the Bengal Native infantry, on full pay. During the whole of that period he was considered and recorded as being on furlough. After the deceased returned from India he lived in England and Scotland until the year 1832, when he went to France with his wife and daughter. Of his movements during the next four years, little was known, except that he spent a portion of each year in England. In 1836, his daughter, the Respondent, was married in Paris to Monsieur de Beauchesne; and in June of that year the deceased took apartments in the Rue Marsoulier in Paris, which he furnished in a simple manner; the apartments were held at a low rent, and he had the power of giving them up at a short notice. [288] In April, 1838, the deceased quitted Rue Marsoulier, and took apartments in the Rue de Trevisé, with the power of giving them up at three months' notice. He afterwards lived in other apartments in Paris. Those apartments were never otherwise than moderately furnished, and held at a precarious tenure, although he had ample means of establishing himself permanently. In the years 1837 and 1838, he spent several months in England; and in the latter year he acquired the brevet rank of Major-General in Her Majesty's army. In 1839, he took a lease for five years of a place in Scotland, with a right of fishing and shooting. He spent several months there in the years 1839 and 1841. In 1843, he returned again to England, stayed there and in Scotland for several months. On none of these occasions was he accompanied by his wife, whose disinclination to England was a source of regret often expressed by him. In the year 1844, his wife died, and was buried in the Northern Cemetery in Paris, and for this purpose General Hodgson purchased in perpetuity a plot of ground in that cemetery, in which he caused a vault to be made, and had a stone inscription placed there, the inscription being "*Famille Hodgson*," and expressed his purpose to be buried there himself. On the death of his wife, General Hodgson shut up, although he did not surrender, his apartments in Paris, and spent the greater part of the next two years in England and Scotland, his club at Edinburgh being his principal home. In 1846, he returned to France, and took the Respondent, who was then living apart from her husband, to live with him. It appeared that he was dissatisfied with his daughter's conduct, and in the year 1848 he married the Appellant, the daughter of Admiral Honyman. The cere[289]-mony took place at the British Embassy, and in the usual affidavit made by the deceased at the English Consulate he described himself as of Astbury, in Cheshire. It appeared that it was the intention of the deceased to take his wife to England shortly after his marriage, for the purpose of introducing her to his English relations. This intention was delayed by the death of his wife's father, and by a severe attack of illness, which rendered it unadvisable that the deceased should undertake a journey to England, and for many months his health was in a very precarious state. In the autumn of 1849, the Respondent threatened to institute proceedings in the Consistory Court of London to declare her father's marriage a nullity, by reason, as she alleged, of mental weakness, and the deceased instructed a Proctor to defend it; other events caused this suit to be postponed. In March in the following year, the Respondent petitioned the Court of Chancery in England for a commission to inquire into the alleged lunacy of her father. The deceased did not dispute the jurisdiction of the English Court, but caused the petition to be opposed on its merits, and the petition was ultimately dismissed. During these proceedings he stayed in Paris, and in October, 1850, before the dismissal of the petition, he renewed for one year the tenure of his apartments. In the spring of the following year, 1851, he came to England, and took a furnished house for a few months at



Southsea. His plans for the future did not appear to be then settled, and in September he again returned to Paris. Very shortly after his return to Paris he had a slight apoplectic seizure, and under medical treatment he rallied in the summer of 1852, but at the close of that year a violent attack of illness finally upset his health and [290] faculties, and he never afterwards was capable of exercising his will or judgment. His wife kept him in Paris under the care of his accustomed medical attendant, and he remained there until his death, which took place in March, 1855. At the time of his death the furniture in the apartments constituted the only effects he possessed in Paris. He possessed a considerable sum in the English funds. The deceased left three testamentary papers, consisting of a Will, dated the 21st of August, 1848, and two Codicils dated respectively, the 28th of March, 1850, and the 13th of March, 1851. These documents were executed in Paris in the English form, and in accordance with the requirements of the Statute of Wills, 1 Vict., c. 26.

On the death of General Hodgson a caveat against probate was entered on behalf of the Respondent, in the Registry of the Prerogative Court, but was afterwards withdrawn, and probate was granted to the Appellant, his widow and executrix. Shortly afterwards, in August, 1855, the Respondent commenced proceedings *de novo*, by taking out a decree calling upon the Appellant to bring in the probate, and to prove the Will and Codicils in solemn form, or to show cause why the probate should not be revoked, and the deceased declared to have died intestate. The Respondent, being separated from her husband under a decree of the French Court, instituted the suit as a *feme sole*. An allegation, in the form of a common *condidit*, was given in on behalf of the Appellant, propounding the Will and Codicils. An allegation was then put in by the Respondent, in which she pleaded that the deceased having permanently resided in France since 1836, died domiciled there, with-[291]-out leaving any Will valid by the law of France. The answer of the Appellant to this allegation denied that the deceased died domiciled in France. The Appellant afterwards filed a responsive allegation, which was confined to the question of the domicile of her deceased husband. This allegation, after pleading the before-mentioned facts, alleged that the deceased in renting apartments in Paris, and residing there, from time to time, did not at any time intend to establish himself permanently, and to become domiciled in France. That he uniformly retained and expressed, both in his letters and in conversation, the greatest affection and preference for his native country, and evinced thereby that he considered himself as identified with English interests, and as a visitor and a stranger in France. The twenty-third article pleaded, that the deceased never applied for letters of naturalization in France, or for the authorization of the French Government, to establish his domicile in France; and that the deceased might at any time have been ordered by the police to quit Paris, or France, without cause shown, and without his having the right to resist such order, as a domiciled Frenchman would have had. The twenty-fourth article pleaded, that the deceased was not, by reason of the premises contained in the preceding article, ever lawfully domiciled in France, so as to have acquired a domicile of succession, according to the laws of that country; and lastly it was pleaded, that by the laws of France the succession to the personalty of all deceased persons, whether testate or intestate, was dependent upon, and governed and regulated by, the law of the place of domicile of the deceased; and that in the case of a foreigner, who was neither naturalized nor authorized to establish his domicile in France, the [292] succession, whether testamentary, or *ab intestato*, was governed by the law of the deceased's own country of origin; and that the same had been frequently decided to be the law of France by Courts of competent jurisdiction. The answer of the Respondent to this allegation admitted that the deceased never applied for letters of naturalization in France, or for the authorization of the French Government to establish his domicile in France. She denied and traversed the allegation that the deceased, renting and residing at Paris, did not intend to establish himself permanently or to become domiciled in France, or that the deceased considered or evinced that he was only a visitor and stranger in France.

A number of witnesses were examined by the Respondent upon this allegation, consisting of Mrs. Perkins, Mrs. Thomas, M. Janaguy, Gunning, and others, who spoke to their belief that the deceased had made Paris his home, and had permanently settled in France. Mrs. Thomas also spoke to a conversation with the de-

ceased, in which he had expressed his intention to be buried with his wife. Witnesses were examined by the Appellant upon this allegation, and letters of the deceased put in evidence. The testimony of the witnesses and the correspondence went to establish that the deceased never would consider himself a Frenchman: that he used to say, "*Je suis Anglais avant tout*," that he was proud of being an English Officer, and never expressed a desire to be domiciled in France. Campbell, one of the Clerks in the Secretary's department at the East India House, was also examined, and deposed that the deceased was at the time of his death a Colonel of the 12th regiment of Bengal Native infantry on full pay, on furlough, and that by the rules of the service liable to be called upon by the [293] Company, at any time, to return to India. Bernard Joseph Leget, an advocate at the Imperial Court of Paris, the author of a book called "*Le Code des Etrangers*," was also examined. He deposed, in his examination in chief, that a foreigner resident in France, no matter for how long time, could not obtain a legal domicile except by letters of naturalization, or the authorization of the Government of France to establish his domicile, and consequently that the deceased, not having obtained either, retained his domicile of origin: that by the French law the Will of a person so circumstanced would be considered valid, if it were valid by the laws of his own country. In his examination on interrogatories, he deposed, that by the laws of France a foreigner could not obtain a domicile of succession by fixing his abode with the intention of permanently abiding there, and he referred to Pothier for the definition of domicile as "*le lieu où une personne a établi le siège principale de sa demeure et de ses affaires*" (Pothier, Contume d'Orléans, ch. I. § I. Art. 8), which the witness said only had regard to Frenchmen, and not to foreigners, and that moreover in Pothier's time the French law did not require authorization, that since his time the law had been modified by the Code Napoleon, Art. 13, interpreted by the Avis C. S. of 18 Prairial, year 11, and that in his opinion, the French law did not now acknowledge any other law of succession of a foreigner than authorization, and, therefore, rejects Pothier's definition of domicile with respect to foreigners. In support of this position he referred to the case of the Baron de Mecklenberg, then lately determined by the Court Imperial at Paris. He further deposed that the French Courts in reference (not to foreigners generally, but) to authorized foreigners or Frenchmen only, would (with regard to [294] the circumstances which constitute domicile as defined by Pothier) adopt the general principles of the law of nations on that subject which are adopted in England and other countries. He said, "The ground on which I give it as my opinion that domicile, as defined generally by writers on international law, is not by the law of France a sufficient domicile to render the estate of a foreigner so circumstanced subject to the French law of succession, is, that there can be only one domicile for all purposes; and that is declared by the 13th Art. of the Code Napoleon, requiring authorization by the Government." He said that he knew that cases very frequently came before the Court of Cassation in Paris, in which the question of domicile occurred; that it was a fact that in France, the term "domicile" was divisible into two classes, but he would not accept the distinction suggested, namely, of one domicile (*proprio sensu*) in a strict sense, or, according to municipal law, and another domicile "*lato sensu*" in a broad sense, or according to the law of nations: that he must be taken as dissenting from this suggestion of two domiciles with reference only to Frenchmen or naturalized foreigners, and that he never would admit the word "domicile" with reference to an unauthorized foreigner. That the French law did not recognize the principle of a domicile in any sense being acquired by either Frenchmen or foreigners in virtue of the law of nations. All that he admitted (as to the suggested existence of two domiciles) was, that a Frenchman or naturalized foreigner might have two species of domicile: civil and political; that he might by special declaration elect one place as his domicile for political purposes, whilst for general purposes the Courts might (in the absence of any special declara-[295]-tion as to his domicile for general purposes) determine his domicile to be elsewhere, and in that determination they would have regard to all circumstances which are held by the law of nations to constitute domicile; regarding, however, such circumstances, not in virtue of the law of nations, but of the Code. That such was the result of the 102 Art. of the Code. That a



foreigner could not exercise municipal rights, *i.e.*, enjoy his *droits civils*, until he had obtained the authorization of the Government to establish his domicile in France, and then the enjoyment of such rights was the consequence of such authorization, and he referred to the 13th Art. of the Code in support of this position. He apprehended the meaning of that Article to be, that foreigners were thereby excluded from acquiring a legal domicile; and, in support of his opinion, he quoted the opinion of M. Gary, a member of the Corps Législatif, who says on this Article:—" *Qu'il n'y a eu aucune objection contra la disposition qui veut que l'étranger ne puisse établir son domicile en France s'il n'y est admis par la Gouvernement. C'est une mesure de police et de sûreté autant qu'une disposition Législative. Le Gouvernement s'en servira pour repousser le vice, et pour accueillir exclusivement les hommes vertueux et utiles, ceux qui offriront des garanties à leur famille adoptive,*" and he also referred to "*Recueil des Discours prononcés au Corps Législatif sur le Code Napoleon,*" par Ferret, Tome I., and in order to show that M. Gary applied the word "domicile" in all senses, and not only in the sense of the acquisition of civil rights, he again referred to the Avis of the 18th Prairial, year 11, to the effect that the Council of State had decreed "*Que dans tous les cas où un étranger veut s'établir en France il est tenu d'obtenir la permission du Gouvernement.*" He said that he could not refer to any passage in the [296] Code by which a foreigner is freed from the obligations of the French law, because the Code was made for Frenchmen, not for foreigners. He considered the right to make a Will a part of the "abstract" right recognized in all civilized countries (setting aside the question as to the mode or form). He admitted that a foreigner in France, whether domiciled by authorization or not, had a right to make a Will; the law of 1819, abolishing the *droit d'Aubaine*, expressly according that power. That there was not any passage in the Code by which the mode in which that right should be exercised by foreigners is strictly defined. That the Code, when speaking of Wills, and the requisites of their validity, was perfectly silent as to any distinction between the Will of a Frenchman and the Will of a foreigner, that it spoke only of the former, for whom alone it was intended. That in making a Will, an obligation was imposed upon every Frenchman to comply with certain conditions and formalities: but such conditions and formalities were not essential to the validity of all Wills made in France, because they are not essential to the Wills of unauthorized foreigners made there. That there was not any passage contained in the Code in which foreigners resident in France were expressly freed from the obligation of complying with such conditions and formalities, inasmuch as the Code applied not to them. That foreigners were not subjected to its limitations, but are left to the law of their own country as to their Wills. He referred to Thornton's, Onslow's, Breul's and Olivarez's cases, and to *Routledge v. De Veine*, and *Lloyd v. Lloyd* (see these cases referred to in *Bremer v. Freeman*, 10 Moore's P.C. Cases, 306), but adhered to the opinion he had given. Bertrand Francois Julien de [297] la Chere, an Advocate to the Council of State and of the Court of Cassation, who had been in practice for twenty-three years, was also examined on this allegation. In his examination in chief he deposed that as General Hodgson had not obtained letters of naturalization in France, nor authorization by the French Government to establish his domicile there, he would not have acquired a lawful domicile of succession according to the French law, unless it should result from certain circumstances; that he had renounced his domicile of origin, that he had not acquired in any other country a new domicile, and that his intention was to establish himself exclusively in France; and he stated that many Courts in France had decided that a foreigner thus residing in France acquired there a domicile of fact, equivalent to a legal domicile, and such a domicile as would regulate the succession to his personal property, whether he died testate or intestate. He then referred to the case of the Baron de Mecklenberg, where the Imperial Court of Paris held that the Baron not having the authorization of the Government was not domiciled there, although he died in Paris after a residence of twenty-six years in France, having a large establishment and his whole fortune there. He also referred to the 7th and 13th Articles of the Code Napoleon, whereby it is directed that foreigners who have received authorization shall enjoy all civil

rights, and said that there was not any written law whereby domicile of succession without authorization was provided for. That such law was the result of general principles of law, independently of the Code. He referred to *Lloyd v. Lloyd* in the Imperial Court of Paris, in 1849, as a ruling authority. That if an Englishman died domiciled in France, whether he had obtained a general domicile, [298] or even by his having obtained letters of authorization, the Courts in France would hold that his Will was valid, if it were valid by the law of his country of origin, and that if an Englishman died intestate, his personal estate would be distributed with the law of England. That the rule applied to all foreigners domiciled in France, the rule being, that the law of the deceased's nationality, and not the law of his domicile, should prevail in those matters. That the French Courts in regulating the affairs of the deceased would adopt the law of the country of origin for their guidance, as being the "*statut personnel*," following the person notwithstanding his domicile. In his examination on interrogatories he said, that he had already stated that under circumstances a foreigner might obtain a lawful domicile in France, without the express authorization of the French Government, but that such domicile would not, in his opinion, regulate his succession, in the sense of causing his personal property to be distributed by the law of France, and he referred to the 102nd Art. of the Code, as the definition of domicile "*au lieu où il a son principal établissement*," and said that in ascertaining the domicile of a foreigner (not having authorization), the French Courts would decide what was his domicile "*où le siège de la demeure et de ses affaires*," by a consideration of all the circumstances, which generally by the law of nations are considered to constitute a domicile, unless, in the country of origin of the foreigner in question, any particular law of domicile prevailed, in which case the French Court would be guided by such particular law; and that it would be a special question in each case depending upon evidence. He further deposed that a foreigner was entitled to exercise municipal rights, *i.e.* to enjoy his "*droits* [299] *civiles*," when he had obtained the authorization of the Government to establish his domicile in France, and he had then a domicile (*proprio sensu*) in the same manner as a Frenchman. That that was the meaning of the 13th Art. of the Code, and a foreigner could not obtain such domicile or exercise such rights without such authorization, that it would be logically correct to infer from the 13th Art. that no foreigner who had not been authorized by the Government should enjoy any civil rights. He further deposed that the right to make a Will was part of *jus universum*, recognized in all civilized countries, and that a foreigner in France, whether authorized or not, had a right to make a Will, and that there was no passage in the Code by which the mode of exercising such right by foreigners is defined, as the Code was made only with reference to Frenchmen in that respect, and therefore, that there was no necessity expressly to exempt foreigners. This witness also referred to the cases of Thornton (Devilleneuve and Carotte's Reps. 1st series, Tome 8, pt. 1, p. 442), *Ouslow v. Ouslow* (*ib.* 2nd series, 1835, pt. 2, p. 374), Breul's Case (*ib.* 1854, 1st part, p. 105), *Routledge v. De Veine* (Tome 1852, part 2, p. 289), *Lloyd v. Lloyd* (*ib.* 1849, part 2, p. 420), Olivarez's and the case of the Baron de Mecklenberg. And, with reference to the opinion he had given in his examination in chief, that the personal property of foreigners domiciled in France by authorization of Government ought to be divided according to the law of their own country, he referred to Thornton's case, in which the Imperial Court of Paris determined that notwithstanding the authorization of the deceased, his moveables were subject to the legislation of his own country; and that the Court of Cassation upheld that decision, and upon this point he also [300] referred to the case of Stewart, reported in the *Journal du Palais*, 1838, 1st part, p. 249, and in support of his opinion that a foreigner domiciled in France might make a Will of personalty, according to the laws of his own country, he referred to the following authorities, "*Droit Commercial*," No. 1486, by Pardessus, Councillor of the Court of Cassation. "*Droit Commercial dans ses rapports avec le Droit des Gens*," by Massé, No. 87; and Marcadé's "*Explication de Code Napoleon*," Art. 999, Tome IV. § II. p. 58. He stated that he was aware that Conolly's case was opposed to his opinion, and he explained that in that case there was a French interest involved, and that all parties had sought the French jurisdiction; and he further added in explanation of his relying on an earlier case in the Imperial Court, that in France the Courts were not legally bound by precedents.



and that the Imperial Courts were frequently influenced by considerations of fact peculiar to each case. And, in conclusion, he added, in explanation of his opinion given in chief, that a domicile of succession of a foreigner would not be inferred (without authorization), unless he died under such circumstances as positively to exclude the possibility of a domicile of his country of origin. That the party must have absolutely renounced his nationality. That it was only by force of the consideration that no other domicile was possible, that he admitted that the French law would allow a domicile of succession without authorization.

Judgment was delivered by the Judge of the Prerogative Court (the Right Hon. Sir John Dodson), on the 18th of May, 1857. After commenting upon the evidence, the learned Judge proceeded in these terms:—"Considering that the deceased was resident in Paris, from the year 1832, till 1855; that he was liv-[301]-ing in apartments furnished by himself, paying the taxes for that house, that he considered it as his home, and he had bought a burial-place for himself; this domicile which he so acquired he never departed from, and did not afterwards acquire a domicile in England or Scotland. Under all these circumstances, the conclusion the Court must arrive at, is, that he was domiciled in France. The remaining question is, whether the Will and Codicils made in the English form are valid, being made by a person domiciled, as I hold him to have been, in France, according to the *jus gentium*, though not by any act of naturalization, or authorization on the part of Government. Whatever may have been my own opinion on this point, whatever I may have considered the true law, I am bound to give up that opinion, because the decision of the superior Tribunal, the Judicial Committee of the Privy Council, in the case of *Bremer v. Freeman* (10 Moore's P.C. Cases, 306), which appears to be on all fours with this case, was this, that the deceased was domiciled in France, and it was held that the Will being made in the English form was invalid because she was domiciled in France. I am, therefore, bound to depart from any opinion I may hold upon a question of this sort, and to bow with all deference to the decision of the superior Court. I must, therefore, make a similar decree as that made by the Judicial Committee in the case of *Bremer v. Freeman*. Costs to be paid out of the estate."

The present appeal was brought from this decree.

Dr. Phillimore, and Mr. Dickinson, for the Appellant.—There are three questions to be considered in this case: First, whether the deceased being an officer in [302] Her Majesty's and the East India Company's military service, could acquire a foreign domicile while in such service; secondly, supposing him capable, whether he did acquire a French domicile; and, thirdly, if he had acquired a *de facto* domicile by the *jus gentium*, whether his Will and Codicils made in the English form, and executed according to the requirements of the English Statute of Wills, 1 Vict., c. 26, are valid instruments. This last question, if it arises, is concluded by the case of *Bremer v. Freeman* (10 Moore's P.C. Cases, 306). In that case it was held by this Court that by the *jus gentium*, a British subject might be *de facto* domiciled in France, and that a Will made there by a person so domiciled, must be according to the requirements of the French law. Here, however, there is no foreign domicile, either *de facto* or *de jure*. The deceased was an officer in the service of the East India Company; absent from India on furlough, but liable at any time to be called to active service. He was also a brevet Major-General in Her Majesty's service, and was liable in that character also to be called upon service. Now, what is the rule as to a soldier's domicile? By the law of England a British-born subject on service in Her Majesty's army, cannot while on active duty acquire a foreign domicile. *The Att.-Gen. v. Napier* (6 Exch. Rep. 217). In that case, Napier, a British-born subject on service in India, died there, and Baron Parke laid it down that an officer going to the East Indies in Her Majesty's service, did not acquire a domicile there so as to exempt his personality from legacy duty in this country (Ib. 221). That case also decided that had Napier not been on duty in Her Majesty's army, he might have acquired an Anglo-Indian domi-[303]-cile. *Forbes v. Forbes* (1 Kay, 341) is to the same effect. The Vice-Chancellor Wood there says (Ib. p. 356), "When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in

India." So in *Craigie v. Lewin* (3 Curteis, Ecc. Rep. 435), Sir Herbert Jenner Fust held in the case of a Scotelman by birth, having by employment in the military service of the East India Company acquired a domicile in India, that on his return to Scotland, though *animo manendi*, his original domicile did not revive, he still holding his commission, and being liable to be called upon to return to India. So by the civil law. Donellus, Com. de Jure Civili Opera, Tome IV., Lib. xvii., de Domicilio (Edit. Romae. 1828). It is true that in *Cockerell v. Cockerell* (25 Law Journ. Ch. 730) an English-born subject, an officer in the Royal Navy, on half-pay, was held to have acquired an Indian domicile, but he had established himself as a merchant in India, and though still drawing his half-pay, he applied for and obtained continued leave of absence, and died resident in India, circumstances which seem to have taken the case out of the rule.

The regulations of the East India Company's service with respect to the limit of the furlough are against the presumption that a military officer can acquire a new domicile. These regulations are founded upon the provision of the Statute, 33rd Geo. III., c. 52, sec. 70, which limits the furlough to five years, except in cases of sickness or infirmity, and Statute, 53rd Geo. [304] III., c. 155, sec. 84, which further authorizes the Court of Directors to permit military officers of a certain rank who have left India on leave, and have not returned within the five years, to have rank and be again capable of serving in India, although such absence was not occasioned by sickness or infirmity. The presumption, therefore, is, that General Hodgson's domicile was still Anglo-Indian. This affords an *indicia* of domicile superior to any other, as by the rules of the service he was incapable of acquiring a foreign domicile. The evidence of Campbell, one of the Clerks in the Secretary's department of the India House, is conclusive on this point. He says, that though General Hodgson was not likely to be called, yet he was liable to be called, to active service. It is not suggested that he would not have returned to his duty if required. Now, the law of the domicile of a Testator decides whether his personal property is liable to legacy duty. *Thomson v. The Lord Advocate* (12 Clk. and Fin. 1), and *The Att.-Gen. v. Napier* (6 Exch. Rep. 217). Yet such duty is not claimed by the revenue authorities when an officer having an Anglo-Indian domicile dies while on furlough. The circumstances necessary to constitute a change of domicile are very fully considered in *Hoskins v. Mattheus* (2 Jur. N.S. 196; S.C. 25 Law Journ. Ch. 689). With regard to General Hodgson's domicile, our contention is, that his character of a military officer on furlough, created a disability to acquire a French domicile. The principles which govern the law of domicile are very accurately defined by Lord Cottenham in *Munro v. Munro* (7 Clk. and Fin. 876). He says:—"It is, I conceive, one of those [305] principles that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley, in *Somerville v. Somerville* (5 Ves. 787), and from which I see no reason for dissenting. So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté; animo et facto*; that is, the choice of a place; actual residence in the place then chosen; and that it should be the principal and permanent residence; the spot where he had placed *larem rerumque ac fortunarum suarum summam*; in fact, there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important ground from which to infer intention." *The Harmony* (2 Rob. Adm. Rep. 324). Lord Stowell there explains the effect of length of time constituting an ingredient in a disputed question of domicile.

But, irrespective of this legal disability, all the acts of the deceased show that he did not and never intended to acquire a domicile in France. The origin of his going abroad seems to have been chiefly to please the French taste of his wife, and to educate his daughter; the fact that during the life of his wife he continued to rent apartments in Paris for her use while he was absent in England and Scotland, is referable to the same cause. The circumstances of the purchase [306] of a family



grave is easily explained; for unless he had purchased the ground in perpetuity the remains of his wife might have been disturbed within a few years. But how does he describe himself? On his second marriage, though it was celebrated in Paris, he describes himself as of Cheshire in England, not of Paris, where he was then living. That is an important fact as showing that he himself considered England to be his domicile. It is in evidence that in 1848, he would have returned to England if his health had permitted him. Again, when the Respondent petitioned the Court of Chancery for a commission *de lunatico inquirendo* against him, the deceased did not dispute the jurisdiction of the High Court of Chancery in England, but conformed and submitted to that *forum* as a British subject. Had he any notion that he had acquired a French domicile he would have disputed the jurisdiction of an English Court.

Then with respect to the French law regarding the testamentary instruments made by the deceased. Foreign law is a question of fact, to be proved by evidence of experts. It was held in *McCornick v. Garnett* (5 De G. Mac. and Gor. 278), that it was not enough to show that a case has been decided upon a question of Foreign law, or upon evidence adduced in another case, although similarly circumstanced. Suppose, therefore, that the recent case of *Bremer v. Freeman* [10 Moo. P.C. 306] applied to the present, we insist, that we have a right to use the evidence of experts taken in this cause to contradict it.—[Mr. Pemberton Leigh: Suppose a case brought here by appeal from the Mauritius: this Tribunal would be then *pro tanto* sitting as a French Court and the decision be founded upon French law. If [307] another appeal came before us upon the same question of French law, should we not be bound by our previous decision?—In *Wilson v. Wilson* (5 H.L. Cases, 40) the House of Lords held, that when a decision of that House was once pronounced in a particular case it was conclusive in that case, and could not be reversed, except by Act of Parliament; but, if the House should afterwards be of opinion that an erroneous principle had been adopted, in such case the House would not be bound in any other case that might be brought before them to adhere to such principle. Here it is shown that the deceased was not domiciled in France; as the 13th Art. of the Code Napoleon requires the authorization of the French Government, which it is not pretended he ever had. The allegation respecting the law of France upon this point is not counter-pleaded, nor were any witnesses examined on the other side to impeach the evidence of the French Advocates examined by us upon the French law. Therefore, the evidence of the experts as to the law of France must, as regards this case, be taken as proving what that law is. These witnesses are Advocates of considerable practice and experience, who have had their attention especially drawn to the cases respecting the domicile of foreigners. They refer to the authorities so copiously cited in *Bremer v. Freeman* [10 Moo. P.C. 306], and in addition, Bertrand Francois Julien de la Chere refers, in support of his opinion, that a foreigner domiciled in France might make a Will, disposing of personalty, to "*The Cours de Droit Commercial*," by Pardessus, Councillor of the Court of Cassation, No. 1486; and to "*The Droit Commercial dans ses rapports avec le Droit des Gens*," No. 87, by Massé; and to Marcadé's [308] "*Explication de Code Napoleon*," Art. 999, Tome IV. § II. p. 58. Another argument may be drawn from the law of France previous to the Code Napoleon, as to the effect of a Will made by an Englishman in France. The Droit d'Aubaine formerly prevailed in France, but both the treaty of Utrecht in 1713, and the treaty of Paris, of the 30th May, 1814, provide for the exception of the property of British subjects dying in France from the operation of the Droit d'Aubaine. In like manner foreigners were, according to the evidence of the French experts in this case, as well as in *Bremer v. Freeman*, not contemplated in the provisions of the Code Napoleon, and that Code, therefore, cannot be held to apply to a Will made in the English form by an Englishman, even if *de facto* domiciled in France.—[Mr. Pemberton Leigh: Are we not concluded by *Bremer v. Freeman* [10 Moo. P.C. 306] from entertaining this argument?—The rule "*Locus regit actum*" is the true principle to proceed upon. The maxim "*Mobilia sequuntur personam*" upon which Lord Wensleydale proceeded in *Bremer v. Freeman*, is not followed by Foreign Jurists. Massé, "*Le Droit Commercial*," Tome II. par. 87. Faelix, "*Traité du Droit International*," Tome I. p. 152, 3. In this country, *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 373) was the first case which decided that a

natural-born British subject might acquire a foreign domicile, and, if he was domiciled abroad, that he must conform in his testamentary acts to the formalities required by the *lex domicilii*. *Croker v. The Marquis of Hertford* (4 Moore's P.C. Cases, 339) followed that case.

Dr. Addams, and Mr. W. E. Murray, for the Respondent.—[309] This case was rightly decided by the Court below, as being governed by the authority of *Bremer v. Freeman* (10 Moore's P.C. Cases, 306). In that case, no letters of naturalization, or authorization of the French Government, as required in the case of a foreigner by the Code Napoleon. Art. 13, had been obtained; yet this Tribunal held that by the *jus gentium*, an Englishwoman, whose *domicilium originis* was English, had obtained a *de facto* domicile in France, and that a Will made by her in the English form, and not in accordance with the requirements of the law of France, her acquired domicile, was invalid. That case is on all fours with the present case. Nothing more can be done by the Court in this appeal than to determine the question of domicile. The other point, the capacity of the deceased, is not ripe for decision.

The first point is, whether it was competent to General Hodgson, a military officer in the East India Company's service on furlough, to acquire a foreign domicile? Now, we submit, that there is no Act of Parliament, or authority except the cases of *Cockerell v. Cockerell* (25 Law Journ. N.S. Ch. 730) and *The Att-Gen. v. Napier* (6 Exch. Rep. 217), relied on by the Appellant's Counsel, to support their proposition that General Hodgson from his *status* was incapable of becoming domiciled in France; but this contention, founded upon the Statutes, 33rd Geo. III., c. 52, sec. 70, and 53rd Geo. III., c. 155, sec. 84, is really of no force, and immaterial. A full Colonel loses nothing by not joining his regiment, and whatever may be the regulations of the service, General Hodgson, both from length of residence in France, a period of upwards of twenty years, as well as other acts, acquired a domicile there. His first wife lived, died, [310] and was buried there, in a vault purchased by him for his family. The Respondent, his daughter, was settled there: she married a Frenchman, acquired a French domicile, and lived in France. A new domicile cannot be established, according to Pothier, "*Coutume d'Orléans*," ch. I. § I. art. 9; Story, "*Conf. of Laws*," ch. III. § 44 (Edit. 1835), except it be *animo et facto*. Now, there can be no question that the intention of the General was to reside permanently in France, to live there *animo manendi*. As in *Cockerell v. Cockerell*, notwithstanding that the deceased, in that case, was an officer in the British Navy, lengthened residence was held to indicate an intention to remain in the acquired domicile. *The Commissioners of Inland Revenue v. Gordon's Executors* (12 Bell. Mur. and Young, Court of Sess. Cases, 657) is, if possible, a stronger authority in our favour. There a Lieutenant in the Navy upon half-pay, and liable to be called upon active service at any time, died in Tortola, one of the Virgin Islands, having resided and held offices there, and the Court of Session in Scotland held that he had acquired a foreign domicile in Tortola, and that his estate was not liable to legacy duty. These cases are of equal authority, as we submit, to the decisions in *Craigie v. Lewin* (3 Curteis, Ecc. Rep. 435) and *Forbes v. Forbes* (1 Kay, 341), and are founded upon a stronger principle, namely, the *animus* of the party resident in a foreign country. *Bruce v. Bruce* (2 Bos. and Pul. 229, note). Having once acquired a foreign domicile, he could not lose it without indicating an intention to abandon it. *The Att-Gen. v. Fitzgerald* (3 Drewry, 610), *Munroe v. Douglas* (5 Madd. 379). Although the deceased had not become a French citizen by na-[311]-turalization or letters of authorization of the French Government, yet he had *de facto* acquired a domicile in France according to the *jus gentium*. He took up his residence in that country *animo manendi*. His Anglo-Indian domicile was abandoned. The acquired domicile being French, as a necessary consequence, therefore, any testamentary disposition he might make, must, to be valid, be executed according to the requirements of the law of his domicile at his death. *Whicker v. Humé* (7 H.L. Cases, 124), *Anderson v. Laneville* (9 Moore's P.C. Cases, 325), *Bremer v. Freeman* (10 Moore's P.C. Cases, 306).—[Mr. Pemberton Leigh: Would it fall, *ex necessitate*, that because an Englishman was domiciled in France, his Will would be bad unless made according to the requirements of the law of France? *Bremer v. Freeman* only decided that the Will before the Court was not good by the law of France. It may be that that case, though right on the facts proved, may not be so



according to the law of France, and if not, then is it not competent to parties to come here and raise the same point ?]—*Bremer v. Freeman* was fully argued and carefully considered. It is the last authority, and has been approved of by the House of Lords in *Whicker v. Hume* (7 H.L. Cases, 132). The fact so strongly relied upon by the Appellant, that General Hodgson submitted to the Court of Chancery in England, is immaterial, as the domicile of the party against whom a Commission of lunacy is applied for, is not material to the question of jurisdiction. *In re Princess Bariatinsky* (1 Phillips, 375). There is no doubt that the Court of Chancery has jurisdiction to appoint guardians to an infant, although her domicile and all her property was situate in Scotland. *Johnstone v. Beattie* (10 Clk. and Fin. 42).

[312] Dr. Phillimore, in reply.

No authority has been referred to, which contains the elements of the present case. The deceased had military rank in the Queen's and the East India Company's service, and all the time he was resident in Paris, his name was on the East India Registry Book as an officer on furlough. The fact of his being on furlough is important, as it is distinguishable from retirement. Thus legacy duty is not claimed by the Inland Revenue authorities from officers on furlough, but it is demanded on retirement from the service.—[Lord Cranworth: If the deceased had gone to Scotland on furlough and resided there as long as he did in France, it would be difficult to say that he had not acquired a Scotch domicile.]—He was, from the nature of his duties, incapable of becoming a French citizen, even if he had been inclined. He evinced, however, no intention to change his domicile of origin. He had no property in France except the furniture of the apartments he rented.

The case stood over for consideration. Judgment was now delivered by

The Right Hon. Dr. Lushington (8th Dec. 1858).—Henry Hodgson is the party deceased; he died in 1855, leaving behind him a widow and an only daughter by a former wife; they are the parties in this cause, Mrs. Hodgson alleging that the deceased died domiciled in England, Madame de Beauchesne, the daughter, that his domicile was French.

The only question we have to determine is, whether the deceased was, at the time of his death, domiciled in England or France. The proceedings have, in [313] effect, though not in form, been narrowed to this sole issue, and so far as we can collect, by the consent of both parties.

The question of domicile has now, for nearly a hundred years been much discussed in our Courts, and there are numerous authorities upon the subject. Various attempts, too, and from an earlier period, have been made by Institutional writers to arrive at a definition of domicile. The attention of foreign Jurists was directed to similar inquiries long before the question arose in England, and the reason appears to have been, that as change of residence on the continent, the removal from one State to another, and from one Province to another within the same State, where the laws were different, especially the law of succession, was more frequent. Such was the case with regard to the Dutch Provinces, and, more or less, as to France and the other continental States.

Various meanings have been affixed to the word "domicile": domicile, *jure gentium*, domicile by the Municipal law of any country, and, we may add, domicile during war, as it may govern the rights of belligerent States. This species of domicile is, it is true, in one sense a domicile, *jure gentium*, but in many particulars it is governed by very different considerations, and decisions belonging to it must be applied with great caution to questions of domicile independent of war.

Our present concern is with domicile, *jure gentium*, apart from belligerent considerations.

Instead of attempting to define beforehand what in law constitutes such a domicile, it seems more expedient in the first place to consider the facts proved in this cause, and, as we proceed, to consider what weight the authorities and principles founded on them would [314] ascribe to each leading fact, and, finally, ascertain the balance. We say the balance, for in this as in all other cases of conflicting domicile, there must be circumstances leading to different conclusions.

All the writers on this subject, and very many Judges, have declared that the

intention of the person whose domicile is in question, is a matter of the greatest importance in order to arrive at a just conclusion. Intention must, in a considerable degree, be inferred from circumstances; therefore, we shall, as briefly as we can, state the history of General Hodgson.

General Hodgson was born in the year 1781, at Astbury, in Cheshire. He was, therefore, an Englishman by birth. All his family were English; one brother was the Dean of Carlisle, another an Admiral. He remained in England till the year 1799, when he proceeded to India in the military service of the East India Company. He came to England on furlough twice before the year 1829, and in the year 1829 he came again, on furlough also.

An Anglo-Indian domicile being, in this case, in its legal effects, the same as an English domicile, we need not stop to examine whether his Anglo-Indian domicile was lost; and on his return the English domicile revived. Up to the year 1832, when he first went to France, it is admitted that his domicile was English. Such was his domicile by birth and residence. The existence of ordinary family ties, such as are presumed under all similar circumstances to be of force, independent of evidence, render an attachment to such domicile probable.

In all such cases, therefore, the presumption of law is against an intentional change of domicile, and, ordinarily so, for a change of domicile supposes a [315] severance, to a great degree at least, of all those mutual ties which bind mankind together, and which we all desire to retain, the dissolution of which is repugnant to all our feelings.

The next fact we proceed to notice, and in this case of great importance, is the profession to which General Hodgson belonged, and the rank he held in it; the *status* thereby conferred upon him, and the obligations, if any, he incurred.

General Hodgson entered the service of the East India Company in the year 1799, and in the year 1829 he became Colonel of the 12th Regiment of the Bengal Native infantry. We learn from the witness, Campbell, that from that time General Hodgson was in the receipt of the full pay and off- reckonings of a full Colonel, as if he had remained in India, and that those emoluments amounted to about £1200 per annum; that he was on furlough, liable at any time to be called upon to return to India.

In June, 1838, Colonel Hodgson, by the Queen's authority, was made Major-General, limited to India; and in 1851, Lieutenant-General, with a similar limitation.

We apprehend that the necessary consequence of such promotion was, that General Hodgson was liable at any time to obey the Queen's commands and serve in India.

This state of facts is in no degree altered by the evidence Campbell has given on cross-examination, who illustrates the practice. It appears that there is a distinction between retirement from the service and leaving India on furlough. Any officer, after twenty years' service in India, may retire on the full pay of his rank.

But, Colonel Hodgson did not retire; he came home [316] on furlough, on leave of absence. Every person so circumstanced is liable to be called on to return, but it is not usual, when, as in the case now under consideration, he would return as a General. Such promotions are few and much sought after, so that the liability of a full Colonel to return to India against his inclination is, as the witness, Campbell, says, merely nominal.

No doubt this is so, but the obligation to return, if ordered, is not the less binding in law, because it is only carried into effect under circumstances generally acceptable to the officer. The power to enforce it under all circumstances remains, and the obligation to obey continues in full stringency. Indeed, we can well conceive that from an unexpected and altered position of affairs in India, it might become the duty of the Government to call into active service, officers so absent under furlough: though in the ordinary state of things there would be no occasion so to do.

With respect to the rank which General Hodgson held from Her Majesty, we apprehend that similar obligations were imposed: indeed, the terms of the commission show it.

Bearing in mind all that we have thus mentioned, it appears to us that some very grave considerations arise.

First. Whether it is competent to a person in General Hodgson's position, to acquire a domicile in a foreign country? Secondly. Whether a foreign domicile is



not incompatible with the obligations already incurred? And, this is not an unimportant consideration; for the authorities show that an intention contrary to duty cannot be presumed.

We are aware that in the case of *Forbes v. Forbes* (1 Kay, 341), the Vice-Chancellor Wood deemed the [317] fact of the Testator being a Colonel in the East India Company's service, and a Major-General, of little importance: but that case is most materially distinguished from the present; the question in *Forbes v. Forbes* being, whether the Testator was domiciled in England or in Scotland, not whether a person so circumstanced was domiciled in a foreign State. In *Forbes v. Forbes*, a Scotch domicile was, of course, as compatible with the duty of an officer as an English one. We think that in all these questions there is a most essential difference between the acquisition of a Scotch or English domicile, and the acquisition of a foreign domicile, the presumption against the latter being infinitely stronger.

There is some other authority on this question that deserves consideration. In the case of *Ommaney v. Bingham*, before the House of Lords, on the 18th of March, 1796, referred to in *Somerville v. Somerville* (5 Ves. 757). It appears that Sir Charles Douglas, being by origin Scotch, had subsequently been both in the Russian and Dutch service. After quitting those services he took up his residence at Gosport. The circumstances of the case are, of course, in very many respects, wholly different from the present; but, the Lord Chancellor made use of an expression which, to some extent, is applicable to this case. He said, "His original domicile having been abandoned (that is, his Scotch domicile of origin), when he afterwards entered into the service of this country he became domiciled here; as a Russian or a Dutchman would on entering into our service." (5 Ves. 759.)

From this expression it is clear that the Lord Chancellor considered, that the fact of belonging to the army or navy of a country had the effect of consti- [318]-tuting domicile in the country in whose service the person might be; and, in this opinion, to a certain degree at least, Sir Herbert Jenner Fust concurred in the case of *Craigie v. Lewis* (3 Curt. Ecc. Rep. 435). There was, however, this distinction; if indeed it be a distinction, between that case and the present: Colonel Craigie was not a full Colonel; General Hodgson was a full Colonel at the period he left India. If, says Sir Herbert Jenner Fust, page 443, Colonel Craigie "did not return to India on the expiration of his leave of absence, or previously attain his full rank, he must have quitted the service of the East India Company." That is, in fact, true by force of the Statute, 33rd Geo. III., c. 52, s. 70. The East India Company could not grant him leave beyond five years, except under certain circumstances and limitations. How in the case of a full Colonel the East India Company had the power to grant such leave, for it is not given by the Statute quoted, we are unable to say; but, there being no dispute on the point, we may assume such power was lawfully granted, though not by the Statute referred to.

But is there any essential distinction between the two cases? In both cases, the East India Company had the power of recalling the officer to service in India. In the case of a full Colonel it was not usual so to do. Similar opinions were expressed in the well-known case of *Bruce v. Bruce* (2 Bos. and Pul. 229, note).

These considerations might be carried much further. It might be asked, whether the acquisition of a foreign domicile did not entail on the person acquiring it a liability, *jure gentium*, to serve in a military capacity in such foreign country; a liability clearly incom- [319]-patible with the obligations of an officer in the service of the Queen and East India Company.

Indeed, this view of the case involves other consequences, for it is not merely a question of domicile in France, but domicile in any other country, however distant. A settled domicile in a country, imports an allegiance to the country, very different from a mere obedience to its laws during a temporary residence.

In solving these difficulties we must always look to the *jus gentium*; this proposition, however true, requires explanation. The Tribunal which tries a question of this description is necessarily bound by the law of the country in which it is situate, and by which it is constituted. That law, whatever it may be, it must necessarily obey; but it is not bound to respect the laws of any foreign country, save so far as they are in accordance with the *jus gentium*.

We do not think it necessary for the decision of this case that we should lay down,

as an absolute rule, that no person, being Colonel of a regiment in the service of the East India Company, and a General in the service of Her Majesty, can legally acquire a domicile in a foreign country. It is not necessary, for the decision of this case, to go so far; but we do say, that there is a strong presumption of law against a person so circumstanced, abandoning an English domicile, and becoming the domiciled subject of a foreign Power.

Then this case stands in this position, that the domicile of origin, the domicile of family and connection, the presumption arising from the *status* of General Hodgson, are all opposed to an intentional abandonment of his domicile, and the acquisition of a domicile in France.

[320] This being so, the question arises whether the other circumstances proved in this case refute the presumption we have stated, and prove that the deceased had acquired a French domicile.

Of course, the most material circumstance to be noticed, and which has been most strongly urged as proving the case of Madame de Beauchesne, is that for a long period of years, General Hodgson had a residence in Paris.

We must take into consideration the description of residence and the circumstances attendant thereon. General Hodgson was married in the year 1811, to a French lady at the Mauritius: they had an only daughter, Madame de Beauchesne, born in 1818: his wife and daughter accompanied him to England, in 1829. From that period, until they went to France, they resided chiefly in Scotland: for there also was resident, at that time, Admiral Hodgson, the brother of the General, to whom he was most particularly attached. In 1832, they went to France. It is exceedingly difficult to ascertain in this case, as in most others of a similar description, what was the leading motive for the deceased so taking up his residence in Paris. Several motives have been assigned, and partially supported by the evidence in this case:—First, that Mrs. Hodgson was a French woman by birth, and would naturally, by habits and feeling, be desirous of residing in that society which was most consonant to those habits. Second, that her health was likely to be promoted by the climate of France. Third, that the education of Madame de Beauchesne might best be conducted in Paris. Fourth, that the living abroad was more economical.

Now, it may be that all these reasons combined, [321] more or less, to induce the deceased to resort to Paris: but they, neither singly nor combined, necessarily import that the deceased had abandoned his English domicile.

We must first inquire what was the nature of the residence of the deceased, and what were his habits and customs during the period from 1832 until his death. It may be fit, also, to observe any remarkable occurrences which may have taken place during that time.

General Hodgson, on going to Paris in 1832, took ready-furnished lodgings: from time to time, he took other lodgings for various periods of time. Laterly, some time after the death of his first wife in 1844, and when he took his daughter to live with him, he had a superior residence: and then, as well as before, the furniture belonged to him. On this latter occasion he went to greater expense. The result is, that, from 1832 till his death, in 1855, the deceased had lodgings in Paris, either ready-furnished, or with furniture purchased by himself: it matters very little which was the case.

In these lodgings the General appears to have resided, with the exception of certain intervals, till his death: at first, and, indeed, for many years, in a very economical manner, keeping only one servant, till Madame de Beauchesne came to live with him.

It is impossible, as we have said, for us to entertain with any precision, the reasons which induced the General so to take up or continue his residence in Paris. There are, however, fair reasons for forming a belief that the leading reason was a desire to consult the wishes of his first wife: she was a Frenchwoman, not well versed in the English language, and not accustomed to English servants and their ways. The [322] fact, however, that Mrs. Hodgson never accompanied the deceased in his many visits to Scotland, England, and elsewhere, strongly supports the supposition that the visit to Paris was chiefly on her account, though there may have been auxiliary motives, as, for instance, the education of his daughter. Perhaps the facts would not warrant us in declaring positively that the first Mrs. Hodgson was the special cause



of the residence of the deceased in France, but we may fairly conclude that such was the chief motive.

The residence in France, however, was by no means continuous. There were very many occasions when the deceased resided for many months both in England and Scotland. On one occasion especially the deceased took a house in Scotland for sporting; on another, at a very late period of his life, after his second marriage, he took a house at Southsea, with the option of remaining after the three months for which the house was hired.

We are of opinion, that the residence in both these houses must be considered as temporary only, and that they cannot be deemed an abandonment of the Paris residence.

During all these years, up to a short period before his death, General Hodgson was accustomed to visit Scotland and England always without his wife, and generally alone, and to remain for many months at a time; on such occasions he resided with his relations and friends, or at hotels or temporary lodgings.

We think it is impossible to say that there is adequate proof that the deceased at any particular time or period intended to abandon his residence in France.

We now come to another head of inquiry, namely, [323] how far the facts of this case, independent of mere evidence, afford proof of intention to abandon the English and to acquire a French domicile. We must, however, premise, that as the English domicile of the deceased, as his domicile of origin, is an admitted fact in the case, the *onus probandi* is on those who allege that it was abandoned, and that another was acquired; they must prove both the propositions stated.

Evidence of either of these two propositions is to be derived from facts and intentions expressed by General Hodgson, either in writing or verbally. We will first look at the affirmative, and then to the negative, evidence.

There is one fact which has been much relied upon by the Respondent in this cause; the fact that the deceased purchased a burial-place in Paris, and purposed to be himself interred there.

It is expedient to examine the circumstances attendant on the purchase of this burial-ground with some particularity.

First, as to the time of the purchase. This is not immaterial. General Hodgson did not, as many persons do, prepare a burial-place for himself in anticipation of his own decease, and of his death in the vicinity of that spot; he bought the burial-ground in consequence of the exigency of the moment, upon the death of his first wife, and not before, and when it became imperatively necessary that he should provide a proper place for her interment. In order to attain that end, and to prevent the operation of the French law, that fresh interments might take place after the lapse of five years in ground not purchased, he was compelled to make a purchase of a [324] certain extent of burial-ground. This he did, but he limited his purchase to two *mètres*, the smallest extent allowed by law to be bought for the purpose sought to be attained. Looking at the circumstances under which this ground was purchased, and to the necessity of the purchase for the decent interment of his wife, we cannot consider this fact, standing alone, as any cogent evidence of an intention to acquire French domicile by showing a determination to remain and die in France. Indeed, the extent of the ground bought, and that it would be capacious enough to hold other bodies, is no proof of an intention to be buried there himself. It was a necessary effect of any purchase at all; a consequence necessarily flowing from the attainment of the object, the acquisition of a fit place of interment for his wife, and the obtaining this extra room was compulsory, not voluntary, on the part of the deceased.

It is true that the General caused, or permitted, an inscription to be placed on the ground. That inscription was, "*Famille Hodgson.*" This, it appears from the evidence, was a mere matter of form usually incidental to all such purchases.

There are, however, certain declarations of intention with regard to this purchase, which remains to be noticed. The witness, Mrs. Perkins, deposes, that in 1844, the deceased said, speaking of the vault he had bought for his wife, that it would contain her, himself, daughter, and grandchildren; and added, "I have made up my mind to be buried here." A declaration spoken to by the witness twelve years after it was made. Mrs. Thomas deposes somewhat to the same effect; so does M.

Deperraud: and there are some other declarations of an intention to remain in France, [325] but these declarations are, for the greater part, rather the impression of witnesses, than any specific declaration coming from the deceased.

With respect to verbal declarations made to witnesses who depose thereto, no doubt such declarations are admissible evidence in these questions of domicile; but the weight to be attributed to them entirely depends on circumstances, especially the time which has elapsed since they were made: and the circumstances under which they were made. To entitle such declarations to any weight, the Court must be satisfied not only of the veracity of the witnesses who depose to such declarations, but of the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased. Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations.

It now remains to consider what evidence there is tending to show that the deceased adhered to his English domicile. This evidence must consist of facts, written documents, and declarations.

We think that the profession and rank, the *status* of the deceased, furnish presumptions against any intention to abandon an English domicile, and to lose the national character of an Englishman. Amongst other proofs are; First, the very strong attachment of the deceased to all his family and friends in England, evidenced by his frequent visits to them. This is proved by all the evidence in the cause, and especially by the letters of the deceased. Second, there are many acts of the deceased which he did, and [326] some things which he did not, all leading to the same conclusion.

He kept an account with an English house of business in London. All his Wills are in the English form, executed according to the English Statute, save one, and the adoption of the French form in that instance is accounted for, namely, to dispose of property in France. All his property was in England, his savings being vested from time to time in the English funds.

His marriage with Miss Honeyman took place in the chapel of the British Ambassador, when he declared his domicile to be English. He expressed great indignation at the notion of being called upon to serve in the French National Guard. He never sought for or obtained the authorization of the French Government to his residence in France: he did not obtain, therefore, any of the advantages of a French domicile; but, on the contrary, was exposed to all the inconveniences of a mere stranger residing in the French territories. He must have been cognizant of this state of things, and the omitting to avail himself of an advantage so easily obtained, is the strongest proof that there was no intention to acquire a French domicile. Beyond the mere fact of residence in Paris, it would be difficult, if not impossible, to find any act of the deceased inconsistent with the retention of his original domicile.

We shall also add, that the impression on the part of Madame de Beauchesne, that the domicile of her father was in England, is shown by the proceedings in Chancery, and by the measures for the purpose of annulling the second marriage. It can hardly be [327] necessary to add to this, declarations of the deceased, such as to the witness, Andriveau, and others.

It appears to us that the result of the examination into all the facts and evidence in this case, is as follows:—that in favour of a French domicile, there is a residence in France, in lodgings, for above twenty years, interrupted only by frequent visits to Scotland and England, with no permanent residence in England, and the purchase, on the death of his first wife, of a burial place under the circumstances to which we have adverted.

On the other hand, there are a multitude of facts and circumstances, already enumerated, which prove, to our entire conviction, that General Hodgson never entertained an intention of abandoning his English domicile.

Then the question for consideration is this: What is the law applicable to such a state of facts? On the one hand, residence such as has been described: on the other, the absence of all intention to abandon an English, and acquire a French, domicile.

Dr. Phillimore, in his Treatise on domicile, has collected together the authorities



bearing upon the question of the effect of the length of time the residence has continued, in ascertaining the legal domicile. All the authorities concur in holding that the presumption is against the intention to abandon the domicile of origin, and in considering length of time an important ingredient; but in other respects, and with regard to the qualifications of such proposition, it is not easy to reconcile them.

We shall hope to frame our judgment in accordance, for the most part at least, with foreign authori-[328]-ties of the greatest weight, and also with the cases decided by our own Tribunals.

We concur in opinion that great weight is to be attributed to length of residence, but we think that other matters must necessarily be taken into consideration. Independent of special circumstances peculiar to the individual, as, for instance, being a Peer of Parliament, we apprehend that all the authorities show that the intention to abandon the domicile of origin and acquire another is a most important and indispensable ingredient in forming a judgment upon these questions.

In *Munro v. Munro* (7 Clk. and Fin. 877), Lord Cottenham said: "To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté et du fait; animo et facto*: that is, the choice of a place; actual residence in the place then chosen, and that it should be the principal and permanent residence; the spot where he had placed *larum rerumque ac fortunarum suarum summam*; in fact, there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. Burge (1 Comm. on Col. and For. Laws, 54), in his excellent work, cites many authorities from the civilians to establish this proposition."

In *Collier v. Rivaz* (2 Curt. Ecc. Rep. 857), Sir Herbert Jenner Fust said: "Length of time will not alone do it; intention alone will not do: but the two taken together, do constitute a change of domicile." In *Munro v. Douglas* (5 Madd. 405), Sir John Leach observed: "A domicile cannot be lost by mere [329] abandonment. It is not to be defeated *animo* merely, but *animo et facto*." It was clearly the opinion of that learned Judge that, to constitute domicile, intention and residence must concur. Denisart, Tome I. Tit. "*Domicil*," quotes authority to the same effect, that neither the intention without the fact, nor the fact without the intention, can create a domicile.

We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long and so continuous, as to raise a presumption nearly, if not quite, amounting to a *praesumptio juris et de jure*; a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal. Such was the case of *Stanley v. Bernes*. The foundation of that decision, in this respect, was, that a Portuguese domicile had been acquired by previous residence and acts, and that mere declarations of intention to return could not be sufficient to prove an intention not to acquire a Portuguese domicile.

In short, length of residence *per se*, raises a presumption of intention to abandon a former domicile, but a presumption which may, according to circumstances, be rebutted.

It would be a dangerous doctrine to hold, that mere residence, apart from the consideration of circumstances, constitutes a change of domicile. A question which no one could settle would immediately arise, namely, what length of residence should produce such consequence. It is evident that time alone cannot be the only criterion. There are many cases in [330] which a very short residence would constitute domicile, as in the case of an emigrant, who having wound up all his affairs in the country of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicile.

Take a contrary case, where a man, for business or pleasure, or mere love of change, is long resident abroad, occasionally returning to the country of his origin, and maintaining all his natural connections with that country: the time of residence would not to the same extent, or in the same degree, be proofs of a change of domicile.

We concur, therefore, in the doctrine held in many previous cases, that to con-

stitute a change of domicile, there must be residence, and also an intention to change.

With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case; and each case must vary in its circumstances; and, moreover, in one, a fact may be of the greatest importance, but in another, the same fact may be so qualified as to be of little weight.

In the present case, we are of opinion, that all presumptions of intention to acquire a French domicile, arising from the residence in France, are rebutted by clear and satisfactory evidence that General Hodgson never intended to abandon his English character, and, therefore, that the decision appealed from must be reversed, and that the costs throughout must be paid out of the estate.

[Mews' Dig. tit. INTERNATIONAL LAW: V. DOMICIL: b. *Of Origin*: g. *Taking Service under the Crown*. S.C. 7 W.R. 397. See *Jopp v. Wood*, 1865, 4 De G. J. and S. 616; *Hamilton v. Dallas*, 1875, 1 Ch. D. 268; *Dowet v. Goughigan*, 1878, 9 Ch. D. 451; *Ex parte Cunningham*; *In re Mitchell*, 1884, 13 Q.B.D. 422; *In re Patience*, 1885, 29 Ch. D. 983. As to Anglo-Indian domicil, see Dicey, *Confl. of Laws*, p. 149.]

### [331] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

FAUSTINI DE ZUGASTI and Others.—Appellants: GAZAWAY B. LAMER and Others,—Respondents \* [Dec. 3 and 4, 1858].

The "NORTH AMERICAN."

A vessel on her port tack is bound to give way to a vessel on her starboard tack, and, if there is any danger of collision, to port her helm and go to leeward of the other vessel, who is to keep her course [12 Moo. P.C. 333].

The Court is bound by the pleadings, and must proceed *secundum allegata et probata* [12 Moo. P.C. 334].

This was an appeal from a decree of the High Court of Admiralty in a cause of damage brought by the Spanish barque *The Tecla Carmen* against the American ship, *The North American*, arising out of a collision between those vessels. The facts, pleadings, and evidence are set out in the judgment of their Lordships. The Court of Admiralty, assisted by the Trinity Masters, was of opinion that both vessels were to blame: the barque for starboarding her helm, and the ship for not porting in time, and by neglecting to do so contributing to cause the collision, and, by a decree dated the 13th of July, 1858, pronounced accordingly.

Against this decree the owners of the *Tecla Carmen* appealed. A cross appeal was also brought by the *North American*.

[332] The case was argued by Mr. Manisty, Q.C., and Dr. Twiss, Q.C., for the Appellants; and Mr. Wilde, Q.C., and Dr. Deane, Q.C., for the Respondents.

Judgment was pronounced by

The Right Hon. Lord Kingsdown (Dec. 8, 1858).—In this case, on the 6th of April, 1858, a suit was instituted in the High Court of Admiralty by the owner, master, and crew, of the Spanish barque *Tecla Carmen* against the ship *North American*, in order to recover damages for the loss occasioned to the former vessel by a collision with the latter. The Court was of opinion that both parties were to blame, as both parties had contributed to the accident. From this decree an appeal has been brought by the Spanish vessel, and there is a cross appeal by *The North American*.

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.



The collision occurred in St. George's Channel about half-past 10 o'clock on the night of the 8th of March, 1858. *The North American* is a large vessel of 1333 tons, and the barque a small vessel of 285 tons. Both vessels were bound for Liverpool, *The Tecla Carmen* in ballast, *The North American* with a cargo of cotton. The night was squally, the wind blowing from the north-north-west, or north-west by north. Both vessels were close hauled, the Spaniard on her starboard tack with her head to the west, or west-south-west, and the American on her port tack with her course north-east by north.

[333] Upon these points there is no difference between the parties, except that there is some discrepancy between them, as in such cases always occurs, as to a point or two of the compass, both in regard to the wind and the courses of the two vessels; but it was agreed by the Counsel on both sides at our Bar that in their view of the case such difference was immaterial.

Nor was there any question made as to the law, and the duty which the law imposed upon each vessel. *The North American* being on her port tack was bound to give way to *The Tecla Carmen* on her starboard tack, and if she saw any danger of collision to port her helm and to go to leeward of *The Tecla Carmen*, who was entitled to keep her course, and was bound, indeed, so far to keep it, as not, by deviating from it, to run into danger.

It is admitted that *The North American* did not, in fact, port her helm till a moment or two before the collision took place. She attempts to justify this alleged neglect by stating that *The Tecla Carmen* had no light exhibited, and could not, therefore, be seen till she was within 600 or 800 feet of *The North American*. The Court below has held that this defence is made out, and that it is clear that the neglect of *The North American* to keep a good look-out, and to port her helm in due time, contributed, at all events, to the accident. In this opinion their Lordships and the nautical Assessors by whom they are assisted, entirely concur. Upon this point, therefore, the judgment must be affirmed.

The next question is, whether *The Tecla Carmen* was also in fault? The fault imputed to her is, that instead of keeping her course, she starboarded her [334] helm, and thereby brought herself into collision with the other ship. If this be made out, as has been held in the Court below, of course the judgment is right.

It is material to attend to the case set up in the pleadings, and sworn to by the witnesses on each side, for we must proceed *secundum allegata et probata*, though we may entertain some doubt whether, in so doing, we shall arrive at the real truth and justice of the case.

The libel, filed on the 6th of April, 1858, on the part of the Spanish vessel, alleges, that the accident took place in the following manner; that *The North American* was first seen by *The Tecla Carmen* at the distance of about a mile, and from three to four points on her port bow; that *The Tecla Carmen* held her course, and that *The North American* did the same till she was within such a distance of *The Tecla Carmen* as to make a collision inevitable; that in order to break the force of the blow *The Tecla Carmen* then ported her helm and luffed up into the wind; but that *The North American*, with her starboard bow, struck *The Tecla Carmen* on her port side, abreast of her fore-rigging, and raked her from thence right forward, carried away her main-mast and part of her mizen-mast, and, in short, reduced her to such a state of wreck that it was necessary for the crew to abandon her.

The allegation on the part of *The North American*, filed the 28th of April, 1858, insists, that if the two vessels had held their respective courses no collision would have taken place, but that *The Tecla Carmen* starboarded her helm, and ran into [335] *The North American* on her port side, the bowsprit of *The Tecla Carmen* passing under the bowsprit of *The North American*, and striking *The North American* on her port bow, near the hawse pipe, and *The Tecla Carmen* being forced round by the weight and impetus of *The North American*, the port bow of *The Tecla Carmen* then came in contact with the starboard bow of *The North American*, and the two vessels lay for some time alongside, chafing against each other.

In proof of this statement, the allegation refers to a model of the bow of *The*

*North American*, showing the damage done to each bow, and which, it alleges, proves that the collision must have been on her larboard, and not on her starboard, side.

The parties are, therefore, directly at variance in their pleadings, as to the mode in which the collision took place.

The witnesses appear to have been examined on the libel of *The Tecla Carmen* before the allegation of *The North American* was put in. The examination of these witnesses began at Liverpool on the 9th of April, and ended on the 12th, and the allegation of *The North American* was not brought in, as already remarked, till the 28th of that month; but the preliminary Act filed on behalf of the owners of *The North American* on the 14th of April, gives the same account as the allegation does of the mode in which the accident took place.

The Master of *The Tecla Carmen* states the accident to have taken place in the manner alleged in the libel, namely, by the starboard bow of *The North American*, running into the port bow of *The Tecla Carmen*; and he alleges that *The North American* [336] starboarded her helm, and thereby occasioned the collision, but for which manœuvre no collision would have taken place. Landabru, the boatswain, gives the same account, and so do all the witnesses on the part of *The Tecla Carmen*, with the exception of Juan José de Muniategui, the mate; but it is very remarkable that this witness in his examination in chief, gives a totally different account, and one which agrees with that subsequently given by *The North American*. He says, "*The North American* hit us first with her stern, and then with her port-bow, on our port-bow, a little before our fore-rigging. The blow led aft. When she hit us she slewed us right round, and her starboard side came alongside our port side. She broke our bowsprit and foremast, and our main and mizen-top mast came down and stove in our port-bow."

The witnesses on the part of *The North American* all concur in stating that the collision took place in the manner stated in their allegation. It is said that only four of the crew were examined on the part of *The North American*, and that many more might have been called; and if the facts were left in any serious doubt upon the evidence, this observation would be entitled to attention.

But before the case closed, evidence came to light which, in their Lordships' opinion, removes all doubt upon this part of the case. The Master of *The North American* had alleged that the inspection of the bows of the ship showed that the collision must have taken place on her port side, and that the violence had been such as to tear away by the bowsprit of *The Tecla Carmen* a portion of the plank against which it struck. Toole, a shipwright at [337] Liverpool, who had examined the ship, was of opinion, that this injury had been caused by the iron band of the cap of the bowsprit of *The Tecla Carmen*.

*The Tecla Carmen* had drifted to Aberystwith, and it seems to have occurred to the Master of *The North American* that if he could find the cap of *The Tecla Carmen's* bowsprit, it might furnish evidence in confirmation of this important fact. He accordingly went down to Aberystwith; he found that *The Tecla Carmen* had been broken up, but he succeeded in obtaining what, we are quite satisfied, are the pieces of wood forming the cap of her bowsprit, with the iron band, or one of the iron bands, which bound them together.

This wood was found to be crushed and split, as by a collision. The cap is of elm, and bedded and wedged in it was found a piece of oak, of which wood the plank of *The North American* is formed. The piece of plank which sustained the injury, cut out from the starboard bow of *The North American*, and the cap of the bowsprit of *The Tecla Carmen*, which is alleged to have inflicted the injury, were produced in the Court below, and before us; and we are entirely satisfied that the collision took place with the larboard, and not with the starboard, side of *The North American*.

But from this fact the Trinity Masters in the Court below have drawn the inference that *The Tecla Carmen* starboarded her helm; at least, we are not aware of any other evidence entitled to the least credit to show that she did so.

We confess, we have great difficulty in drawing this inference. Our nautical Assessors are of opinion that, having regard to the position of the two vessels, [338] as it appears in the evidence, when *The North American* was first seen from *The Tecla Carmen* they would have run into each other, if both had held their course, and that *The North American* having ported her helm just at the last



moment, the collision might have taken place exactly as it did, without either *The Tecla Carmen* having starboarded her helm, as alleged by *The North American*, or *The North American* having starboarded, as alleged by *The Tecla Carmen*.

This certainly would be most consistent with the probability of the case. The Spanish vessel would be likely to hold her course, knowing that the other ship was bound to give way; *The North American* would hold her course, because she was not aware of anything which made it necessary for her to alter it. There seems no conceivable motive why either vessel should starboard her helm. In this view of the case, *The North American* alone would be in fault, from her neglect to keep a vigilant look-out, and the decree would require to be altered.

If it were necessary for us to determine this point, we should be under great difficulty; for while, on the one hand, we strongly incline to this view of the case, it must rest in a great measure upon the opinion of our nautical Assessors differing from that of the Trinity Masters in the Court below, and in order to advise the reversal of a judgment, we must not merely doubt whether it is right, but be satisfied that it is wrong.

But, we think that this view of the case is excluded by the pleadings and the evidence. *The Tecla Carmen* rests her complaint upon this, that the collision took place on the starboard side of *The* [339] *North American*, and could not, therefore, have been occasioned by *The Tecla Carmen* having starboarded her helm; that the ships would have actually gone clear of each other, if *The North American* had not starboarded, and thereby brought her starboard-bow into collision with the port-bow of *The Tecla Carmen*. All the arguments below and before us proceeded on this basis, and we do not think that it would be consistent with the safe administration of justice to alter the judgment upon grounds quite inconsistent with the case, made by the Appellants both in their allegation and in their evidence, and at the Bar.

We must advise Her Majesty to affirm the decree; but as both parties have complained of it, there will be no costs.

[Mews' Dig. tit. SHIPPING; A. XX. COLLISION; 13. *Jurisdiction and Practice*; f. *Pleadings*; l. *Costs*; iv. *Both Vessels in Fault*; v. *Appeal*; XXVI. *Admiralty Law and Practice*; 24. *Costs*; c. of *Appeal*. S.C. Swab. 358. For subsequent proceedings see Swab. 466; Lush. 79. As to admiralty jurisdiction of Privy Council see note to *Batten v. Reg.* 1857, 11 Moo. P.C. at p. 287.]

### [340] ON APPEAL FROM THE COURT OF ADMIRALTY OF THE CINQUE PORTS.

JOHN GANN and Others.—*Appellants*: JEAN BAPTISTE NAVARIN BRUN and Others,—*Respondents* \* [July 4, 1856].

#### THE "CLARISSE."

A Court of appeal, in a disputed question respecting the amount of remuneration awarded by the Court below, for salvage service, is indisposed, except it appears that the judgment is clearly erroneous, to interfere with the compensation which the Court below, in its discretion, has awarded.

In this case, the appeal was brought from a decree pronounced by the Judge of the Court of Admiralty of the Cinque Ports, in a cause of salvage, arising out of the loss of the French brig, *Clarisse*, in the month of November, 1855. The parties claiming salvage in the Court below were very numerous, and included not only

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir John Patteson, and the Right Hon. Sir John Dodson.

the present Appellants, but also the owners, and masters of many other boats belonging to Colchester, Milton, Whitstable, and Margate, who being content with the salvage awarded them, did not join in the appeal.

The proceedings in the Court of Admiralty of the Cinque ports at Dover are not by Act on petition, as in the High Court of Admiralty. No formal pleadings were given in, the case being decided upon the facts disclosed in the affidavits of the parties.

From the affidavits filed it appeared, that *The Cla-[341]-risse* was a French brig, and at the time she was wrecked, was on a voyage from Marseilles to London, laden with a cargo of tallow, oil, linseed, etc. On the 15th November, 1855, the ship struck on the Girdler sand and remained fast on the bank straining heavily, and making so much water that she had 5½ feet of water in her, and the sea broke heavily over her. The Master of the smack *Liberty*, in passing by, observed the ship aground in great distress, boarded her with three of the crew, with the consent of the Respondent, Captain Brun, when the pumps were set to work. The smack *Mandamus* of Whitstable, came up soon afterwards, when the Master of *The Liberty*, and the Master of *The Mandamus*, agreed to "shut in" or share the salvage between them. *The Liberty*, from the dangerous state of *The Clarisse*, took Captain Brun and crew on board, and landed them at Herne Bay, leaving a portion of her crew with the French brig. The Masters of *The Liberty* and *Mandamus* wished to keep the salvage to themselves, but were interfered with by several smacks and luggers from Whitstable, Milton, Colchester and Margate; the latter more especially forced themselves into the service. Shortly after Captain Brun and the crew had quitted the brig, the salvors began to quarrel among themselves. The work of salvage was proceeded with during the 16th and 17th days of November, and on the morning of the 18th the brig broke up. The cargo saved amounted to £6370 6s. 6d., which produced, after deductions, the sum of £6050. Of this sum there were saved by the Colchester boats, exclusive of *The Liberty*, who was in the first instance employed in landing the Captain and crew, £1500; [342] by the Whitstable boats, £2831 8s. 4d.; by the Margate boats, including *The Mary*, £1685 13s. 2d.; by the Milton boats, £35 3s. 5d.

The Judge of the Court of Admiralty of the Cinque Ports (Dr. Phillimore) by his judgment (see judgment reported Swabey's Adm. Reps. 129), was of opinion, that although it was not a case of derelict, yet the salvage service was of considerable merit. He then went on to say that it had been contended before him that the salvage remuneration, which it was admitted must be awarded, ought to be divided amongst the smacks and luggers from Colchester, and certain vessels of the same kind from Margate, Whitstable and Milton; and that on the one hand it was contended that the only real salvors were a vessel from Colchester called *The Liberty*, one from Margate, *The Mary*, and other smacks. He was, however, clearly of opinion, that the pre-eminent award for salvage was due to *The Liberty*, as it was owing to the agency of *The Liberty* that the lives of all the persons on board the French vessel were saved. He considered that *The Liberty* coming up at the time it did, and enabled to save the lives of the persons on board the *Clarisse*, was entitled to a far larger sum of salvage than the other smacks and vessels. He then referred to the affidavit of Glover, the Master of *The Liberty*, which stated that there was a leak, and the pumps set to work by the crew who got on board, that the smack *Mandamus* then came up, and that Glover went on board of her and entered into an agreement with the Captain to shut in with him, that is to shut out all other persons, and they only to undertake the whole management of the affair, and he then left some portion of his [343] crew with the brig. The learned Judge then went on to say that the claim of the next vessel was *The Mandamus*, who were the first in possession of *The Clarisse*. There was no distinct evidence as to what the other vessels were, or with whom they engaged, and the owners contended that they alone were entitled to compensation; it was said that there was a known rule that thus attaches to priority of service a right, which excludes all other persons from interfering in any way with the right acquired by priority of service, and that the Colchester men were charged with having sinned against that rule, not by their conduct, but by their intervention, but that the Margate men were charged with violating it both by their intervention and by the violence of their conduct;



that there was, however, a large *de facto* proportion of the casks salvaged by those who were accused of unnecessary intervention, namely, the Colchester and Margate men. The latter alone saved £1638 12s. 2d. worth of property. That the first salvors, although first in possession, was not in continuous possession. That he conceived that the justice of the case would be met by not wholly excluding the Margate or Colchester men, but to mark, especially in the case of the Margate salvors, the opinion of the Court with respect to their conduct, by a considerable diminution of the salvage to be awarded them as compared with that which the Court thought it its duty to give others. That it was admitted that the whole amount of the property salvaged was £6050; the Court, therefore, allotted to *The Liberty*, the salvor of the lives of the Captain and crew, £460; to the other Colchester smacks, £320; to the Whitstable smacks, £320; to the Margate smacks, £100; to the lugger *Mary*, £30; and [344] to the Milton smacks, £50, making the sum of £1280.

Against this decree the salvors, with the exception of *The Liberty*, and other Colchester boats, *The Mary* and *The Milton* boats, brought the present appeal. They submitted that the sum awarded by the Court was an inadequate compensation to those engaged, at the imminent risk of their lives, in salvaging derelict property, amounting to £6370 6s. 6d., and that the distribution was disproportionate to the value of the portions of the cargo salvaged by the respective parties, and to the services rendered by them. The Respondents' case was that the gross sum awarded was an ample remuneration for the services performed. That to them the apportionment of the salvage was of no moment, although they considered that the Judge of the Court below had correctly estimated the merits and demerits of the several salvors.

Dr. Addams, and Dr. Bayford, for the Appellants; and Dr. Robinson, and Dr. Twiss, for the Respondents.

Judgment was delivered by

The Lord Justice Knight Bruce.—Considering the distress and danger in which the vessel was placed, and the meritorious nature, so far as the salvors were concerned, of the services rendered, their Lordships would, in all probability, had the case come originally before them, have been disposed to allow a greater amount of total remuneration. It is, however, a settled rule, and one of great utility, [345] particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of appeal to interfere upon a question of mere discretion. On general grounds, therefore, their Lordships are not disposed to increase the amount given in the Court below.

The Margate smack, to which £100 had been allowed, appeared, so far as their Lordships could form a judgment, to have misconducted themselves greatly, and to have done more harm than good; and had they not been joined in the appeal with the other Appellants, to whom no such observations applied, their Lordships would have been disposed to take away one-half of that sum. Their Lordships, however, decline to interfere in that case also. With regard to the sum of £640, composed of two sums of £320 each, one of these sums should be allotted exclusively to the nine boats which arrived at the wreck on the 15th of November, consisting of seven boats from Whitstable, and *The Prince of Orange* and *The Unity*; the other sum of £320, must be divided *per capita*, between the remaining Colchester and Whitstable boats, eleven in number. There will be no costs of this appeal.

[Mews' Dig. tit. SHIPPING, A.; XVIII. SALVAGE; 4. *Misconduct or Want of Skill*; 13. *Award*; d. *Appeal—Reviewing Award*. S.C. Swab. 129. See *The Chetah*, 1868, L.R. 2 P.C. 210, 5 Moo. P.C. (N.S.) 278; *The England*, 1868, L.R. 2 P.C. 253, 5 Moo. P.C. (N.S.) 344; *Arnold v. Cowie*, 1871, L.R. 3 P.C. 592, 8 Moo. P.C. (N.S.) 22; *The Zeta*, 1875, L.R. 4 Ad. and E. 462; *The Thomas Allen*, 1886, 12 A.C. 121; and cf. *Green v. Bailey*, 1858, 12 Moo. P.C. 350. As to admiralty jurisdiction of Privy Council, see note to *Batten v. Reg.* 1857, 11 Moo. P.C. at p. 287.]

## [346] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

FREDERICK WILLIAM GREEN.—*Appellant*: ISAAC BAILEY.—*Respondent* \*  
[July 9, 1858].

## THE "NEPTUNE."

In a case of salvage service, the amount of compensation to be awarded, is in the discretion of the Judge of the Court of Admiralty, and the Judicial Committee will not interfere with the manner in which that discretion has been exercised, either by diminishing or increasing the amount awarded, except in a case of very extraordinary character.

This was a cause of salvage promoted by the Respondent, the Master, and the owners and crew of the lugger *Diana*, against The *Neptune*, in order to obtain compensation for salvage service, attended with risk of life, rendered to The *Neptune*, by the Master and crew of The *Diana*. The value of The *Neptune* was admitted to be £3000. The Appellant tendered £100 for the services rendered, which the salvors refused.

The circumstances attending the claim for salvage were shortly as follow:—

On the 7th of October, 1857, the ship *Neptune*, whilst in the prosecution of her voyage from London to Bristol, encountered a heavy gale in the Channel, and having lost an anchor and chain, had her sails split, her ropes damaged, and her rudder so damaged that she steered badly, was obliged to put back, and about 9 A.M. of the 8th she was boarded by Prescott, a [347] Trinity House pilot, off Dungeness, who, upon ascertaining her damaged condition and that her crew were greatly exhausted, advised her Master to endeavour to get assistance, and another anchor and chain as soon as possible. Upon reaching the Downs, the lugger *Diana*, which had been launched with the greatest difficulty and risk to her and her crew, by reason of the tempestuous state of the weather then prevailing, made towards The *Neptune* through a very heavy sea, and on nearing her were informed that an anchor and chain, as also assistance, were required on board her. The *Diana* thereupon approached nearer to The *Neptune*, and after several unsuccessful attempts, four of her crew succeeded in boarding her, having incurred great risk as well to the lugger as her crew in so doing, by reason that The *Neptune* could not be hove-to: and as the heavy sea caused both vessels to roll and pitch heavily, it was impossible to prevent The *Diana* from getting under the ship's counter and sustaining damage. By the directions of the pilot, two of The *Diana's* crew who had boarded her were sent to the wheel, and the other two forward to look out, as it was thick and misty, and The *Neptune*, accompanied by The *Diana* (which, from the heavy sea making over her, was obliged to be continually pumped out), arrived at and was brought up in Margate Roads, whereupon her Master went ashore in The *Diana* to obtain an anchor and chain. Subsequently an anchor and thirty fathoms of chain, weighing, together with a coil of rope and shackles, nearly four tons, having been got on board The *Diana*, she left Margate therewith for The *Neptune*, and after continuous labour for about three hours and a half, by reason of there being [348] no tackle on board The *Neptune* wherewith to hoist in the anchor and chain, the same were got on board The *Neptune* by the combined efforts of the two crews. The men then left The *Neptune* and returned to The *Diana*, whereupon she left for Deal through a very heavy sea, and on arriving there at about 2 A.M. of the following day, was, with the assistance of men employed from the shore, hauled up the beach. In rendering those services the salvors incurred great risk of life and property, both on launching their lugger (of the estimated value of £175) from the shore, and on each occasion of going alongside The *Neptune*: but more particularly upon the first occasion, when, through the heavy sea and pitching and yawing of The *Neptune*, The *Diana* was struck and injured by The *Neptune's* counter. The violence of the gale during the 7th and 8th of October was so great, that several vessels were wrecked and others greatly injured.

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir Cresswell Cresswell, and the Right Hon. Sir John Taylor Coleridge.



For these services the Respondents brought an action in the High Court of Admiralty in the sum of £450, which produced a tender by the owners of *The Neptune* of the sum of £100, which was refused, and the action proceeded.

The Judge of the Admiralty Court (The Right Hon. Dr. Lushington) held the tender of £100 insufficient, and awarded the salvors £300, for the services rendered. The material part of his judgment, was in these terms:—"I will proceed first to take the admitted points, namely, the tempestuous weather and the damaged state of the vessel. It is also admitted that an anchor and cable were taken on board, and the anchor and cable for a vessel of this large burthen were, according to the representation of the salvors, [349] of four tons' weight, and, therefore, it was not an easy thing, I apprehend, to bring them off from the shore when the weather was as has been stated. What is the disputed point? Whether the salvors acted with propriety in boarding the vessel; whether they boarded her at risk to themselves; or whether they were guilty of such a total want of skill in managing their vessel that they did damage to their boat by unseamanlike conduct? Now, the whole probability is against these Deal boatmen, who are known to be most skilful men in performing salvage services, having run unnecessary risk from their own want of skill or unseamanlike conduct; and when I look to the evidence of the pilot, which I take to be the best evidence in the case, I think that this statement, made on the part of the owners, is totally without foundation. I am, therefore, of opinion that, looking at the state of the wind and weather, these salvors did incur considerable risk in rendering assistance to this vessel. If they did go out, in the state in which the wind and weather then was, and shortly afterwards met with this vessel, it is not to be forgotten, in awarding remuneration, the amount of risk and danger they encountered in going out for the purpose of rendering assistance to vessels in distress. They went on board, and the pilot stated he required assistance and employed them. Such was the state of the weather that it was utterly impossible to get the vessel into Ramsgate Harbour, and she was consequently forced to go to the Margate Roads. The salvors then go ashore, get an anchor and cable on board, and then return to the ship, and it takes no less than three hours and a half to get the anchor and cable on board *The Neptune*. I entertain no doubt what [350]-ever that the defence set up on the present occasion is destitute of all foundation whatsoever, and I think that the tender is wholly insufficient, and I shall give £300. I think it is absolutely necessary, where the Court sees services performed in a locality like the present, and where it also sees the risk of life and property which the salvors incurred, to give an adequate reward to encourage them and others to do the like on future occasions."

The Appellant, the owner of *The Neptune*, appealed from this decree, submitting that the sum of £300 awarded to the Respondent was excessive and ought not to be upheld, as the tender of £100 was ample and liberal for the services rendered.

Dr. Addams, Q.C., and Dr. Twiss, Q.C., argued the case for the Appellant, citing *The Hector* (3 Hagg. Adm. Rep. 90).

The Admiralty Advocate (Dr. Phillimore, Q.C.), and Dr. Spinks, appeared for the Respondents; but their Lordships without calling upon them delivered judgment by

The Right Hon. T. Pemberton Leigh.—It is important to adhere strictly to the rule laid down in this Court in the case of *The Clarisse* [*Gann v. Brun*] (*ante* [12 Moo. P.C.], p. 340). There the Lord Justice Knight Bruce states the rule in these words (*ante* [12 Moo. P.C.], p. 344): "Considering the distress and danger in which the vessel was placed, and the meritorious nature, so far as some of the salvors were concerned, [351] of the services rendered, their Lordships would in all probability, had the case come originally before them, have been disposed to allow a greater amount of remuneration. It is, however, a settled rule and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of appeal to interfere upon a question of mere discretion. On general grounds, therefore, their Lordships are not disposed to increase the amount given in the Court below." Now, the same rule must apply in diminishing the amount of compensation which is applied in increasing it, and where the Court below appears to have been fully in possession of all the facts and

to have understood those facts accurately at the time the judgment was pronounced, and where, therefore, the amount awarded was one of mere discretion, their Lordships would not, except in a case of very extraordinary character, interfere with the manner in which that discretion was exercised. Their Lordships are of opinion, looking at the evidence in the cause and the judgment of the Court below, that there is no ground for disturbing the amount fixed, and that the appeal must be dismissed with costs.

[Mews' Dig. tit. SHIPPING : A. XVIII. SALVAGE : 13. *Award* : d. *Appeal—Reviewing Award*. See *The England*, 1868, L.R. 2 P.C. 253, 5 Moo. P.C. (N.S.) 344. As to admiralty jurisdiction of Privy Council, see note to *Batten v. Reg.* 1857, 11 Moo. P.C. at p. 287.]

[352] ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

ANTONIUS XENOS,—*Appellant*; EDMUND ALDERSLEY and others.—  
*Respondents* \* [July 5 and 6, 1858].

THE "EVANGELISMOS."

A collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port, the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The Plaintiffs failed in identifying the vessel seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages.

Such decree affirmed on appeal, there being no evidence of *male fides*, or *crassa negligentia*, which might imply malice, on the part of the Plaintiffs in arresting the ship, such arrestment being necessary and the foundation of the action in the Admiralty Court, the proceedings being *in rem*.

This was originally a cause of damage brought by the owners of the British brig *Hind*, against the Greek brig *Evangelismos*, arising from a collision which took place on the 20th of October, 1858, at the mouth of the river Thames, under the following circumstances.

At about seven P.M. of the 19th of October, 1857, the brig *Hind* was brought to an anchor about two miles below the Nore Light, and at about thirty minutes before one A.M. of the 20th, a vessel (supposed to be the brig *Evangelismos*) was perceived on The *Hind*'s starboard bow, and hailed to mind [353] her helm. When the strange vessel had neared The *Hind* to within about 150 yards, her helm was ported, and she came angling across The *Hind*'s bows, in order to pass her on her port side; but as the wind and tide brought her rapidly down upon The *Hind*, the port fore-rigging of the strange vessel caught and carried away The *Hind*'s jib-boom and bowsprit, which latter went through the foresail of the strange vessel, and the port-bow of the strange vessel then came in violent contact with the bluff of the port-bow of The *Hind*. Upon the two vessels getting clear of each other, the strange brig sailed away towards the Essex shore, closely followed by The *Hind*'s boat, which had been lowered immediately after the collision; and upon the strange vessel coming to an anchor off Southend, those in The *Hind*'s boat made her fast astern of a schooner, which had been brought up near the strange vessel, and remained there until daylight watching her. At daylight The *Hind*'s boat went alongside the strange vessel then under weigh, and endeavoured, but ineffectually, to board her: at which time some of her crew were perceived upon a stage over her port-bow repairing damages.

\* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, the Right Hon. Sir Crosswell Cresswell, and the Right Hon. Sir John Taylor Coleridge.



Upon the day following the accident, The *Evangelismos* was found in the West India Docks; and as her appearance coincided with the strange vessel which had been in collision with the *Hind*, and she was identified as being the vessel which had been followed by The *Hind's* boat immediately after the collision; and as moreover her port-bow had sustained damage, and her foresail was split, she was believed to be the identical vessel which had been in collision with The *Hind*; whereupon a warrant was ex-[354]-tracted from the Admiralty Court at the instance of the owners of The *Hind*, and The *Evangelismos* was arrested on the 29th of October, in an action of damage for £500. The Appellant, a foreigner, had no funds in this country, and although the brig was under charter to carry a cargo of coals to the Levant, she was compelled to remain under arrest until the 21st of January, 1858, when an indemnity having arrived from Constantinople, bail was given and the brig released.

The usual pleadings having been filed on behalf of the respective parties, and witnesses examined in support thereof, the cause came on for hearing on the 1st of March, 1858, before the Right Hon. Dr. Lushington, who, considering that the *onus probandi* as to the identity of the vessel doing the damage was upon the parties proceeding, pronounced that it had not been sufficiently proved that The *Evangelismos* was the vessel which had been in collision with The *Hind*, and, therefore, dismissed the owner of The *Evangelismos* from the suit, with costs.

Application was thereupon made to the Judge sitting in Chambers, on behalf of the owner of The *Evangelismos*, to condemn the owners of The *Hind* in the damages and losses which had been sustained by the owner of The *Evangelismos*, in consequence of having been so arrested and detained; but the Judge considering that the arrest of The *Evangelismos* had been made in the *bona fide* belief that she was the vessel which had been in collision with The *Hind*, and that there had been no *mala fides* in the proceedings, refused to condemn the owners of The *Hind* in damages as well as costs.

The owner of The *Evangelismos* appealed [355] against so much of the decree made thereon, as refused damages for being unjustly arrested and detained. The appeal was confined to that single point.

Dr. Addams, and Dr. Twiss, for the Appellant.—By the unwarrantable arrest of the ship, the Appellant, a foreigner, has sustained very heavy losses. The arrest was without probable cause. There was no shadow of reason for charging The *Evangelismos* as being the vessel which ran into The *Hind*. The Court below, therefore, ought in the ordinary practice prevailing in the Admiralty Court to have condemned the owners of The *Hind* in damages and losses for the false arrest and long detention of the vessel. The *Orion* (a), The *Glasgow* (b), [356] The

(a) This case and the two succeeding ones were not reported at the time. They were extracted from the Registrar's Books, and printed as a supplement to the Appellant's Case.

#### THE "ORION" (Feb., 1852).

In this case, The *Orion* was arrested at Cowes at the suit of the owners of The *Waterloo*. In a few days it was discovered that The *Orion* was not the right ship. The action was subducted and The *Orion* was released, having been under arrest six days. The owners of The *Waterloo* were condemned in the costs, losses, charges, damage, demurrage, and expenses caused by the illegal arrest of The *Orion* and her freight, and the amount was referred to the Registrar.

(b) THE "GLASGOW," otherwise "YAMACRAW" (May, 1855) (Reported, 1 Swabey's Adm. Rep. 145).

This ship, the property of Charles Jones, of the city of Gloucester, ship owner, was sold by Richard Ward, her Master, at Savanna, without any authority from her owner, and her name was changed from *Glasgow* to *Yamacraw*. The ship, then called The *Yamacraw*, arrived at Liverpool, with her freight, was arrested at that port by warrant from the Court of Admiralty, at the suit of her owner, Charles Jones, in a cause of possession, and the ship remained under arrest until the cause was heard. An appearance was given on behalf of the parties who had purchased the ship. The cause came on for hearing, and the Judge, by his interlocutory decree,

*Nautilus* (a), these cases have been recently decided and fully establish the practice of awarding damages for a groundless arrest. In *The Lavin Lark* (10 Moore's P.C. Cases, 201) this Court, in the case of an illegal seizure of a vessel for being engaged in the slave trade, gave damages. So at Common Law an action lies for false arrest. Trespass lies against the Sheriff if he seize another's goods by mistake, *Jarmain v. Hooper* (7 Scott. N.R. 663).

Dr. Deane, Q.C., and Mr. Vernon Lushington, for the Respondents.—The arrest of the *Evangelismos* was made in the *bona fide* belief that she was the vessel that had been in collision with *The Hind*. Such arrest was the foundation of the action, the proceedings in the [357] Admiralty Court being *in rem*. The Plaintiff having failed to identify *The Evangelismos* was fixed with costs. The Court properly, according to the ordinary rule prevailing where there was no *mala fides*, refused damages. Even with regard to costs in a case of collision when there are great difficulties, which may have misled the parties, the Court will not give costs. *The Ebenezer* (2 W. Rob. 213). No authority can be found in the Admiralty Court where damages have been awarded unless there was *mala fides* or fraud in the transaction. *The John* (2 Hagg. Adm. Rep. 317). That fact distinguishes the present case from *The Orion*, *The Glasgow*, and *The Nautilus*. No doubt an action will lie at Common Law for a false and malicious prosecution, Co. Litt. 161 (a), Hargrave's note. *Waterer v. Freeman* (Hobart, 266), or for suing a party in a Court that has no jurisdiction, and arresting him, *Goslin v. Wilcock* (2 Wils. 302-5); but the true test is, whether the arrest in this case was malicious, so as to give a right of action. In *Mitchell v. Jenkins* (5 Barn. and Ad. 588), Baron Parke truly lays down the rule. He says (5 Barn. and Ad. 594), "In every action for a malicious prosecution or arrest, the Plaintiff must prove what is averred in the declaration, viz., that the prosecution or arrest was malicious, and without reasonable or probable cause; if there be reasonable or probable cause, no malice, however distinctly proved, will make the Defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved." So in *crassa negligentia*, *Davies v. Jenkins* (11 Mee. and Wels. 745). There the Exchequer Court [358] held that an action was not maintainable against an attorney, who being retained to sue for debt a person of the same name with the Plaintiff, by mistake, and without malice, takes all the proceedings to judgment and execution against him, or having obtained judgment against the right person, by mistake and without malice issues execution against the Plaintiff. Again, in *De Medina v. Grove* (10 Q. Ben. Rep. 152) the Court of Queen's Bench held that an action would not lie against an execution creditor, or his attorney, for issuing a *fi. fa.* indorsed to levy the whole sum recovered by a judgment which, to the knowledge of both, had been partly satisfied by payments, unless malice and want of probable cause be proved.

The Right Hon. T. Pemberton Leigh.—The Respondents in this case brought an action against the Greek brig, *The Evangelismos*, of which the Appellant is owner, for damage sustained by the ship of the Respondents, in a collision which took place on the 19th of October, 1857. They failed to establish their case, and the action was dismissed with costs. It appears that there was a defence put in, by which the Appellants claimed not only to have the suit dismissed, but to have costs and damages awarded to them for the injury sustained by the detention and demurrage of the ship

dismissed the Defendants who had purchased this ship, and condemned Charles Jones, her former owner, in demurrage and costs, and referred the amount of demurrage to the Registrar and merchants.

(a) THE "NAUTILUS" (March, 1856) (Reported, 1 Swabey's Adm. Rep. 105).

An action was entered against the above vessel, cargo, and freight, at the suit of the Master, owners, and crew of the yawl, *Newport Lass*. An appearance was given on behalf of the owners of *The Newport Lass*, and it was alleged the case had already been heard before some local magistrates, who had awarded £53 for salvage, and that amount was, therefore, paid into Court and tendered to the salvors, who rejected the same. The Proctor of the salvors this day accepted the tender, and the arrest of the ship was superseded. The Judge, by interlocutory decree, condemned the salvors in costs and expenses consequent on the arrest of the ship.



while under arrest. That question is now raised before us in appeal, the learned Judge of the Court below in Chambers, being of opinion that the proper decree to be made was to dismiss the action with costs, but without damages.

It is urged by the Appellant that damages ought [359] also to have been awarded, as the rule of the Admiralty Court is, that the party who has sustained injury has a right to be indemnified. On the other hand it is said that the arrest of the ship, in this case, was the foundation of the action, and it is only for the purpose of founding the action that the ship was arrested, and, therefore, the arrestment of the ship cannot be said to be an illegal or improper act, except to the extent of bringing the action.

It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the Court can award.

Their Lordships think there is no reason for distinguishing this case, or giving damages. Undoubtedly there may be cases in which there is either *mala fides*, or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded.

The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it? Their Lordships are of opinion, that there is nothing [360] whatever to establish the Appellant's proposition. It is true the identity of the ship was not proved, but there were circumstances which afforded ground for believing that this ship was the one that had been in collision with the barge.

Their Lordships, therefore, will affirm the judgment of the Court below: and they would have given costs; but inasmuch as the Appellant had not an opportunity in the Court below of addressing the observations to the learned Judge which they have to their Lordships, we think that the appeal ought to be dismissed, but without costs.

[Mews' Dig. tit. SHIPPING; A. XXVI. ADMIRALTY LAW AND PRACTICE; 22. *Practice*; d. *Arrest*. S.C. Swab. 378. See *Wilson v. Reg.*, 1866, L.R. 1 P.C. 405, 4 Moo. P.C. (N.S.) 407; *The Cathcart*, 1867, L.R. 1 Ad. and E. 333; *The Strathnaven*, 1875, 1 A.C. 58; *The Collingrove*, *The Numida*, 1885, 10 P.D. 160. As to admiralty jurisdiction of Privy Council, see note to *Batten v. Reg.* 1857, 11 Moo. P.C. at p. 287.]

### [361] ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

WILLIAM KIRCHNER, JOSEPH SHARP and ROBERT WATERSTON,—*Appellants*; JOHN BOURN VENUS,—*Respondent* \* [Feb. 4 and 5, 1859].

The right of lien arises either by implication of law, or by express contract between the parties.

Freight is the reward payable to the carrier for the safe carriage and delivery of goods. It is payable only on safe carriage and delivery. If the goods

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

are safely carried, the Master of the ship has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight be paid [12 Moo. P.C. 390].

Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract, whether a lien does or does not exist. When the contract made gives no lien, a court of law will not supply one by implication [12 Moo. P.C. 391, 398].

D. and Co., of Liverpool, shipped goods for Sydney. The bill of lading stated the goods to be to the shipper's order or assigns, "he, or they paying freight for the goods here as per margin." In the margin it was stipulated as follows:—"Freight payable in Liverpool to M., one month after sailing, vessel lost or not lost." The bill of lading passed into the hands of K. and Co. as indorsees for value. On the ship's arrival at Sydney, the port of delivery, the Master was advised by the shipowner that the sum agreed to be paid as freight at Liverpool, had not been paid, and he refused to deliver the goods to K. and Co., the assignees of the bill of lading unless freight was paid, claiming a lien on the goods for the unpaid freight.

Upon appeal,—Held by the Judicial Committee (reversing the judgment of the Supreme Court of New South Wales),

First, that the amount agreed to be paid by the shippers at the port of shipment, one month after sailing of the ship, did not acquire the legal incident of freight, though described under that name in the bill of lading, it being merely money to be paid for taking goods on board and undertaking to carry, and not for carrying the goods: and that there was no right of lien on the goods by the shipowner in respect of such sum of money being unpaid [12 Moo. P.C. 390].

Secondly, that as the bill of lading provided that the freight was payable to a third party, M., and not to the shipowner, payment for freight to the Master or shipowner, would be no answer to an action in England, by M. in the name of the shipowner, for non-payment of freight [12 Moo. P.C. 398].

Evidence of the usage of a particular place, to add to or in any manner to affect the construction of a written contract, is admitted only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the agreement with reference to it [12 Moo. P.C. 399].

No such presumption arises, if one of the parties is ignorant of such usage or custom [12 Moo. P.C. 399].

Evidence was admitted of a custom in Liverpool, that a lien on goods for a sum agreed to be paid there as freight continued. Held further, that as the assignees of the bill of lading were resident in Sydney, in New South Wales, and there was no evidence that they were acquainted with the local usage in Liverpool, such evidence of custom was not admissible for the purpose of explaining the effect of the memorandum in the bill of lading, or of showing the terms on which the goods were shipped, in the construction of such bill of lading.

The case of *How v. Kirchner* (11 Moore's P.C. Cases, 21) upheld. *Gilkison v. Middleton* (2 Com. Ben. Rep., N.S. 134) and *Arush v. Graham* (8 Ell. and Bla. 505), resting on the former authority, commented upon and dissented from [12 Moo. P.C. 397].

This was an action of trover brought by the Appellants to recover the value of certain goods shipped [362] from Liverpool to Sydney, in a vessel called *The Countess of Elgin*.

The Appellants were merchants, carrying on business at Sydney, in New South Wales, under the style of "Kirchner and Co." The Respondent was the Master of *The Countess of Elgin*. The goods in question [363] were shipped at Liverpool, on board *The Countess of Elgin*, in seven separate parcels, under seven bills of lading, each of which related to a distinct parcel. By the several bills of lading (which bore dates between the 16th and 25th of February, 1854, both inclusive), the goods



were deliverable to order or assigns, he or they paying freight for the said goods here, as per margin. The margin of each of these seven bills of lading contained a note of the total amount or sum payable in respect of the goods in such bill of lading mentioned, for freight, with primage and average accustomed. In the margin of one of the bills of lading, the total sum payable was divided into two portions, of different amounts; and against one portion was written "half paid here," and against the other portion was written, "half paid there." The margin of that bill of lading also contained a memorandum in these words—"Half freight payable in Liverpool to Aeneas Macdonnell, one month after sailing, vessel lost or not lost." The margin of each of the other six bills of lading contained the following memorandum—"Freight payable in Liverpool to Aeneas Macdonnell, one month after sailing, vessel lost or not lost."

Messrs. Dickson and Co. were the shippers, and the parties to whom the goods belonged at the time of their shipment; Fairclough and Co., in whose name they were shipped, being their agents. At the time when the goods arrived at Sydney, the Appellants (who were indorsees and holders for value of the bills of lading, having made large advances upon them, upon the faith of their being clean bills of lading, beyond the half freight upon the one parcel, payable there under the second bill of lading) paid to the Respondent the half freight, amounting to £317 16s. 4d. Messrs. Dickson and Co. had become Bankrupts before the ship arrived at Sydney, without having paid the freight at Liverpool, as provided for by the memoranda in the bills of lading.

After payment of the sum of £317 16s. 4d., the Appellants demanded the goods of the Respondent, who returned the following answer: "I will give you up the goods you now demand only on payment of £1243 14s. 5d., for the freight or carriage of them, there being a lien or claim upon the goods to that amount."

The Appellants and the Respondent afterwards came to an arrangement, by which the Respondent delivered the goods to the Appellants; upon their giving a promissory note for the sum of £1243 14s. 5d., the entire amount of freight claimed by the Respondent. The note was given on terms that the payment of the amount, or of so much as should ultimately be decided to be due (with the exception of the half freight paid) should abide the result of an action, and that the delivery up of the goods and giving of the promissory note should be without prejudice to either party.

The Appellants then brought an action against the Respondent in the Supreme Court of New South Wales. The declaration averred that the Respondent converted to his own use or wrongfully deprived the Appellants of the use and possession of the goods. The Respondent put in a plea, wherein he alleged that he claimed to hold and retain, and did hold and retain, the goods, as a lien and security for the sum of £1243 14s. 5d. due to him for the freight and carriage of the goods as a common carrier, from Eng-[365]-land to Sydney for the Appellants, and which sum, although demanded, had not been paid. Upon which plea issue was joined.

Both parties agreed to admit on the trial that the bills of lading, with the memoranda and indorsements thereon, were to be considered as proved.

The Respondent, after joinder of issue, applied to the Supreme Court for leave to issue a commission for the examination of witnesses in Liverpool, for the purpose of proving the existence at that place, of a usage or custom of merchants there, that the shipowner, in case of non-payment of freight, did not lose his lien, security, or claim upon the goods upon the arrival of the ship at her port of discharge, notwithstanding that, by the terms of the bill of lading, freight was stated to be made payable in England. This application was opposed by the Appellants, who contended that the proposed evidence would be inadmissible. On the 27th of December, 1854, the Supreme Court granted the commission, being of opinion, that the proposed evidence would be admissible for the purpose of explaining the memoranda taken in connection with the bills of lading, and of showing the terms upon which the goods were understood to be shipped at Liverpool, by the Captain as the agent of the shipowner.

Three witnesses, shipbrokers, carrying on business at Liverpool, were examined at Liverpool, under this commission. They deposed to the existence of such usage, and stated various instances, in which, under similar circumstances, the lien of the

unpaid shipowner had been insisted upon, and had ultimately prevailed against the claim of the indorsee of the bill [366] of lading at a foreign port, to have the goods delivered freight free.

The action was tried at Sydney, on the 12th of August, 1856, before Sir Alfred Stephen, the Chief Justice, and a special jury of four, when the evidence taken under the commission was received on behalf of the Respondent, notwithstanding the Appellants' objection to its reception, first, as an attempt to vary the terms of the bills of lading by oral evidence; and, secondly, because the usage thereby sought to be established, was unreasonable and bad. Four witnesses, merchants, carrying on business at Sydney, were examined on behalf of the Appellants, to prove that the usage or custom set up by the Respondent was unknown at Sydney. The Chief Justice, in his summing up, told the jury, that if they believed that such a usage prevailed generally in Liverpool, their verdict should be for the Respondent; and if not, then for the Appellants. He declined to give any opinion, whether the usage was reasonable or not, but told the jury, that if they thought it unreasonable, they might consider that circumstance in forming their opinion as to the fact of its existence. The jury, by a majority of three-fourths, returned a verdict for the Appellants, the verdict of the majority being taken by consent, in lieu of a unanimous verdict.

A motion was made by the Respondent for a new trial on the ground that the verdict was against the weight of evidence, and against law. The Court being dissatisfied with the verdict, directed the action to be tried a second time before a special jury of twelve.

Accordingly, on the 9th and 10th days of February, [367] 1857, the action was tried a second time before Mr. Justice Dickinson and a special jury of twelve, when the evidence taken by commission and other parol evidence in support of the usage or custom at Liverpool, was admitted by the learned Judge, notwithstanding the Appellants again objected to its reception upon the grounds before stated. Evidence was also given on behalf of the Appellants to show that such a custom did not exist, and that it was unreasonable. The jury, upon the second trial, returned a verdict for the Respondent, by a majority of eleven to one; such verdict having been taken by consent as on the previous trial in lieu of a unanimous verdict.

In consequence of this verdict the Appellants applied for a third trial; relying principally on the grounds, first, that the evidence of usage at Liverpool ought not to have been admitted to vary the terms of the bill of lading, so as to affect parties not necessarily cognizant of such usage; and secondly, that such usage, even if sufficiently established by evidence, was unreasonable and bad.

This application was refused. Chief Justice Stephens delivered the judgment of the Court on the 1st of August, 1857, as follows:—"This is an action of trover, by the consignee of sundry large shipments of goods from Liverpool to Sydney, against the Master of the vessel, under several bills of lading signed by him, brought to try the right of the shipowner, under the circumstances hereinafter mentioned, to detain those goods in the port of delivery for the unpaid freight thereon. In all the bills of lading, although in some other respects varying, there was a memorandum (stamped on the instrument) that the freight was payable in Liverpool, to a person named, one month after the [368] sailing of the vessel, whether she should be then lost or not. On the effect of this memorandum, and on the admissibility of evidence of usage, and the effect of usage on the assumed right of lien, the case wholly depends. It was admitted that the freight, in fact, remained unpaid, and that the shippers were insolvent. The Defendant insisted, that the right of lien for the freight was not affected by the stamped memorandum, but that if, by reason of that memorandum, the right was suspended during the agreed month of credit, it revived by non-payment of the stipulated amount at the expiration of that month. The Plaintiffs maintained, on the contrary, that no right of lien for freight exists (especially against consignees who take under the bill of lading) in a case of this kind: at any rate, not by the common law, or the general mercantile usage of the realm. But then the Defendant alleged that there was, at all events, a custom existing and generally known in Liverpool, and, for that reason, binding on shippers in that port, and all claiming under them: that the right of lien continued, notwithstanding the insertion in the bills of lading of a memorandum



framed as in this case. The Plaintiffs, denying the existence of the custom, contended that, if existing, it was invalid; that it was bad in law, as unreasonable, and that no such custom could, in any event, bind a consignee in this port ignorant of it. The Court, however, granted a commission for the examination of witnesses in Liverpool as to the alleged usage. We, in the same Term, held, in a case of *Kirchner v. How*, where the question as to the shipowner's right of lien (irrespective of custom) was the same; that where, at all events, the bills of lading made the so-called freight payable by the shipper, no right of detention, as for [369] freight, existed. The commission being returned, with a considerable body of evidence taken under it, showing (though certainly not in the most conclusive manner, so as absolutely to exclude all question) that a custom, substantially to the effect asserted, did exist in Liverpool, the action came on for trial before me in August last. The Plaintiffs' Counsel, on the grounds taken by him when opposing the issue of the commission, objected to the reception of the evidence; and, on the same grounds, in his address to the jury, endeavoured to induce them to give no effect to it. He contended, that the unreasonableness of a custom might be considered by them, at all events, as a ground for disbelieving the evidence of its existence in point of fact. In my charge to the jury, I assented to this latter position, but told them that, in the opinion of the Court, the existence of the usage, if proved, would sustain the defence in point of law. Several witnesses, merchants of standing and character, were called for the Plaintiffs, who said that they had never heard of any lien being insisted on, or claimed, in cases of this kind. None of them, however, happened to be acquainted with the usage or understanding of merchants in the port of Liverpool. The jury, by a majority of three-fourths, returned eventually a verdict for the Plaintiffs. The damages were (by consent) nominal only; the goods having been, in fact, long ago given up on an indemnity. In the whole, there were seven bills of lading. In each of them the goods are deliverable to the order of the shipper or his assigns, he or they paying freight for them. But, in one instance, the word 'here' is introduced after the word freight. In another, the words 'payable by the shippers' are inserted after that word. In another, the word 'there' [370] is used (instead of here) after the word freight. The stamped memorandum is alike on all, 'freight payable in Liverpool to Eneas Macdonnell, one month after sailing, ship lost or not lost.' It did not appear what connection there was, if any, between the shipper and the Plaintiffs, beyond that of consignor and consignees; whether the former was principal or agent in the transaction, or who, in fact, was the principal; or that the Plaintiffs were consignees for value, or as agents only. The verdict having been set aside, a second trial of the action took place before Mr. Justice Dickinson, when the jury found a verdict for the Defendant; thus sustaining the lien. The evidence on the question of usage varied very slightly from that given on the first trial. In other respects the evidence was the same. A new trial is now asked for on behalf of the Plaintiffs, on substantially the same grounds as those which were formerly urged for them. It is intolerable, said their Counsel, that a consignee shall be bound by a custom of which he is necessarily ignorant, and into the existence of which he has not fair means of inquiring. The inconveniences and evil results, moreover, of such a state of things as the decision will (it is said) induce, are much insisted on; the risks incurred in advancing money on the security of a bill of lading, and the injustice of compelling an indorsee, or an equally innocent consignee, to pay freight, which he may naturally conclude, from the terms of the instrument, has been paid already. The objection that the contract itself (the memorandum being confessedly embodied in it) excluded the incident of lien, and that evidence of usage operated to vary that contract, was strongly urged. The case of *Brown v. Byrne* (18 Jurist, 701), it was said, on which our [371] determination to grant the commission mainly proceeded, had been materially impaired by *Cuthbert v. Cumming* (24 Law Journ. Exch. 198). It was argued, moreover, that the usage which prevailed in the port of delivery, if evidence of usage was admissible at all, afforded the proper test and guide. Lastly, it was submitted, that the evidence given at Liverpool, as to the usage there, failed to establish that usage. The evidence on such a point, it was said, should, in the language of Lord Chief Justice Tindal, in *Lewis v. Marshall* (7 Man. and Gr. 745), be 'clear, cogent, and irresistible.' At all events, it was said, the Plaintiffs were

entitled to a verdict in respect of those particular goods on which the freight is, by the bill of lading, expressed to be payable by the shipper. In addition to the case already mentioned, the following cases were cited:—*Spartali v. Benecke* (19 L.J.C.P. 294); *Bottomley v. Forbes* (5 Bingham, N.C. 121); *Howard v. Tucker* (1 Barn. and Ad. 712); *Smith v. Jeffryes* (15 Mee. and Wels. 561); *Jones v. Tarleton* (9 Mee. and Wels. 675); *Lewis v. Marshall*; and three cases in the 25th Vol. of L.J.C.P. p. 234, Q.B. p. 313, and Exch. p. 233. The case of *Jones v. Tarleton* seems to have no application to the present. We have considered the important questions which arise in this case; and, adhering to our decision in *Kirchner v. How*, and in the present action, on the occasion of our granting the commission to examine witnesses in Liverpool, we decline to grant a new trial. It is unnecessary, we think, to recapitulate, in this place, the reasons which we then gave; first, for the opinion that, irrespective of any question of usage, no lien for freight exists in cases of this kind; but, secondly, that a custom or usage in favour of such a lien existing in the port of [372] shipment where the contract was made, will (the stipulated freight, or sum so called, not being paid) confer the right of lien; because those reasons were at the time fully reported; and, should this case be referred to the Judicial Committee on appeal, can be readily transmitted to that Tribunal with the present judgment. We do not think that the evidence to establish the usage was either as cogent, or on all points as clear, as might have been desired. If believed, however, it was, in our opinion, sufficient. So far as the testimony in Liverpool went, it was all one way; and if there was any which impeached it, the jury had the whole before them, fully and ably commented on. Neither on the ground, therefore, of inadmissibility of the evidence, nor of its insufficiency or incompleteness, nor on the ground of the inefficiency of the usage at Liverpool (if proved) to sustain the defence, do we see any reason for disturbing the verdict. There is some difficulty, apparently, with respect to the goods included in that particular bill of lading, which mentions the freight as being payable by the shippers. The words there are, to 'order or to assigns, he or they paying freight for the said goods at the rate of as per margin payable by shippers.' Then follows the printed memorandum, of which the tenor has been already given. Looking at the whole of these words the meaning appears to us to be that the shippers are the parties looked to, in the first instance, to pay in Liverpool; and we think that resort to the consignees, in case of default, is not thereby necessarily excluded. In each case, the money was to be paid in Liverpool, and, therefore, presumably, in the first instance, by the shippers. It follows that the evidence of usage was equally admissible to affect the goods now in question, [373] as those included in the other bills of lading. The evidence may not have been, and it certainly was not, as distinctly applied to bills of lading in the one form as in the other, but there was still evidence applicable to all the bills. In one of them, indeed, the word 'there' being introduced into the body of the instrument, the freight would seem to be payable only in Sydney; and if so, presumably by the consignees. But the memorandum making the freight (in terms) payable in Liverpool, is equally stamped on that particular bill. There seems to be no substantial ground, therefore, for distinguishing between the two cases. Whatever difference may exist, however, if any, would appear rather to be in favour of the Defendant, and consequently of the verdict which the Plaintiffs desire us to set aside."

The present appeal was brought from this judgment.

Mr. Manisty, Q.C., and Mr. J. A. Russell, for the Appellants. This judgment cannot be maintained. It is in direct opposition to the previous decision of the Supreme Court at Sydney, in the case of *Kirchner v. How*, and to the judgment of affirmance of that case pronounced by this Court, *How v. Kirchner*, (11 Moore's P.C. Cases, 21). The facts of that case are identical with the present. There freight was to be paid by the shipper, and not the consignee, one month after the sailing of the ship, irrespective of the safe delivery of the goods. Lord Wensleydale, in delivering judgment, says (*ib.* 35), "Their Lordships were perfectly satisfied that in this instrument the [374] word 'freight' was not used in the sense that would give a right of lien, and that, therefore, there was no lien upon the cargo." Here the bills of lading are not only different in form from general bills of lading, but they also differ from each other. Thus it is provided in all the bills but one, that freight



is to be payable in Liverpool to Macdonnell, "one month after sailing, vessel lost or not lost;" in the excepted one it is stipulated for "half freight payable in Liverpool to Macdonnell, one month after sailing, vessel lost or not lost:" these bills of lading, however, in both instances amounted to a special contract for payment; and that destroys the shipowner's general right of lien for freight on the goods shipped. It is laid down in Abbott, "On Shipping," p. 334 (9th Edit.), that, "Although by the policy of the law, freight, strictly so called, does not become due until the voyage has been performed, it is competent to the parties to a charter-party to covenant by express stipulation in such a manner as to control the general operation of the law." A party has no right to claim possession of a chattel inconsistent with the terms of the contract. *Chase v. Westmore* (5 Mau. and Sel. 180), *Andrew v. Moorhouse* (5 Taunt. 435), *Hutton v. Warren* (1 Mee. and Wels. 466), *Blakey v. Dixon* (2 Bos. and Pul. 321), *Small v. Moates* (9 Bingh. 574. S.C. 2 M. and Scott. 674). The cases of *Gilkison v. Middleton* (2 Com. Ben. Rep. N.S. 134), and *Neish v. Graham* (8 Ell. and Bla. 505), will probably be relied upon by the Respondent. Those cases are distinguishable from *How v. Kirchner*, and differ materially from the present in the form of the bills of lading. Not being then reported, they were not cited before this Court on the hearing of the appeal of [375] *How v. Kirchner* which was decided in December, 1857, after those cases had been determined. The facts in *Gilkison v. Middleton* [2 C.B. N.S. 134], heard by the Common Pleas in April, 1857, are complicated, which may have caused the Court to lose sight of the fundamental principle that a contract to pay for the carriage of goods in a certain way excludes the shipowner's general right of lien. It appears that by a memorandum of charter made at Liverpool, it was agreed that a ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandize for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of £7. 10s. per ton, of fifty cubic feet for tea delivered for the round out and home; other goods, if shipped, to pay in customary proportion; in consideration whereof the outward cargo was to be carried freight free; payment to become due was to be made in this way, £800 on sailing, on charterer's acceptance at three months' date, and the balance on the unloading and delivery of the cargo by approved bills on London, at two months' date, or cash; the Master to sign bills of lading at such rates of freight as might be required by the agents of the charterers, without prejudice to the charter-party; and the owners were to have an absolute lien upon the cargo for the recovery of all freight, dead-freight, demurrage, etc., due to the ship under the charter-party. By another memorandum, indorsed on the above, Singapore was substituted for China; and it was agreed that, on the delivery of the cargo in Singapore, the freighters' agent there should have the option of load-[376]-ing the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be £3375 in full; that, should the vessel proceed to China, the freighters should pay an additional freight of 31s. per ton, on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China, and on acceptance at three months for £900, on the ship's sailing from Liverpool, was substituted for £800. The ship was laden by the charterers chiefly as a general ship, but they shipped on their own account goods, for which the Master signed bills of lading, making the goods deliverable at Singapore to M. and Co., or assigns, paying freight as per margin. In the margin, the freight (in the aggregate, £196. 12s.) was declared to be "payable in Liverpool, one month after sailing of vessel, lost or not lost." The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for £900, which became due on the 23rd of May, and was dishonoured, and the Court held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading, as against the consignees of M. and Co., who had advanced money, to the consignees upon the shipment, but not for the £900. This case was followed by *Neish v. Graham*. When that case came before the Court of Queen's Bench, in November, 1857, the argument was stopped by Lord Campbell, on the ground that the case was concluded by *Gilkison v. Middleton*; and the Court of Queen's Bench, without examining the

soundness of the decision of the Court of Common Pleas held, that a shipowner had a lien for freight as against the [377] Defendant, the assignee of a bill of lading. The goods in that case were shipped by S. from Glasgow to Lima, under a bill of lading, by which freight was to be paid by the shipper, one month after sailing, ship lost or not lost. The bill of lading was handed by S. to the Defendant, for value. S. having made default in paying the freight, the Master at Lima refused to deliver the goods without payment of the freight, claiming a lien, which, notwithstanding the terms of the bill of lading, the Court allowed. Even if those cases can be sustained, yet, there are circumstances in the present case, which are distinguishable and take it out of those authorities. Here the freight is made payable in Liverpool, not to the shipowners, but to a third party, Macdonnell, who probably had made advances on account of the freight. Now, it nowhere appears that Macdonnell was to receive the freight as agent for the shipowners; therefore, payment of freight to the Master at Sydney would be no answer to an action in England for non-payment of the freight to Macdonnell. It is true, Macdonnell could not have brought an action in his own name, as the contract was not made with him; yet, he might have brought an action in England in the name of the shipowners; and, in such circumstances, payment to the shipowners, or even to the Master, or the shipowner's agent, would be no defence.

Secondly. Evidence of the alleged usage and custom at Liverpool was received which ought to have been rejected. But we submit that, even if admissible, the verdict was against the weight of evidence, and assuming the alleged custom to have existed in point of fact, it was first, unreasonable and bad in point of fact; and secondly, such evidence could not affect [378] the Appellants, the assignees of the bill of lading, merchants resident at Sydney, totally unacquainted with such local usage. The first and principal point for consideration upon this branch of the case, is the admissibility of the evidence of the usage at Liverpool. The rule is, that in mercantile contracts such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable. Here it cannot be received, as the effect of it would be to engraft on the bills of lading (negotiable instruments, passing by endorsement the goods to another, *Young v. Mellow* (5 Ell. and Bla. 555).) a custom of trade existing in Liverpool, with reference to which the assignees of the bill of lading residing at Sydney were entirely ignorant. In such circumstances the Appellants were clearly not bound by such a custom. *Bartlett v. Pentland* (10 Barn. and Cr. 770). Lord Tenterden there says, "Usage in a particular place, or of a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with the usage, and adopt it." In *Hall v. Janson* (4 Ell. and Bla. 500), a custom pleaded inconsistent with the terms of a written policy was held inadmissible. Lord Campbell there said (p. 510), in reference to the case of *Brown v. Byrne* (3 Ell. and Bla. 702), that the Court thought that "the marginal note would better express the view taken of the subject by the Judges who concurred in that decision, if it had been said that the custom 'was not inconsistent with the bill of lading,' instead of that it 'controlled the bill of lading.'" So in *Phillips v. Briard* (1 Hurlst. and Norm. 21), the [379] Exchequer Court determined that evidence of a custom which did not explain or annex an incident to the contract, but added a new term to it, was inadmissible. *Blackett v. The Royal Exchange Assurance Company* (2 Cro. and Jer. 244), *Lewis v. Marshall* (7 Man. and Gr. 729), *Hudson v. Clementson* (18 Com. Ben. Rep. 213), *Smith v. Jeffries* (15 Mee. and Wels. 561), are authorities which show that evidence of usage such as the present was unreasonable, and bad in point of fact and law, and ought not to have been received.

Mr. Bovill, Q.C., and Mr. Hutton, for the Respondent.—First. According to the true construction of the terms of the bills of lading, "he or they paying freight for the said goods," the delivery of the goods was conditional upon such freight being paid. *Hov v. Kirchner* (11 Moore's P.C. Cases, 21) was decided by this Court without the cases of *Gilkison v. Middleton* (2 Com. Ben. Rep. N.S. 134) and *Neish v. Graham* (8 Ell. and Bla. 505) having been brought under your Lordships' consideration. Although that case may be distinguished from the present by reason of the particular terms of the bill of lading, yet those authorities must be held to conclude the



question, and be taken as overruling *Blakey v. Dixon* (2 Bos. and Pul. 321), *Small v. Moates* (9 Bingham, 574), *Andrew v. Moorhouse* (5 Taunt. 435), and that class of cases upon which *How v. Kirchner* was founded. *Gilkison v. Middleton* (2 Com. Ben. Rep. N.S. 134) was decided by the Court of Common Pleas in April, 1857. There, by a memorandum of charter made at Liverpool, it was stipulated for the Master to sign bills of lading at such rates of freight as may be required [380] by the agents of the charterers, without prejudice to this charter-party; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, etc., due under this charter-party, and the Court held that the owners had a lien upon the goods so shipped by the charterers for the amount of the bill of lading freight, as against the consignees. Mr. Justice Cresswell said (2 Com. Ben. Rep. N.S. 152).—"It appears by the charter-party that £900 was due on account of freight three months after the ship sailed from Liverpool, and there is a stipulation that the owners shall have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, etc., due under the charter-party; that is, they have a lien upon the cargo for any freight due, and which is not exonerated." That case was followed by *Neish v. Graham* (8 Ell. and Bla. 505), in which the Court of Queen's Bench, holding themselves bound by *Gilkison v. Middleton*, determined that a lien for freight as against an assignee was not waived by the terms of a bill of lading. In *Moeller v. Young* (5 Bla. and Ell. 7; reversed by the Exchequer Chamber, *ib.* 755) the bill of lading stipulated for delivery to the freighter, or his assigns, on paying freight as per charter party, and the Court of Queen's Bench held that payment and delivery were concurrent acts, and that in default of payment the party was justified in refusing to deliver. *Gledstanes v. Allen* (12 Com. Ben. Rep. 202) is also an authority upon this point; *Stevenson v. Blakelock* (1 Mau. and Sel. 535) shows that a lien may exist, although a specific sum be given for payment.

Second. The Court below properly admitted evidence of the usage at Liverpool, in order to show the [381] terms on which the goods were shipped and received on board at Liverpool, the bills of lading not being, according to the mercantile usage at Liverpool, an absolute contract, but only evidence of the terms upon which the goods were shipped. Such evidence was admissible to show a known usage of the port at which the bills of lading were made, not inconsistent with the bills of lading, and with reference to which the parties intended to contract. Baron Parke, in *Hutton v. Warren* (1 Mee. and Wels. 475), explains the principles upon which evidence of custom is admitted. He says,—“It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent, and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.” In *Brown v. Byrne* (3 Ell. and Bla. 702) a bill of lading expressed that goods, shipped at N. were deliverable at L. to order or assigns, “he or they paying freight for the said goods five-eighths of a penny sterling per pound, with five per cent. prime and average accustomed.” By the usual custom in the trade at L. three months' interest, or discount, is deducted from freights, payable under the bills of lading, on goods coming from certain ports, including N. The shipowner claimed the freight without any deduction, concluding that the custom was not binding in law, as contradicting the written contract; but the Court of Queen's Bench upheld the custom, and held that it controlled the bill of lading. Parol evidence of local custom was also admitted in *Phillips v. [382] Briard* (1 Hurlst. and Norm. 21), *Cuthbert v. Cumming* (11 Exch. Rep. 405), *Parker v. Ibbetson* (27 L.J. C.P. 236; 4 Jur. N.S. 536), *Smith v. Wilson* (3 Barn. and Ad. 728), *Bottomley v. Forbes* (5 Bingham, N.C. 121), *Syers v. Jonas* (2 Exch. Rep. 111), Story “On contracts,” sec. 649. The test is whether the evidence is repugnant to the tenor of the contract. Here the evidence of usage was good and reasonable, as explaining that the memorandum, instead of restricting the words in the body of the bill of lading stipulating “for delivery to the shipper's order or assigns, he or they paying freight,” was merely intended to confer upon the shipowners an additional right against the shippers, without prejudice to the liability to pay freight mentioned in the body of the bill, or to the lien of the shipowner. The rights of the Appellants, as assignees of the bills of lading, are no

greater than those of the shippers under whom they claim, and are, therefore, subject to and liable to be affected by the usage of the port at which the goods were shipped. The evidence of the existence and extent of the usage was properly left to the jury, and being unimpeached by any evidence on the part of the Appellants as to the non-existence of such usage, fully supported the verdict.

Mr. Manisty, Q.C., in reply.—*Small v. Moates* (9 Bingham, 590; S.C. 2 M. and Scott, 674) furnishes the true rule. Chief Justice Tindal there says, "An express contract is the strongest and surest ground upon which the right of lien can in any case be placed." Now, in the present case, the bills of lading stipulate that freight is to be payable at the port of shipment, before the [383] arrival of the ship at the port of discharge, and, therefore, clearly excludes any general right of lien a shipowner may have on the goods for freight.—[Their Lordships called upon him to distinguish the case of *How v. Kirchner* (11 Moore's P.C. Cases, 21) from *Gilkison v. Middleton* (2 Com. Ben. Rep. N.S. 134), and *Neish v. Graham* (8 Ell. and Bla. 505).]—*How v. Kirchner* is founded upon principles of shipping law laid down in cases which have fully established that a special contract as to the particular payment of freight destroys the general right of lien of the shipowner upon the goods, *Howard v. Tucker* (1 Barn. and Ad. 712). The decision of the Court of Common Pleas in *Gilkison v. Middleton* must have arisen from a misapprehension of the facts, as it is contrary to law, *Howard v. Tucker*, *Small v. Moates* (9 Bingham, 574), *Andrew v. Moorhouse* (5 Taunt. 435). In *Gilkison v. Middleton* the ship was laden by the charterers chiefly as a general ship, but they shipped on their own account goods for which the Master signed bills of lading, making the goods deliverable at the port of delivery Singapore, to a firm there named or their assigns, paying freight as per margin. In the margin, the freight was declared to be "payable at Liverpool, one month after sailing of vessel, lost or not lost." The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months, for £900, which became due on the 23rd of May in that year, and which was dishonoured: and the Court of Common Pleas held, in those circumstances, that the owners had a lien upon the goods shipped by the charterers for the amount of the bills of lading as against the consignees, who had advanced money upon the shipment, but not for the [384] £900. It is true that case was followed and concurred in by Lord Campbell in *Neish v. Graham* (8 Ell. and Bla. 505). There goods were shipped by S. from Glasgow to Lima, under a bill of lading, by which freight was to be paid by the shipper one month after sailing, ship lost or not lost. The bill of lading was handed by S. to the Defendant, for value. S. having made default in paying the freight, the Master, under instructions from home, refused to give up the goods to the Defendant's agent at Lima, without payment of the freight, claiming a lien upon them, and the Court of Queen's Bench determined that the shipowner had a lien for freight as against the Defendant, for the terms of the bill of lading were not such as to waive his right to it. That case, however, was not fully argued, as the Court of Queen's Bench stopped the case, and, without investigating the case of *Gilkison v. Middleton* (2 Com. Ben. Rep. N.S. 134), considered themselves concluded by its authority. Both those cases are contrary to *Blakey v. Dixon* (2 Bos. and Pul. 321), *Andrew v. Moorhouse* (5 Taunt. 435). The important and sound distinction in respect to the shipowner's right of lien for freight laid down in those cases was recognized in the judgment pronounced by Lord Wensleydale in *How v. Kirchner*. The Court below was wrong in not adopting their previous decision in that case, as it governs the right of the lien of the shipowners in the present case. The evidence of usage at Liverpool not being in the circumstances admissible to add to the bills of lading.

The case stood over for consideration.

Their Lordships' judgment was now delivered by

Lord Kingsdown (March 16, 1859).—In this case the Appellants were British merchants, [385] carrying on business at Sydney, in New South Wales, under the firm of Kirchner and Co. The Respondent was the Master of the sailing-ship *The Countess of Elgin*.

In the month of February, 1854, seven parcels of goods were shipped at Liverpool, on board of this ship, by John W. Fairclough and Co., for which goods seven bills of lading were signed by the Respondent as Master. One of these bills of lading was in



the following terms:—"Shipped in good order and condition, by J. W. Fairclough and Co., in and upon the good ship or vessel called *The Countess of Elgin*, whereof is Master for this present voyage, and now lying in the port of Liverpool, and bound for Sydney, five hundred cases champagne wine, being marked and numbered as per margin, and are to be delivered in like good order and condition, at the aforesaid port of Sydney (all and every the dangers and accidents of the seas and navigation, of whatsoever nature or kind excepted), unto order or to assigns, he or they paying freight for the said goods here as per margin, with average accustomed.

"In witness whereof, the Master or purser of the said ship or vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void.

"Dated in Liverpool, this 16th day of February, 1854.

"Contents unknown. Not liable for breakage or leakage, unless from improper stowage. J. B. Venus."

In the margin of the bills the sums due for freight [386] and average were stated, and the following words were added:—"Freight payable in Liverpool to *Æneas Macdonnell*, one month after sailing, vessel lost or not lost."

These words in the original bill of lading are stamped in print.

The other bills of lading were substantially to the same effect. The variations are not such as, in their Lordships' judgment, affect the questions which arise on the appeal. They will, therefore, confine their attention to the bill of lading thus set forth.

This bill of lading had passed into the hands of the Appellants as indorsees for value, before the ship arrived at Sydney; and on her arrival in the month of August, 1854, they applied to the Respondent for the delivery of the goods.

The Respondent had learned that the sum agreed to be paid for freight in Liverpool had not been paid, and he, therefore, refused to deliver the goods without payment of that sum.

The Appellants thereupon, on the 28th of August, 1854, commenced an action against him in the Supreme Court of New South Wales, for the wrongful conversion of the goods; to which the Defendant, now the Respondent, pleaded "that he claimed to hold the goods as a lien and security for the sum due to him for the freight and carriage of the goods by him as a common carrier, from England to Sydney aforesaid, for the Appellants (the Plaintiffs in the action), and which sum, although demanded, had not been paid."

Issue having been joined, the Defendant applied to the Court in the month of October, 1854, for a commission to examine witnesses in England, in order to [387] prove, "that by the usage or custom of merchants the shipowner, in case of non-payment of freight, does not lose his lien, security, or claim upon the goods, upon the arrival of the ship at her port of discharge, notwithstanding that, by the terms of the bill of lading, freight is stated to be made payable in England." This application was opposed by the Plaintiffs, on the ground, amongst others, that the proposed evidence would vary the contract, and so, if obtained, would be inadmissible.

The Court, however, made an order for issuing the commission. Evidence was taken under it, and the depositions of the witnesses were read (though objected to by the Plaintiffs) on the trial of the action. It was contended by the Defendant that the evidence proved the existence at the port of Liverpool of the alleged custom, and it was admitted by the Plaintiffs that no part of the sum claimed for freight had been paid in Liverpool.

The case came on for trial, for the first time, on the 12th of August, 1856, when the Chief Justice told the jury that if they believed that such a usage as the one relied on prevailed generally in the town of Liverpool, their verdict should be for the Defendant; and if not, then for the Plaintiffs. The jury found for the Plaintiffs.

An application was made for the new trial, one of the reasons assigned being, "that inasmuch as by the bills of lading upon which the questions arose in the case, the goods were made deliverable to the shipper's order, or assignees', he or they paying freight, such freight was, in point of law, payable by the Plaintiffs as consignees and endorseees, either in Liverpool, or, [388] in default thereof, in Sydney, before they could demand delivery of the goods." The Court granted a new trial,

which came on to be tried on the 10th of February, 1857, when the jury found a verdict for the Defendant.

On the 16th of February, 1857, the Plaintiffs moved the Court that the verdict found for the Defendant might be set aside, and a verdict entered for the Plaintiffs, or that a new trial might be granted, on grounds which included the following:

"That the evidence on the part of the Defendant was improperly admitted, because it not only added an incident to a written contract, but defeated it by giving a lien as for freight; whereas the contract in writing was, by law, not for freight at all, and gave no lien, and because it was irrelevant to the issue, which was a claim of lien by the Defendant as a common carrier, which could not be supported by proof of any local usage of Liverpool." Another ground was that the evidence was offered to affect the Plaintiffs, who were no parties to the contract, and were not liable to pay any freight or remuneration by such contract. It was also insisted that the evidence did not prove the existence of the alleged custom, even at Liverpool, and that evidence that no such custom existed in London had been improperly rejected, and that due weight had not been given to the evidence of the Plaintiffs that no such custom of Liverpool was known at Sydney.

The Court refused a new trial, expressing their opinion—"first, that irrespective of any question of usage, no lien for freight exists in cases of this kind; but secondly, that a custom or usage in favour of such a lien existing in the port of shipment where the con-[389]-tract was made, will (the stipulated freight, or sum so called, not being paid) confer the right of lien." The Chief Justice then observes, that the evidence to prove the custom, though not very cogent, or on all points as clear as might have been desired, was, in the opinion of the Court, sufficient, and, at all events, that the effect of it had been properly submitted to the jury.

On these grounds the Supreme Court refused the Plaintiffs' motion, and from the Order containing that refusal the present appeal is brought.

In their judgment the Court below refer to their decision in a previous case of *Kirchner v. How*, in which they had held that when by the bill of lading, the sum called freight was to be paid by the shipper at the port of shipment, no lien upon the goods could be maintained against the consignee of the goods at the port of discharge, if, in fact, the money had not been paid. That case was brought by appeal before the Judicial Committee, and the decision was affirmed, Lord Wensleydale and Sir William Maule being two of the members of the Committee present on the occasion. The case of *How v. Kirchner* was decided here in December, 1857, and is reported in 11 Moore's P.C. Cases, 21.

If that decision be correct, the only question now for consideration is, whether the Court below has properly found that the rights of the parties in the present case are altered by the effect of the custom alleged to exist at Liverpool.

But, in the course of the argument before us, our attention was called to two cases; one in the Court of Common Pleas, and the other in the Court of Queen's Bench; in which, as it was said, in a state of circum-[390]-stances not distinguishable in principle from *How v. Kirchner*, those Courts had arrived at a conclusion different from that of the Judicial Committee. These two cases were *Gilkison v. Middleton* (2 Com. Ben. Rep. N.S. 134); and *Neish v. Graham* (8 Ell. and Bla. 505).

It will be necessary to examine these cases with great attention, and with all the respect which is due to the very high authority of the Courts in which they were decided; but before we do so, it may be convenient to state the principles of law by which we apprehend that the decision of cases of this description must be governed.

The right of lien may arise either by implication of law, or by express contract between the parties. Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery: if the goods are lost on the voyage, nothing is payable. On the other hand, if the goods are safely carried, the Master of the ship has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight be paid. These incidents to freight exist by rule of law, without reference to any bill of lading, or other written contract between the parties.

But a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire



the legal character of freight, because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is, in effect, money to be paid for taking the goods on board and undertaking to carry, and not for carrying them. This was, in substance, decided by the cases of [391] *Blakey v. Dixon* (2 Bos. and Pul. 321), and *Andrew v. Moorhouse* (5 Taunt. 435).

In the former case the declaration alleged that in consideration of the Plaintiff having taken on board his ship certain goods to be carried to Surinam, the Defendant undertook to pay him the money due to him for freight and carriage of the same on the delivery of the bill of lading. It was held by the Court that the declaration was bad on demurrer, on the ground that it claimed money due for freight, whereas nothing could be due for freight except for actual carriage of the goods.

In the case of *Andrew v. Moorhouse* [5 Taunt. 435], where the shipper of goods had the option either of paying freight on the delivery of the goods at the port of discharge, or of paying it at a less rate at the port of shipment on the sailing of the ship, and he elected to pay at the port of shipment, he was held not to be relieved from his obligation to make the payment, because the goods were lost on the voyage, and, therefore, no freight, in the proper sense of the expression, ever became due.

No doubt parties who have superseded by a special contract the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered, and they may do this either by express conditions contained in the contract itself, or by agreeing that in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight. But in such case the right of lien depends entirely on the agreement, and if the parties have not, in fact, made such a contract, [392] it is very difficult to understand upon what grounds it can be implied, or why, upon failure of performance of the agreement which they have made, the law is to substitute for it another and very different contract which they have not made. To use the language of Lord Ellenborough in *Stevenson v. Blakelock* (1 Mau. and Sel. 543), "where there is an express antecedent contract between the parties, a lien which grows out of an implied contract, does not arise."

The inconveniences of establishing such a lien are very serious. If the shipowner has a lien on the goods, unless the money agreed to be paid at the port of shipment has actually been paid, what, on arriving at the port of discharge, is the Master to do? In many cases, probably in most cases, he can have no means of knowing whether the payment has or has not been made; the fact itself may be a matter of uncertainty, depending on the state of disputed accounts between the shipowner and the merchant; or the money, though not paid at the day, may have been subsequently paid; or securities may have been taken, or other arrangements made for giving time. Is the Master to withhold the goods from the consignee till by communication with the port of shipment all these matters have been cleared up? This communication may occupy weeks, or even months, and the profit or loss on the adventure, and even the well-being or ruin of the consignee, may depend, from the state of the markets, on the delivery of the goods a day or two sooner or later.

Take, again, the case of an indorsement of a bill of lading. We know how largely these instruments are used for the purpose of raising money on the credit of the goods consigned by them. If an [393] indorsee on looking at the bill sees that the goods are subject to the payment of freight, he calculates the value of the goods, and measures his own advances accordingly. So, if he knows that the goods are not subject to freight, and that the bill of lading is what is termed "a clean bill," he is equally relieved from embarrassment; but how can he make advances with any safety, if it be left in doubt on the bill of lading whether the goods are to be liable to charge for carriage or not; if the liability of the goods to the payment of freight depends, not on the agreement appearing on the bill of lading, but on the question whether that agreement has or not been actually performed, and if the title to receive the goods is liable to be suspended till these facts have been ascertained?

It was upon these grounds that their Lordships proceeded in the case of *How v. Kirchner* [11 Moo. P.C. 21], in ignorance that any different decision had been pronounced by any other Court.

We will proceed to examine the two cases to which we have adverted, *Gilkison v.*

*Middleton* [2 C.B. (N.S.), 134], and *Neish v. Graham* [8 E. and B. 505]. The facts in *Gilkison v. Middleton*, as far as they are material to the present purpose, are these. The Plaintiffs, who were shipowners, had chartered a vessel to Syers and Co., for a voyage to Singapore, out and home, in consideration of a sum of between £3000 and £4000, to be paid for the hire of the ship. Of this sum £900 were to be paid by the charterer's acceptance at three months' date on the sailing of the ship, and the remainder on the arrival of the ship from her return voyage. The outward cargo was to be freight free; then followed the stipulations on which the decision turned. It was [394] provided that the Master of the ship should sign bills of lading at such rates of freight as might be required by the agents of the charterers, without prejudice to the charter party, and that the shipowners should have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, etc., due to the ship under the charter party. By the effect of this instrument the freight for all goods put on board this vessel would be due to the charterers. They shipped on board for the outward voyage certain goods of their own, which of course they might, if they pleased, have shipped free of freight; but they procured the Master, under the power conferred on him by the charter party, to sign three bills of lading for these goods at certain rates of freight, amounting altogether to £196 12s. These goods were consigned to the Defendants as agents for the charterers at Singapore for sale, on account of the charterers. In the margin of the bills of lading were the words, "Freight payable in Liverpool, one month after sailing of the vessel, lost or not lost." As regarded the parties themselves this was a mere illusion. Syers and Co., as shippers of the goods, were to pay the freight which, in their character of charterers of the vessel, they were entitled to receive. They indorsed over these bills of lading, however, to C. S. Middleton and Son for an advance of money; C. S. Middleton and Son being, in fact, a partnership trading under that name at Liverpool, and the same persons to whom, as agents of the shippers, the goods were consigned under the firm of Middleton and Co., at Singapore. The ship sailed on her voyage, and the bills for £900 were given by the charterers to the Plaintiffs, the shipowners; but before the goods arrived at Singa-[395]-pore, the bills were dishonoured, and the Master of the ship received notice of this fact from the shipowners before the delivery of the goods. In this state of circumstances the shipowners claimed a lien on the goods of the charterers for the amount of the bills so unpaid, or, at all events, on the freight payable on those goods under the bills of lading.

The case turned entirely on the construction of the charter party, by which, while on one hand it was expressly provided that the shipowners should have a lien on the cargo for all freight due under the charter party: on the other hand, it was provided that the outward cargo should be freight free, and it was insisted on the part of the consignees that the lien must, therefore, be confined to the homeward cargo: no such cargo, in fact, ever having been loaded. The Court, however, was of opinion, that the lien extended to all the cargo, whether outward or homeward, and the grounds of the judgment were thus stated by the Chief Justice Cockburn:—"The cargo being expressly made liable for all freight due under the charter party, it follows, that, on the arrival of the ship at Singapore, there was £900 due for freight, for which the cargo was liable. If matters had so remained, the owners clearly would have had a lien for that £900. But they have, by their Master, become parties to bills of lading making the goods deliverable to the consignees on payment of certain specified freight; and the Defendants have made advances upon the faith of those bills of lading. The owners, therefore, have, by their own act, placed third parties in a situation in which they would sustain prejudice by their insisting on the full right to which they would otherwise have been entitled. That being so, it [396] seems to me, that the utmost the Plaintiffs can be entitled to recover, as against the consignees, is the freight mentioned in the three bills of lading, and for that sum, and that sum only, they are entitled to the judgment of the Court."

In this judgment it is rather assumed than decided that by the terms of the bills of lading, the goods were deliverable to the consignees only on payment of the freight. The argument at the bar was directed mainly to the construction of the charter party, and the effect of the special provisions in the bills of lading was not argued by the Defendant's Counsel, or, if at all, not in such a manner as to bring distinctly under the view of the Court the very important question involved in it.



with the decided cases bearing upon the point, and the consequences which must result from the decision.

In the case of *Neish v. Graham* [8 E. and B. 505], the same question, which, a month afterwards, came before this Committee in *How v. Kirchner* [11 Moo. P.C. 21], was raised in the Court of Queen's Bench, and if that Court had, on its own view of the case, come to a different decision, we should have felt ourselves placed in the greatest difficulty on the present occasion. On looking, however, through the report of that case, it is clear, that it was decided solely on the authority of *Gilkison v. Middleton* [2 C.B. (N.S.), 134]. All the observations which fell from the Court before that case was cited, appear to be adverse to the decision ultimately pronounced. Lord Campbell, in stopping the reply, observes: "If *Gilkison v. Middleton* had been cited earlier in the argument, we should have relieved Mr. Kemplay sooner. It is a decision exactly in point. But for that case, it might have been argued that, though there is always [397] a lien where it is not waived, yet there is such a waiver when the freight is to be paid at the port of discharge [which must be a misprint for port of shipment] within a month from the sailing of the ship. But, we find, that the Court of Common Pleas, in a case quite in point, has decided otherwise: and I am not at all prepared to disagree with them. At all events, here is an express decision by a Court of co-ordinate jurisdiction."

Each of the other Judges concur solely on the authority of *Gilkison v. Middleton* [2 C.B. (N.S.), 134].

It is, perhaps, hardly possible for the most acute, able, and experienced Judges to collect with perfect accuracy all the circumstances of a case so complicated as *Gilkison v. Middleton*, by merely looking at the report during the progress of an argument before them. For the reasons which we have explained, we cannot think that the point in question can be considered as concluded by that decision; and *Neish v. Graham* [8 E. and B. 505] rests entirely on its authority.

Having again considered the law laid down in *How v. Kirchner* [11 Moo. P.C. 21], with the most earnest desire to correct our view of it, if we could discover it to be erroneous, we must say that, upon principle, it appears to us to be right, and that we are bound to abide by it.

It was contended, indeed, by the Appellants, that whatever the law may be in the cases of *Gilkison v. Middleton* and *Neish v. Graham*, there is a circumstance to be found in the present case sufficient to distinguish it in their favour from those authorities. That circumstance is, that the freight is here made payable not to the shipowner, but to a third person, namely, *Aneas Macdonnell*; that it does not appear that he was to receive the freight as agent for the [398] shipowners; that he may have made, and probably has made, advances on account of the freight, and that, in such case, payment of freight to the Master at Sydney, would be no answer to an action in England, for non-payment of freight to *Macdonnell*; that although *Macdonnell* could have brought no action in his own name, as the contract was not made with him, yet, that he might have brought an action in the name of the shipowners, and that in such action payment to the shipowners, or the Master as their agent, would be no sufficient defence.

There appears to their Lordships to be great weight in these arguments; but it is of so much importance to the public interest that questions of general mercantile law should be determined rather upon broad principles than upon nice distinctions in each particular case, that they prefer to rest their decision on the ground that, where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist, and that when the contract made gives no lien the law will not supply one by implication.

For these reasons, their Lordships are of opinion that, unless the contract in this case can be extended by the usage of the place where it was made, so as to have an effect which in itself it does not bear, the lien cannot be maintained.

It was strongly argued before us that the evidence in this case was not admissible, for that its object was to introduce into the contract a term inconsistent with its actual contents, which it is clear cannot be done. It is not necessary in our

view to decide this [399] point, and it is, perhaps, therefore, better to express no opinion upon it.

Nor do we find it necessary to consider whether the evidence actually given was sufficient to support the finding of the jury.

The ground upon which it appears to us that this case must be decided in favour of the Appellants, is this, that when evidence of the usage of a particular place is admitted, to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their agreement with reference to it. But, no such presumption can arise when one of the parties is ignorant of it. In this case, the indorsees of the bills of lading were resident, not in Liverpool, but in Sydney, and though they may be agents for merchants resident in London, there is no evidence that those gentlemen were acquainted with the alleged usage of Liverpool.

It appears to their Lordships that it would be inconsistent alike with the rules of law and the convenience of commerce, to affect the construction of a negotiable instrument in the hands of a *bona fide* holder for value by evidence of a local usage of which he was ignorant, and could not be bound to take notice.

In the case of *Howard v. Tucker* (1 Barn. and Ad. 712), where a bill of lading represented the freight of goods to have been paid, when in fact it had not been paid, it was held by the Court that though such representation was not conclusive as between the shipper of the goods and the shipowner, yet as against the indorsee for value of the bill of lading [400] without notice, the freight must be held to have been paid.

If the bill of lading holds out that the goods are to be delivered free of freight to the consignee, it can be of no importance from what cause such exemption from freight arises: and being of opinion, for the reasons already explained, that such is the representation contained in these bills of lading, we must hold no freight can be claimed in this case from the consignees.

We must advise Her Majesty to reverse the judgment appealed from, a new trial must be ordered, and the Appellants must have their costs of this appeal.

[Mews' Dig. tit. EVIDENCE, III. d. 9. USAGES AND CUSTOMS OF TRADE, a. *Principle of Admissibility*; tit. LIEN, A. GENERAL PRINCIPLES, 1. *Nature of Right*; tit. SHIPPING, A. XIII. FREIGHT, 1. *Nature of*, 3. *Payment*, a. *To Whom*, i. *Generally*, 4. *Lien on Cargo*, a. *Creation of*, c. *Against Indorsee or Assignee of Bill of Lading*. S.C. 7 W.R. 455; 5 Jur. N.S. 395. See *Buckle v. Knoop*, 1867, L.R. 2 Ex. 129; *M'Lean v. Fleming*, 1871, 2 H.L. Sc. 128; *Allison v. Bristol Marine Insurance Co.*, 1876, 1 A.C. 209.

#### ON APPEAL FROM THE SUPREME COURT AT MADRAS.

THE EAST INDIA COMPANY.—Appellants: ANDREW ROBERTSON, and JOHN GOLDINGHAM, and Others,—Respondents \* [March 15, 16, 17, 1859].

The Madras civil service annuity fund was created for the purpose of providing annuities to the civil servants of the East India Company in the Madras Presidency, upon retiring from service. The annuities were to be provided for by subscriptions of the civil servants to the fund, to the amount of one half, and by contributions by the East India Company to the extent of the other half. These contributions were to be received by trustees and applied by them to make good the deficiency which was to be supplied by the Company.

\* Present: The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir Edward Ryan, the Right Hon. Sir Cresswell Cresswell, and the Right Hon. Sir Lawrence Peel.



It appeared that in some instances the trustees of the fund, where an excess of subscriptions had been paid by a subscriber entitled to an annuity beyond the half value of the annuity, had returned the excess. R., a subscriber, from the institution of the fund in 1825, had contributed beyond the half value of his annuity. Held that, although the regulations of the Madras civil service annuity fund did not justify a refund to a subscriber of the amount of his subscriptions in excess of the prescribed amount, yet that the practice which had prevailed of the trustees refunding the contributions in excess, and the acquiescence of the East India Company in such practice, precluded the Company from disputing the right of the subscriber to repayment of the surplus of his subscriptions in excess of the half value of the annuity payable out of the fund [12 Moo. P.C. 465, 466].

Two sets of Defendants severed in defence (their interests involving an alternative as to which was responsible to the Plaintiff), and the Court below fixed one set of the Defendants with the liability. Upon an appeal in which the Plaintiff was made sole Respondent, the other Defendants were held entitled to appear, and to lodge a separate case [12 Moo. P.C. 403].

This was an appeal from a decree of the Supreme Court of Judicature at Madras, which declared the Respondent, Robertson, entitled to the repayment [401] by the Appellants of the accumulated amount of his subscriptions to the Madras civil service annuity fund, and of interest thereon in excess of half the value of the annuity payable to the Respondent, Robertson, out of the fund.

The suit was instituted by the Respondent, Robertson, against the Appellants and the other Respondents, John Goldingham, Guy Lushington Prendergast, Thomas Pycroft, Franklyn Lushington, George Ellis, Alexander John Arbuthnot, and James Duncan Sim, the managers and trustees of the Madras civil service fund. The object of the bill was to compel a refund or repayment by the Appellants and the trustees of the fund, of the accumulated amount of the Respondent, Robertson's, subscription to the Madras civil service annuity fund, and interest in excess of half the value of the annuity payable to him out of the fund. The question turned upon the constitution and construction of certain deeds creating the Madras civil service annuity fund, and the rules and regulations for the [402] administration of that fund. The facts, with the history of the institution of the fund, are so fully set forth in the judgment that any further statement here is unnecessary.

By the decree of the Supreme Court at Madras, it was declared that the Plaintiff was entitled to a refund or repayment of the surplus or excess paid by the Plaintiff to the Madras civil service annuity fund, as a subscriber to the fund, with interest thereon from the 28th of April, 1855, to the day of payment, at the rate of five per cent per annum. And the Court further decreed that the Defendants, the East India Company, should pay to the Plaintiff the sum of Rs. 39,014, being the amount of such surplus or excess, and also the sum of Rs. 5055, being the amount of interest, making together the sum of Rs. 44,069. And the Court further declared that the Defendants, the East India Company, were liable to pay to the Plaintiff an annuity of £1000 per annum up to the time of his death.

The Appellants brought the present appeal from that decree. They made Robertson, the Plaintiff in the Court below, the sole Respondent to the appeal.

In consequence of which

Mr. W. W. Mackeson (2nd Dec. 1858 \*) moved, on behalf of the Defendants, the trustees and managers of the civil service annuity fund, for leave to appear separately, as they had an interest dis-[403]-tinct from the East India Company, who sought to make the trustees of the fund responsible to the Respondent.

Mr. W. H. Melvill, for the Appellants, opposed, on the ground that it would entail unnecessary expense upon the fund, if the trustees were made parties.

Their Lordships were of opinion, that as the trustees had put in a separate

\* Present: The Right Hon. Dr. Lushington, The Right Hon. The Lord Justice Knight Bruce, the Right Hon. The Lord Justice Turner, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.

answer in the Court below, and the Appellants sought to fix them with the liability, they were entitled to appear and lodge a separate case.

The appeal was argued by Sir R. Bethell, Q.C., Mr. E. J. Lloyd, Q.C., and Mr. W. H. Melvill, for the Appellants; and Mr. R. Palmer, Q.C., and Mr. Freeling, for the Respondent, Robertson.

Mr. Rolt, Q.C., and Mr. W. W. Mackeson, appeared for the trustees of the fund, but were not called upon, as the Appellants undertook the responsibility of the trustees.

The points submitted to their Lordships in argument sufficiently appear in the judgment. The authorities cited were, upon the question whether Robertson was entitled to have the excess of his subscriptions refunded, *Boldevo v. The East India Company* (a), *Davis v. The Trustees of the Madras Civil Service Fund* (b). [404] And, as to the effect of the mistake in the construction of the rules and regulations of the Madras civil service annuity fund, by the trustees in granting a refund to annuitants, entitling a subscriber to relief in equity. *The Directors of the Midland Western Railway of Ireland v. Johnson* (6 H.L. Cases, 798), *Kerr v. The Middlesex Hospital* (2 De G. Mac. and Gor. 576), *Stokes v. Heron* (12 Clk. and Fin. 161), *Rawlings v. Jennings* (13 Ves. 38), *Stretch v. Watkins* (1 Madd. 253), and *O'lough v. Wynne* (2 Madd. 188), were referred to.

Their Lordships' judgment was delivered by

The Lord Justice Turner (20th June, 1859).—This is an appeal by the East India Company from a decree of the Supreme Court of Judicature at Madras, by which that Court declared the Respondent, Robertson, to be entitled to a refund or repayment of the surplus, or excess, paid by him to the Madras civil service annuity fund, as a subscriber to the fund, with interest from the 28th of April, 1855 (the date to which the Respondent's account was made up by the trustees of the fund), to the day of payment, at the rate of £5 per centum per annum; and the Court decreed the East India Company to pay to the [405] Respondent the sum of Rs. 44,069, the amount of such surplus, or excess, and interest; and the Court also declared that the East India Company was liable to pay to the Respondent an annuity of £1000, up to the time of his death, and decreed the Company to pay the same accordingly; and, further decreed the Company to pay the Respondent's costs of the suit. There were some further directions in the decree as to acts to be done by the trustees of the fund, for the purpose of effectuating the payments decreed to be made by the Company, but it is unnecessary to refer particularly to those directions, the Company having very properly, upon the hearing of the appeal, taken upon themselves the case of the trustees.

The Madras civil service annuity fund had its origin in the year 1800, when it was determined that the objects of an institution, which had been founded in the year 1787, to provide for the widows and children of the civil servants of the Madras Presidency, should be extended for the purpose of securing to a certain number of the civil servants of the Presidency annuities on which they might retire from the service.

This extension was carried into effect by a deed poll, dated the 1st of September, 1800. In the year 1814, the funds of the institution, to which the East India Company were large contributors, had greatly accumulated, and it was determined to separate the charity and annuity branches of the fund, and to increase the number of the annuitants.

A deed poll, dated the 1st of July, 1814, was accordingly executed by a large

(a) 26 Beav. 316. Affirmed on appeal by the Lord Chancellor, Jan. 11th, 1860.

(b) This case is not reported. The facts were these:—In the year 1852, Davis, a member of the civil service, and a subscriber to the Madras fund of 1825, filed a bill in the Supreme Court of Madras against the then trustees of the fund, for the refund of the excess of his subscriptions over the half value of his annuity; the suit was defended by the trustees on behalf of the East India Company. On the 7th of August, 1856, a decree was passed, whereby it was declared that Davis was entitled to a refund of such surplus; and the trustees were directed to pay the same to him with costs. The trustees accordingly paid the surplus.



number of the civil servants of the Presidency. The provisions of this deed were to this effect; the accumulated funds of the institution were assigned to trustees, as to five-[406]-eighths, in trust for the charity branch; and as to the remaining three-eighths, in trust for the annuity branch. There were to be seven trustees of the funds, of whom the Chief Secretary and the Accountant-General of the Madras Government were to hold the office *ex officio*, and the others were to be annually elected. The Sub-treasurer of the Madras Government was to be the treasurer of the institution, and the moneys belonging to the fund were either to be kept in the public treasury, or invested on public Government securities; and as to the annuity branch, in order to secure the payment of twenty-three annuities of £400 each, a capital of two and a half lacs of star pagodas was to be raised by the three-eighths of the capital belonging to the fund and the accumulations upon it, and by the contributions of the East India Company, and the payments of the parties to the deed. Each party was to pay to the annuity branch two per cent. per annum on all his salaries, allowances, emoluments, and fees of office, until the two and a half lacs of star pagodas should have been accumulated; but no party was to be required to subscribe towards forming the accumulated capital more than 2500 pagodas. When the two and a half lacs of star pagodas should have been accumulated, the rate of subscription was to be reduced to such an amount as would provide the annual sum of 8000 pagodas, being the sum required, with the interest on the accumulated capital, to answer the twenty-three annuities of £400. Each of the annuities was to be payable for the life of the person accepting it. The annuities were to be offered to the civil servants, parties to the deed, according to their seniority, but no party was to be allowed to accept an annuity from [407] the fund until he should have paid to the annuity branch the sum of 2000 pagodas. The number of the annuities was not to exceed twenty-three, unless the Court of Directors should previously sanction an increased number. Any party accepting an annuity was to resign the service before the 1st of January next following his acceptance.

Another deed poll, dated the 1st of May, 1818, was afterwards executed by many of the civil servants of the Presidency. By this deed, after reciting the deed poll of 1814, it was agreed that sixty annuities of £600 sterling should thereafter be granted and paid to the persons who were parties to the recited deed, and to that deed, under the same provisions, however, as were contained in the recited deed as to the annuities of £400; it was further agreed that none of the parties to the deed should be allowed to accept an annuity of £600, until he should have paid to the annuity branch of the fund the sum of 5490 pagodas, except that a remission or abatement was to be made in favour of certain parties. It was also agreed that the increased monthly contribution to the annuity branch of the fund should be paid by each of the parties to the deed so long as he continued to receive salary, allowance, emoluments, or fees of office, notwithstanding he might have subscribed the whole of the 5940 pagodas; and the contribution thereafter to be made by the parties to the annuity branch was fixed at the rate of three and three-quarters per cent. per annum, on all salaries, allowances, emoluments, and fees of office.

In the year 1824, the East India Company concurred with their civil servants in Bengal in the establishment of a fund for granting them annuities on [408] their retiring from the service. The principles on which that fund was to be established, and the rules by which the application of it was to be governed, were contained in a despatch from the Court of Directors to the Government of India, dated the 8th of December, 1824, and in a paper appended to that despatch, containing the regulations of the fund as proposed by a committee of the Bengal civil servants, with the alterations in those regulations which the Court of Directors considered to be necessary.

The despatch is to this effect: it notices, in the early part of it, the annuity funds at Madras, and that at Madras the condition of the grant of the annuities was that the grantee should have paid, either in subscriptions to the fund, a certain aggregate sum, or that he should pay the difference between such sum and the amount of his subscriptions. It then points out, in paragraph 40, that an annuity fund to be successful must derive material assistance from the Company; and then in paragraphs 41, 42, 43, it proceeds thus:—"41. A contribution to an annuity

fund from the Company is evidently a boon to the service, and operates precisely in the same way as if the Company itself were to grant annuities to civil servants upon retirement, so that the real pecuniary advantage to the service of a fund so constituted is, that a civil servant, when he retires, has in addition to his own savings, whether they have accumulated in the shape of subscriptions to the fund, or in any other mode, a life annuity proportionate to his share of the Company's contribution to the fund; and if, in aid of their direct contribution, the Company protect the fund from loss by establishing fixed rates of interest and exchange, then the servants derive the [409] further advantage of individual protection from these contingent losses to the extent of their individual property in the fund.

"42. With a view to establish a fund on such liberal principles as to insure its success as a measure highly beneficial to the whole service, we conceive that the Company's contribution should be proportionate to the contribution of the service, and the amount of both must necessarily be fixed in relation to the extent of the advantages which the fund may be destined to afford.

"43. These advantages should certainly be considerable, because, in order that the fund may be beneficial to the service, it is important that all the annuities from it, as they accrue, should be accepted by old servants, so as that the fund may not be instrumental to the retirement of young and active servants; and it cannot be expected that old servants in the possession, as they generally are, of lucrative offices, would be tempted to retire if the annuity did not afford a material addition to such income as the party may possess."

Then in paragraph 44, it states that the attention of the Court of Directors has been directed to four particulars; first, the amount of each annuity; second, the number of the annuitants; third, the proportion of the value of the annuity which should be paid by the annuitant; and fourthly, the security that the annuities will be regularly paid.

As to the amount of the annuity, it states, in paragraph 46, that the Directors have come to the determination that the annuities should not fall short of Rs. 10,000 each, payable in England at the rate of 2s. the rupee, being £1000 sterling.

[410] Then, as to the number of the annuities, it proceeds in paragraph 47 thus:—"The next point which has called for consideration is the number of annuities which should be granted in each year; upon which we have found it necessary, in the first place, to determine what should be the qualification of an annuitant in respect of length of service; and we have resolved that a civil servant should not be eligible to accept an annuity, unless he have been actually in the civil service the full period of twenty-five years, or upwards, and resident in India in the service not less than twenty-two years;" and then in paragraph 48, "We are also of opinion, that the fund should be so constituted as to afford a reasonable expectation that at the end of twenty-five years from the date of appointment to the service, a civil servant, having completed the term of actual residence already specified, would obtain the offer of an annuity."

And then, in paragraph 51, it states that the Directors have determined that nine should be the number of the annuities in each year. It then enters upon the question as to the proportion of the value of the annuities which should be paid by the annuitants; as to which it proceeds in paragraph 52 thus: "The third point requiring attention, is the proportion of the value of the annuity which should be paid by the annuitants, or, in other words, what shall be the sum paid by a servant, including his accumulated subscriptions, to entitle him to an annuity if otherwise eligible; upon which point, we must observe, that we consider it of essential importance that, so far as may be practicable, the advantages afforded by the fund should be available by those eligible to receive them upon terms of strict equality."

"53. If the an-[411]nuitants were all of the same age when they became such, this point could, in a great degree, be accomplished by fixing an aggregate sum as the purchase-money for the annuity, but as the ages of the annuitants must naturally vary, it follows that, to maintain strict equality, the amount of the purchase-money should depend upon the value of the annuity, which, of course, is regulated by the age of the annuitant." "54. The Committee of the servants upon your establishment propose that 'any subscriber who may accept the tender of an annuity shall be required, to entitle him to such an annuity, to pay to the institution the differ-



ence between two-thirds of the actual value of the annuity on his life and the accumulated value of his previous contributions, in case the latter quantity shall be less than the former.' " 55. But as, for the reasons already assigned, we have determined that the annuity be Rs. 10,000, we are of opinion that, in order to render that arrangement of important value to the service, the proportion of purchase-money should be reduced, and we have accordingly resolved to fix it at one-half the value of the annuity, according to the following table, which is calculated upon the principle of our allowing an interest of 6 per cent. per annum upon all the balances of the fund, as hereafter explained, viz. :—

|       |                                     | Rupees.  |
|-------|-------------------------------------|----------|
|       | If of the age of 40 years . . . . . | 1,07,050 |
|       | „ 41 „ . . . . .                    | 1,05,800 |
|       | „ 42 „ . . . . .                    | 1,04,730 |
|       | „ 43 „ . . . . .                    | 1,03,560 |
|       | „ 44 „ . . . . .                    | 1,02,350 |
|       | „ 45 „ . . . . .                    | 1,01,100 |
| [412] | „ 46 „ . . . . .                    | 99,800   |
|       | „ 47 „ . . . . .                    | 98,410   |
|       | „ 48 „ . . . . .                    | 97,070   |
|       | „ 49 „ . . . . .                    | 95,630   |
|       | „ 50 „ . . . . .                    | 94,170   |
|       | „ 51 „ . . . . .                    | 92,730   |
|       | „ 52 „ . . . . .                    | 91,290 " |

" 56. Upon this principle, a servant getting an annuity at the expiration of twenty-five years' service, and at the age of forty-five, will pay altogether, including interest upon his subscriptions, Rs. 50,550, for an annuity of Rs. 10,000, instead of Rs. 47,180, the sum proposed by the Bengal civil servants, for an annuity of Rs. 7000."

" 57. But although in the mode here proposed all servants, upon becoming annuitants, will pay half the value of their respective annuities, and no more, and will so far be placed upon an equal footing, yet it has not escaped our observation that there will be a material difference in the value of the risks incurred by the several subscribers of losing, by death or early retirement, the amount of their contributions."

And, after pointing out in this 57th paragraph the differences of risk arising from the different amounts which would be payable by the different subscribers and the different periods for which they would pay, it brings this part of the subject to a conclusion in the same 57th paragraph, in these words:—" Thus it is clear that subscribers becoming annuitants during the first twenty-five years, will not have incurred a risk of equal amount, either relatively one with another or with those who become annuitants after the expiration of that period. Of this advantage, however, existing servants could not be deprived [413] without sacrificing one important object of the fund, viz., the inducement which it will afford to old servants who retire; and it may also be observed that the benefit which the younger servants will derive from such retirements, together with the advantage which they will severally possess of accumulating a fund for the purchase of the annuity by gradual deposits, improved at a fixed and favourable rate of interest, will, in a great degree, countervail the difference of risk as compared with their seniors, who will not have enjoyed to the same extent the benefit either of accelerated promotion or accumulation by gradual deposits at interest."

Proceeding then to the fourth head, that of security, it points out, in paragraph 58, that when an annuity was granted, the value of it should be set apart; and it then enters upon the means by which the advantages to be derived from the annuity fund are proposed to be secured, and states those means to be, first, by subscriptions from civil servants proportioned to their official income, the rate of which is fixed at four per cent. upon the salaries and allowed emoluments of subscribers; secondly, by contributions from the Company, as to which there are the following provisions in paragraph 61:—" With a view essentially to promote the welfare of this important class of the Company's servants, to whom is intrusted the discharge of

very arduous and responsible duties, and from a conviction that pecuniary advantages of equal extent could not so beneficially be communicated in any other mode, we have resolved, that, provided an annuity fund be formed in Bengal, upon the principles explained in this despatch, and under such a modification as we shall prescribe, of the regulations [414] framed by a Committee of the civil servants, on the 28th of January, 1822, the Company shall contribute whatever sum may be required in addition to the contributions of subscribers, to enable the fund to grant such number of annuities as may be accepted under the prescribed regulations, not exceeding nine per annum." Then paragraph 62 says,—“With this view, we desire that the fund be annually credited with a sum equal to the amount yielded within the year by the subscription of four per cent. on the official incomes of the subscribers, and that you receive into deposit, and allow interest at six per cent. per annum, to be computed annually upon the balance belonging to the fund; we also desire, that if, at the expiration of five years from the date of the institution of the fund, the balance shall be less than the amount apparent in the prospective calculation contained in a subsequent part of this despatch, the fund be credited by you with the amount of the deficiency; that if, on the other hand, the balance shall exceed the balance so calculated, then an annual deduction equal to the income derived from the excess of balance shall be made either from the Company's contribution, or from the rate of interest allowed on the accumulations of the fund, at the option of the Court of Directors; that a similar adjustment be effected at the expiration of each succeeding five years; and that, when the fund shall have arrived at the twenty-fifth year of its operation, the table of the valuation of annuities be corrected according to the experience of the intervening period, and the Company's contribution be then finally limited to the sum which, when added to the contributions of subscribers, and to the income derived from the accumulated balance, will make a total [415] income equal to the grant of nine annuities annually, according to the valuation which shall then be fixed.

“63. Upon the principles which we have thus explained, the number of nine annuities annually is virtually guaranteed by the Company, and the Company's contribution is limited to the amount necessary for the accomplishment of that important object.

“64. We have further resolved that an interest of six per cent. per annum be allowed on the funds set apart for the payment of annuities.”

And, thirdly, by fines from subscribers on becoming annuitants, which are referred to in paragraph 66, in these terms:—“There is another large source of income; viz., the difference between the accumulated value of a subscriber's contributions, and one-half of the value of his annuity. This, in the earlier periods of the operation of the fund, will be considerable, but its amount will, of course, decrease annually until the end of twenty-five years, when we calculate that the accumulated value of a subscriber's contributions for the whole of that period will average Rs. 38,876; that the age of the subscriber will be about forty-five, and half the value of the annuity Rs. 50,550; so that the fine to be paid up on becoming an annuitant, after having subscribed to the fund for twenty-five years, will be about Rs. 11,674. In this view, therefore, when the fund shall have been in operation twenty-five years, its income from fines will probably average Rs. 1,05,066 per annum.”

The despatch, then, after expressing the wish of the Directors to bring the fund into operation with the least practicable delay, sets out a prospective calculation of the receipts and disbursements of the fund, proceeding upon this footing: first, the ages of [416] the subscribers at the times when they would become annuitants are estimated, the age in the eighth and subsequent years being taken to be forty-five, and then the average of the salaries of the Bengal civilians at the several periods of their service are taken, and from these data the income to be derived from fines is calculated; then the entire income in each year from contributions and fines is computed, and the expenses and the value of the nine annuities at the expiration of the year are deducted, and thus the state of the fund at the end of each of the first twenty-four years is ascertained: the result of the calculation, as summed up in paragraphs 72 and 73, being that, at the end of the twenty-fourth year, there will be an income exceeding the value of nine annuities, upon lives of forty-five.



Paragraphs 74 and 75 then point out possible disturbances in these calculations, in these terms:—"74. It is probable that in the course of the years included in the foregoing statement some of the subscribers, by obtaining accelerated promotion through the retirements occasioned by the fund, will have contributed a larger amount in the shape of subscriptions than has been assumed, but this effect will in a great degree be counterbalanced by the cases in which the contributions of subscribers will be suspended for the period of their absence to Europe under the regulations announced in this despatch.

"75. Any variation of importance that may occur in the actual result, as compared with our calculation, will be satisfactorily adjusted by the arrangement which we have prescribed in the 62nd paragraph."

And, lastly, the despatch states, that the Directors have determined that every annuity, as it should [417] become due, should be paid over by the managers of the fund to the Government of Bengal, and issued to the annuitant by the Company in England at an exchange of 2s. the sicca rupee.

The regulations of the fund, as altered by the Court of Directors, which were appended to the despatch, so far as material to the question before us, were as follows:—The subscribers were to contribute one twenty-fifth part of their salaries and other emoluments. The annuities were fixed at Rs. 10,000 each, payable in England at 2s. the rupee, being £1000 sterling. They were to be tendered to the subscribers having served in the civil service twenty-five years, and actually resided twenty-two years of that period in India, according to their seniority on the gradation list of the service as fixed by the Court of Directors: and the right of preference was not to be barred by refusal in a preceding year.

The number of annuities was not to be more than would complete nine per annum. The actual value of annuities tendered and accepted was to be passed to a separate account on the books of the institution, under the head of appropriated funds, and to the debit of this account were to be entered all payments in satisfaction of annuities. Any subscriber having resided in India in the civil service not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retiring from the service before the option of an annuity should devolve on him, was to be entitled to the same in his prior turn, without any payment to the fund, save what might be claimable under the following rule; and any subscriber so retiring previous to having paid the subscription for the [418] aforesaid period of twenty-two years, was to be similarly entitled, provided he continued to contribute for the deficient years, according to the average of the contributions of those of his own standing, or made such payment in hand as the manager should regard as equivalent. Any subscriber who might accept the tender of an annuity was, in order to entitle him to such annuity, to pay to the institution previous to the date at which the annuity was to commence, the difference between one-half of the actual value of the annuity on his life, and the accumulated value of his previous contributions, in case the latter quantity should be less than the former. Any member so choosing, might decline paying the difference defined in the foregoing rule, and was, in such case, to be entitled to an annuity diminished in proportion to the sum by which the accumulated value of his contributions was less than one-half of the actual value of an annuity on his life.

Rules 14 and 16 were as follows:—"14. Any subscriber who may be dismissed from the Honourable Company's service shall forfeit all right to benefit by the institution, and be entitled to no refund of payment which he may have made." "16. The resignation of the Honourable Company's service is an essential condition to entitle an individual to an annuity from the institution."

The affairs of the institution were to be managed by a Committee of nine, of whom four were to be *ex officio*: the Chief Secretary to Government, the Accountant-General, the Sub-Treasurer, and the Civil Auditor; the others were to be elected at a general meeting. Rule 21 was as follows:—"The Sub-Treasurer of Government shall, with the permission [419] of his Excellency the most noble the Governor-General in Council, be requested to act as treasurer to the fund, and all money, and securities for money, belonging to the fund in India, shall be kept in the public treasury, subject to the direction and control of the trustees and managers of the fund."

The funds of the institution, as well as those set apart for the payment of annuities as those arising from the accumulation of capital, were to be deposited in the public treasury. All questions proposed at a general meeting, whether annual or special, were to be determined by a majority of three-fourths of the members who might either be present at such general meetings or vote thereat by proxy, and upon all general questions involving any increase or diminution of the rate of contributions, or any essential addition to or alteration in the original rules and principles of the institution, all subscribers in India who might not be able to attend the meeting in person were to be allowed to deliver their sentiments and votes by a written communication to be signed by them and addressed to the chairman of the meeting; provided always that no decision upon such question should be valid or have any effect until sanctioned and approved by the Court of Directors of the Company, to whom all parties considering themselves aggrieved by such decision should have a right of appeal, and the decision of the Court of Directors was, in all cases, to be final. The actual value of an annuity on the life of any subscriber was to be determined by a table annexed.

Paragraphs 34 and 35 were as follows:—"34. To determine the accumulated value of the contributions of any subscriber, the accountant shall keep separate accounts of the receipts from each [420] member, and these accounts shall be annually made up with the rate of interest at which it shall appear the funds of the institution may have approved. "35. At the close of every third year the managers shall, according to the annexed table, calculate the actual value of the pending annuities, and shall then compare the total of their values with the assets belonging to the appropriated funds of the institution. Should those assets exceed in value the said total, the difference shall be carried to the credit of the unappropriated funds of the society, and be available for the purposes of the institution. On the other hand, should the value of the said assets be less than the total aforesaid, the deficiency shall be supplied by a transfer from the latter fund to the former."

The plan of the Bengal fund having been thus arranged, the East India Company were desirous of providing for their civil servants at Madras the same advantages as had been conceded to those in Bengal; and accordingly they caused a copy of their despatch, as to the Bengal annuity fund, and of the regulations under which they had given their sanction to that fund, to be laid before the managers of the civil fund at Madras, with an intimation that if the subscribers to that institution would effect such alterations and modifications of the annuity branch as would make it correspond with the regulations prescribed for the Bengal fund, and would fix their subscriptions to that branch at a rate equal to that which had been fixed for the Bengal servants, they (the Company) would be prepared to make the necessary addition to their contribution to the fund.

In consequence of this communication the trustees of the Madras civil service fund made a report to [421] their subscribers, dated the 22nd of July, 1825, by which, after noticing that the Court of Directors required a contribution of four per cent. upon the salaries and other emoluments of their civil servants, and also required the payment, as a fine, of half the estimated value of every annuity granted, after allowing the annuitant credit for his subscriptions and for interest thereupon, and after referring to the other parts of the Company's plan, and to the difficulties arising from that plan, differing in several material points from that by which the subscribers to their fund stood pledged to one another, they proceeded to point out the rules by the introduction of which they might be enabled to carry the Company's plan into effect, and which were as follows:—

"Rule 1. That the present capital of the annuity branch of the civil fund shall be set apart as appropriated funds for the payment of outstanding annuities, and of the annuities of £400 which have still to be granted as lapses occur.

"Rule 2. That those annuities shall be paid—First, from the Honourable Court's annual donation of Rs. 35,000, to the annuity branch of the civil fund: secondly, from the interest, at the rate of eight per cent. allowed by the Honourable Company on the capital to be set apart; and, thirdly, as far as necessary, from the capital itself.

"Rule 3. That the subscriptions of those civil servants who may assent to the



plan sanctioned by the Court of Directors, shall commence at the rate of four per cent. on their salaries and other official emoluments from the 1st of May, 1825.

"Rule 4. That credit shall be given as heretofore to each subscriber for the amount of his past contri-<sup>[422]</sup>butions to the annuity branch of the civil fund, but without interest, none having heretofore been allowed.

"Rule 5. That those subscribers to the civil fund of 1818 whom circumstances may not permit to take advantage of the Honourable Court's plan shall continue their subscriptions at the rate of three and three-quarters per cent., and in their turn, as heretofore, shall succeed to annuities of £600, on the terms prescribed by the annuity fund of 1818.

"Rule 6. That subscribers to the annuity fund of 1818 who may assent to the Honourable Court's plan, but may afterwards be precluded by circumstances from qualifying themselves to succeed to annuities according to that plan, shall be permitted to revert to the present annuity fund, under the 5th rule.

"Rule 7. That each member of the civil service in India shall be required to declare his choice whether he will assent to the Honourable Court's plan within  
from the present date, and each member of  
the civil service absent from India, within  
from the  
date of his return to India."

The subscribers to the Madras fund, at a meeting held on the 24th of August, 1825, approved of the adoption of the Company's plan in the mode proposed by the trustees' report; and the report having been forwarded to the Madras Government, the Governor in Council approved of the mode suggested by it, as effecting as near a conformity between the annuity branch of the Madras civil fund and the plan for granting annuities sanctioned by the Court of Directors, as the nature of the case would allow; and, subject to the confirmation of the Court of Directors, sanctioned, from the 1st of May, 1825, the operation of <sup>[423]</sup>the new annuity fund in the manner suggested by the report. Ultimately the Court of Directors, in a despatch to the Government of Madras, dated the 10th of November, 1826, approved of the modifications suggested by the trustees' report, as the means of introducing the new plan, except that, in the first instance, they declined to sanction the reversion to the old fund by those who might join the new scheme, and be unable to complete the requisite period of service; but we collect from the trustees' report of the 9th of October, 1851, that they afterwards conceded this right.

There are some passages in this despatch of the 10th of November, 1826, which seem to be worthy of attention. They are as follows:—

"20. We acquiesce in the proposition that subscribers to the new fund shall have credit for the amount of their past contributions to the annuity branch of the old fund, but without interest, none having heretofore been allowed: interest at the rate of six per cent. per annum, to be computed annually, will be allowed by us upon the subscription to the new fund agreeably to the regulations contained in our despatch to the Government of Bengal, dated the 8th of December, 1824.

"21. Referring to the principle explained in paragraphs 49 to 51 of that despatch, we have determined that the number of annuities to be granted annually to civil servants upon your establishment shall be four; which number, however, is to include any of £600 and of £400 to persons not yet retired from the service, either by resignation or by an absence of more than five years from India, as well as those of £1000 under the new plan.

<sup>[424]</sup> "22. In order to accomplish these objects, a larger proportionate contribution than is allowed to the Bengal fund will probably be required from the Company, because the Bengal allowances being upon a larger scale than those of Madras, the annual contribution of the service in the shape of per-centage upon salaries will be larger in Bengal than at Madras; but, on the other hand, the eventual payments in the shape of fines or difference between the aggregate of annual contributions and half the value of the annuity to be received from annuitants who have not subscribed, or who have not long subscribed to the old fund at Madras, may be larger than the sum to be received from annuitants in Bengal.

"23. Another circumstance, therefore, which may occasion the necessity of a larger proportionate contribution from the Company to the new fund upon your establishment is, that as most of the subscribers have already contributed to the old

fund, the amount of those contributions will go in reduction of the sum payable upon their becoming annuitants.

"24. We have not the means of making a prospective calculation of the progress of the new fund at your Presidency, because we are not in possession of the amounts already contributed to the old fund by subscribers to the new fund, which will materially affect the receipts of the latter during the first years of its operation.

"25. Neither are we informed how frequently existing annuities upon the old fund may be calculated to fall vacant. This consideration will affect the number of annuities expected to become chargeable upon the new fund.

"26. We desire that you, who have the means of [425] obtaining this and all other requisite information, will cause such a calculation to be made, embracing the period comprised in the prospective calculation included in our despatch to the Government of Bengal, dated the 8th of December, 1824.

"27. This computation will enable you to judge how far an annual contribution on our part, equal in amount to the contributions of our civil servants, is likely to render the fund adequate to the probable demands upon it. We estimate four per cent. upon their salaries to produce Rs. 1,18,000 per annum. If a contribution of this sum shall be shown to be inadequate, we authorize you to increase it, provided it shall not exceed, for the present, the sum of Rs. 1,50,000.

"28. You will be enabled to adjust the actual results to the necessities of the fund every five years, as directed in the 62nd paragraph of our despatch to the Bengal Government; so that the Company's contribution from year to year may not materially vary in amount, and may ultimately be fixed and determined at the sum necessary to enable the fund to grant four annuities annually.

"29. We also authorize you to credit the new fund with interest upon the balances at the rate of six per cent. per annum.

"30. We shall not object to the new fund being brought into operation from the 1st of May, 1825; that is to say, that the contribution of the service and of the Company shall commence from that date, and that the first set of annuities shall commence from the 1st of May, 1826."

In the year 1838, the rules of the Madras fund, as established in the year 1825, were published in Madras. [426] They provided, in the first place, for the appropriation of the capital of the annuity branch of the civil fund to the payment of the outstanding annuities, and of the annuities remaining to be granted out of that fund.

Rules 4 and 5 were as follows:—

"4. That those subscribers to the civil fund of 1818 whom circumstances may not permit to take advantage of this plan shall continue their subscriptions at the rate of three and three-quarters per cent., and in their turn, as heretofore, shall succeed to annuities of pounds sterling six hundred, on the terms prescribed by the annuity fund of 1818.

"5. That subscribers to the annuity fund of 1818 who may assent to this plan, but may afterwards be precluded by sickness (certified to be of such a nature as to render it improbable that they can return to the service), from qualifying themselves to succeed to annuities according to it, shall be permitted to revert to the annuity fund of 1818, under the terms of the deed, but the refund of any sum in which the accumulated amount of their subscriptions to this plan may exceed the sum payable for the annuity fund of 1818, shall not be allowed."

The subscribers were to contribute four per cent. of their salaries and public emoluments. The annuities were fixed at £1000 sterling, and were to be tendered to subscribers who had served in the civil service twenty-five years, and actually resided twenty-two years of that period in India, according to their seniority on the gradation list of the service as fixed by the Court of Directors, and the right of preference was not to be barred by refusal in a preceding year.

[427] Rules 13, 14, 15, 16, 17, 22, 23, 30, 34, and 35 were as follows:—

"13. The number of annuities offered shall not be more than may complete four (4) per annum from the 1st of May, 1826; these shall be tendered to all the qualified subscribers, according to the gradation list, with the understanding that persons parties to this plan will obtain annuities of pounds sterling one thousand.



on the condition herein specified, and persons who may have adhered to the fund of 1818, will obtain annuities of pounds sterling six hundred, on the terms of that deed. Civil servants succeeding to an annuity on this plan shall not become chargeable on the annuity branches of the civil funds of 1800, 1814, or 1818.

" 14. The actual value of annuities of pounds sterling one thousand, or pounds sterling six hundred, as the case may be, tendered and accepted as above, shall be passed to a separate account on the books of the institution, under the head of appropriated funds, and to the debit of this account shall be entered all payments in satisfaction of annuities.

" 15. Should any subscriber having resided in India in the civil service not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retire from the service before the option of an annuity may devolve on him, he shall be entitled to the same in his proper turn without any payment to the fund, save what may be claimable under the following rule.

" 16. Any subscriber who may accept the tender of an annuity of pounds sterling one thousand, shall be required, to entitle him to such annuity, to pay to the institution, previous to the date at which the [428] annuity is to commence, the difference between one-half of the actual value of the annuity on his life and the accumulated value of his previous contributions, in case the latter quantity shall be less than the former; but should the contributions be in excess, such excess shall be refunded. These values shall be determined as below provided. Such annuity, if required, may be made payable either to the date of the decease only, or quarterly and to the date of decease; the first benefit may be secured previous to the date at which the annuity is to commence by payment as fine of the value of half-a-year's annuity of Company's rupees five thousand, as computed in the subjoined table; the latter by paying, in addition to that fine, the value of an addition of Company's rupees two hundred and twenty-five, as computed in the same table. Subscribers retiring on annuity cannot be allowed to purchase only the benefit of a quarterly payment, but there will be no objection to the other benefit being taken singly.

" 17. Any member so choosing may decline paying the difference defined in the foregoing rule, and shall in such case be entitled to an annuity, diminished in proportion to the sum by which the accumulated value of his contributions is less than one-half of the actual value of an annuity on his life.

" 22. The affairs of the institution shall be managed by a committee of seven, of whom two shall be *ex officio*, the chief secretary to Government and the accountant-general. The other five shall be subscribers, and elected at a general meeting; the members of the committee shall be also the trustees for the funds of the institution.

" 23. The sub-treasurer of the Government of [429] Fort St. George shall, with the permission of the Right Honourable the Governor in Council, be requested to act as treasurer to the institution, and the funds, as well as those set apart for the payment of annuities as those arising from the accumulation of capital, shall be deposited in the public Treasury, subject to the direction and control of the trustees and managers of the fund.

" 30. All questions proposed at a general meeting, whether quarterly or special, shall be determined by a majority of three-fourths of the members who may either be present at such general meetings or vote thereat by proxy, but the concurrent voices of nine members, at least, shall be requisite to determine upon any question whatever; and upon all general questions involving any increase or diminution of the rate of contributions now fixed, or any essential addition to, or alteration in, the original rules and principles of the institution which are now established, all subscribers in India who may not be able to attend the meeting in person, shall be allowed to deliver their sentiments and votes by a written communication, to be signed by them, and addressed to the managers of the fund, accompanied, if they are at Madras on the day of such meeting, by the certificate of a medical gentleman, stating the inability of the party to attend the meeting in person; provided always, that no decision upon such question shall be valid, or have any effect, until sanctioned and approved by the Court of Directors of the East India Company, to whom all parties considering themselves aggrieved by such decisions shall have a right of appeal, and the decision of the Court of Directors shall, in all cases, be final.

[430] " 34. To determine the accumulated value of the contributions of any

subscriber, the accountant shall keep separate accounts of the receipts from each member, and these accounts shall be annually made up with the rate of interest allowed by the Company.

"35. At the close of every third year, the managers shall, according to the annexed tables, calculate the actual values of the pending annuities, and shall then compare the total of their values with the assets belonging to the appropriated funds of the institution. Should those assets exceed in value the said total, the difference shall be carried to the credit of the unappropriated funds of the society, and be available for the purposes of the institution; on the other hand, should the value of the said assets be less than the total aforesaid, the deficiency shall be supplied by a transfer from the latter fund to the former."

At the foot of these rules there was a table, showing the value of an annuity of Rs. 10,000 on lives from 30 to 76, and there was a column in this table in which the half value of the annuity was set out.

In the same year, 1838, the trustees of the Madras fund forwarded to the Government of Madras calculations which had been made by them in conformity with the requisition contained in the 26th paragraph of the despatch of the 10th of November, 1826, and in a letter from the trustees which accompanied these calculations there were the following passages:—

"2. These calculations are two-fold, the first exhibiting the prospective assets of the fund established by the Honourable Court, and the income with which it would commence its twenty-fifth year; the second the actual results for the period of ten years, from [431] 1825-26 to 1834-35 inclusive, during which the fund has been in operation.

"3. As stated in our predecessors' letter to your address under date 4th of July, 1827, we have experienced some difficulty in framing the required calculations, as we are not aware of the exact data on which they should be made. We have, however, carefully followed the instructions furnished to the Bengal Government; and though, we still entertain \* doubts regarding the correctness of the data we have adopted, we think it better to submit the calculations, in order that they may be strictly scrutinized by the home authorities, and that the error, if any, may be the sooner pointed out and corrected.

"7. In the actual operation of the scheme, we have made the adjustment required by the 35th rule, regarding the actual values of pending annuities at the close of every third year. The difference which should be credited to the fund, as directed in paragraph 62 of the despatch, we have not yet applied for, because we are desirous that the calculations should be previously verified and approved by the Honourable Court, but, if verified, we shall make due application for it.

"8. The Honourable Court will have now an opportunity of viewing the results of two successive quinquennial periods; and, in order to render the information complete, we have caused a separate statement to be prepared, showing the amount of fine paid by each annuitant in the years under consideration, and the age of such annuitants respectively."

[432] These calculations were also accompanied by the accounts on which they proceeded, and in these accounts there were the following items: In the statement of the names of gentlemen who have taken annuities from 1825 to 1836, together with their ages and the fines paid by them, this item: "Mr. C. Harris, £1000 (the amount of the annuity), sixty-five (the age), and £3492 6s. 11d. refunded;" and in another account this item: "Amount repaid Mr. C. Harris, being the overpayment of the fine due by him."

There was also in these accounts an item of £213 6s. 3d. refunded to Mr. William Oliver, on which some reliance was placed on the part of the Appellants, as having been calculated to induce them to believe that these refunds were not in respect of excess of subscriptions, it being admitted that the refund to Mr. William Oliver was not on that account; but it is to be observed that a sum of Rs. 1205 is mentioned in the accounts as having been paid for fine in respect of William Oliver's annuity, and that there is no mention in the accounts of any sum paid for fine in respect of Harris's annuity.

"\*NOTE.—The balance at the end of thirteenth year in the prospective calculation then begins to diminish, instead of increasing as previously."



It appears also that in the year 1838, the Court of Directors detected what they considered to be an error in some of the accounts of the trustees of the fund, arising from their having considered the Madras rupee as equivalent to the sicca rupee, and gave directions by a despatch, dated the 5th of September, 1838, that immediate measures should be taken to correct the error.

In the year 1840, the trustees of the fund claimed to be entitled against the Government to credit for an [433] unappropriated balance of Rs. 4,34,494, and the letter by which the requisition was made not having been signed by the Accountant-General, one of the *ex officio* trustees, he was called upon by the Government to state whether he considered the civil service to be entitled to this credit. His letter, in answer, dated the 27th of May, 1840, contains the following passage:—"2nd. In the fifth paragraph of their despatch to the Government of India, in the financial department, No. 7, of 1835, dated 27th of May, 1835, the Honourable Court of Directors declare that they will be willing to acquiesce in a regulation to the following effect, if adopted by the subscribers, viz., 'that at the close of every year the number of unaccepted annuities be publicly declared, and that two-thirds of them be appropriated to subscribers duly qualified in the order of seniority as respects the applicants within the period of three months from the time of the surplus being declared, and as respects other applicants in the order in which they may apply for annuities, upon payment of one-fourth instead of one-half of the value of the annuity, and that in the event of the accumulated subscriptions, with interest, exceeding the said one-fourth, the balance, with interest, be returned to the subscriber; that the remaining one-third of annuities, together with such of the two-thirds as shall not be claimed within the period of three years from the time of declaring the surplus, shall lapse to the fund.'"

The Government of Madras also, in the year 1840, called upon the trustees for a report on all the branches of their fund, and the trustees accordingly furnished these accounts. In the accounts thus furnished the repayment to Mr. Harris again appears, [434] and there appears also this entry: "Amount repaid to Mr. N. Webb, being the over-payment of fine due by him, Rs. 9,221. 9a. 11p.;" and in the letter of the trustees accompanying these accounts, dated the 15th of April, 1841, there are the following passages:—

"2nd. The enclosed accounts, marked A. and B. respectively, contain detailed statements of the annuity fund of 1825, since its commencement up to the 30th of April, 1840, or for fifteen complete years since its establishment, divided into its two branches of 'unappropriated' and 'appropriated' respectively, and the statement, No. 1, is an abstract of the account, A.

"3rd. From that statement it will be perceived, that since the year 1825-26, when the Company's annuity plan commenced, up to last year, 1839-40, during the fifteen years it has been here in operation, there has been contributed to it—

|  | Rs.       | A. | P. |
|--|-----------|----|----|
| " By the subscriptions of the service . . . . .  | 20,85,752 | 0  | 2  |
| " By the company . . . . .   | 20,85,752 | 0  | 2  |
| " * By the annuitant's balance of fines and penalties, etc., not<br>included in the first item . . . . . | 14,36,966 | 3  | 5  |
| " By interest . . . . .  | 1,92,448  | 6  | 2  |
| <hr/>  |           |    |    |
| " Making a total fund of rupees . . . . .  | 58,00,918 | 9  | 11 |
| " From which there has been expended, for<br>[435] charges and re-funds . . . . .                        | 1,04,354  | 15 | 3  |
| " Appropriated to annuities already granted,<br>forming what is called the 'Appropriated fund' . . . . . | 52,89,619 | 8  | 5  |
| <hr/>  |           |    |    |
|  | 53,93,974 | 7  | 8  |
| <hr/>  |           |    |    |
| " Leaving a balance unappropriated, as stated at the close of<br>account A., of rupees . . . . .         | 4,06,944  | 2  | 3  |
| <hr/>  |           |    |    |
| " This constitutes what is called the 'Unappropriated fund.'"  |           |    |    |

"\* The statements 2 and 3 show that part of their payments are also included in the first item to the extent of—

| Rs.      | A. | P. |                                 |
|----------|----|----|---------------------------------|
| 63,328   | 9  | 0  | for the reduced annuitants, 14. |
| 6,66,796 | 6  | 11 | full ditto, 46.                 |

7,30,124 15 11

" But these two sums include also interest, or part of the fourth item here."

\* \* \* \* \*

" 49th. In conclusion, we have to state that when the subscriptions to the annuity fund of 1818 and 1825 conjointly exceed the fine payable by any individual claiming an annuity from the latter, the excess has been repaid to him in the rare instances noted in the margin.\* We notice this merely that the [436] Honourable Court of Directors may render uniform the practice in this respect at all the Presidencies."

"\* In 1834-35 to Mr. C. Harris . . . . . 3492 6 11

" In 1837-38 to Mr. N. Webb . . . . . 9221 9 11"

In the year 1844, a further correspondence took place between the trustees of the fund and the Madras Government. The trustees applied to the Government for assistance, pointing out that the Company's contributions to the fund fell short of the Rs. 1,50,000, authorized by the Company's despatch of the 10th of November, 1826. The Government required explanations as to the state of the fund, and the trustees again furnished detailed statements of the accounts, in which the re-funds already mentioned, and a further like re-fund to Mr. Lushington, in the year 1843, appeared. These accounts were forwarded to the Court of Directors, and on the 30th of July, 1845, they sent a despatch to the Madras Government, which contained these passages:—

" 1. We approve your having sanctioned the usual number of four annuities for the Madras civil service for the present year.

" 2. The documents which you have forwarded to us, however, clearly show that the Madras civil service annuity fund is incapable of providing for the continual grant of this number of annuities annually, without further support. Indeed, the capital on the 1st of May, 1845, will amount only to Rs. 2,61,143. 10a. 6p., which sum, after adding to it the fines payable on the four annuities which you have sanctioned, will probably be insufficient to provide for their value to be transferred, in accordance with the regulations, to the appropriated capital of the fund.

" 3. We were not wholly unprepared for this [437] result. The privileges conceded to the Madras service upon the establishment of the annuity fund of 1825, that previous subscriptions to the old fund should be reckoned in diminution of the fines for annuities from the new fund, and the grant of £600 annuities upon the terms of the old fund, have necessarily had a considerable effect in keeping down the means of the new fund. This possible result we had in view when, in our despatch, dated the 10th of November, 1826 (Public Department), we stated, that if the contribution from the Company of an amount equivalent to that from the service should be shown to be inadequate for the object mentioned, it might be increased, 'provided that it shall not exceed, for the present, the sum of Rs. 1,50,000.'"

In the conclusion of this despatch, the Court of Directors authorized the Madras Government to credit the unappropriated branch of the fund with the difference between the full amount of the Rs. 1,50,000 per annum, with interest at six per cent., and the amount which had been actually paid by them: and this credit was given accordingly.

In the year 1847, the fund having become deficient for payment of the annuities, the Court of Directors, by a despatch, dated the 23rd of June, 1847, authorized the Madras Government to pay the deficiency to meet the current payments. The 6th paragraph of this despatch was as follows:—" 6. We consider it unnecessary to enter into a calculation with the view of estimating the probable amount of a fixed annual contribution that may be required from the Company to enable the fund to grant four annuities annually. It will be sufficient, if the necessary means be



provided, as the exigency arises. We, [438] therefore, authorize you to pay to the fund any actual deficiency to meet the current payments that may have existed in 1846-47, after the acceptance of the prescribed number of annuities, and to adopt the same course, when necessary, in future years."

In another despatch of the same date, after a statement of the amount of the charge against them to meet the annuities, there is this passage in paragraph 6:—"This forms a serious demand against the Company; but, we nevertheless feel that, under the arrangements which have had our sanction for the benefit of the civil service, we cannot refuse to meet it."

On the 6th of February, 1850, the Court of Directors addressed the following despatch to the Governor-General of India:—

"1. We consider it desirable to direct your attention to an important point of difference in the practice of granting annuities from the civil service annuity funds at Madras and Bombay, as compared with the practice in Bengal, in view to your devising measures to remedy the inconvenient results which we shall now point out.

"2. The point to which we allude, is the system of refunding at Madras and Bombay, to parties on becoming annuitants, the sums which they may have subscribed to the funds in excess of half of the value of their annuities, whilst in Bengal no such refund is allowed.

"3. In the year 1841, the question of a refund came under our consideration from Bengal, to which we replied in paragraph 2, of our despatch, dated the 1st of September in that year, No. 29, as follows: 'With respect to refund of subscriptions, we are [439] disposed to meet the views of the majority of the subscribers to the extent of confining refund to the excess which may have been paid beyond the half-value of the annuity, such an arrangement being in accordance with the regulations of the fund.'

"4. The Bengal civil service refused to adopt the principle of refunding, by passing a rule to the contrary, whereupon a few members of the service, who had contributed to the fund an amount beyond the half-value of an annuity, appealed to us to obtain a return of the excess. In reply, we stated in our despatch to the Government of Bengal, dated the 20th of September, 1843, No. 29, 'that we cannot interfere in any way to relieve them from the operation of the rules of the civil service annuity fund, and that every annuity taken must be subject to those rules as they may exist at the time.'

"5. The question of refunding to the servants on the Bengal establishment having thus been disposed of, the point for consideration is, whether the same principle should not be adopted at the other Presidencies. We admit, that we have hitherto not objected to the rules which were passed at those Presidencies, allowing the system of a refund, but, we are now of opinion, that the operation of such rules is alike disadvantageous to the service and to Government, by retarding promotion, from the continuance of men in office after their capability for efficient employment has ceased; besides which, the Company have to contribute more largely, particularly to the Madras fund, to supply the regulated number of annuities, than was contemplated at the formation of the general scheme in the year 1825.

"6. The refunding of subscriptions, with accu-[440]-mulations of interest, can scarcely be justified; nor can we consider that the funds at Madras and Bombay have any claim on the Company for additional contributions to supply the fixed numbers of annuities annually, whilst any refund of subscriptions is allowed.

"7. We, therefore, desire that you will give the subject of this despatch your best consideration, with a view of procuring an alteration in the rules of the civil service annuity funds at Madras and Bombay, in order that the principle of refunding may be abolished, and that the operation of the funds at the several Presidencies may be uniform on the point herein specified.

"8. We shall transmit a copy of this despatch to the Governments of Madras and Bombay, with instructions to them, respectively, to co-operate with you in view to proposing to the subscribers the alterations in the rules which we have indicated."

The Court of Directors, at the same time, sent a copy of this despatch to the Government of Madras, accompanied by the following letter:—

"1. We forward in the packet, copy of despatch\* which we have addressed to the Government of India, relative to a discrepancy of some importance between a

rule of the civil service annuity fund at your Presidency, which allows of contributions to the fund in excess of half the value of the annuities to be refunded to parties on becoming annuitants, and the rule in Bengal, which precludes a refund.

" 2. We have expressed our opinion to the Government of India of the disadvantages attending the refunding system, and we desire that you will adopt such measures, in co-operation with that Govern-[441]-ment, as may appear best calculated to induce the civil service at your Presidency to abrogate it."

The Governor-General of India, afterwards, on the 30th of March, 1850, in pursuance of the despatch of the 6th of February, 1850, wrote to the Government of Madras, requesting that the views of the Court of Directors should be submitted to the managers of the fund at Madras, with the desire that they would circulate, for the consideration and votes of the service, how far they might be willing to accede to the Court's wishes, that the practice of refund hitherto allowed by the rules of the Madras fund, should be abrogated. The despatch of the Court of Directors was accordingly forwarded to the trustees of the fund, and a special meeting of the subscribers to the fund was summoned by them for the purpose of considering the question, whether the practice of refund, hitherto allowed, should be abrogated. This meeting was held on the 26th of September, 1850, when the votes of the subscribers, having been taken upon the proposition, a majority of more than three-fourths were against the abrogation of the practice. This result having been communicated to the Madras Government, and by them to the Court of Directors, the Court, on the 20th of May, 1851, sent the following despatch to the Madras Government:—

" 1. The proposition for abrogating the rule of the Madras civil service annuity fund, which provides for refunding to its members, on becoming annuitants, the amount which they may have contributed in excess of half the value of their annuities, having been circulated for the votes of the service, and rejected, we consider it necessary to lay down a principle for regu-[442]-lating the interest to be allowed on such excess when it occurs.

" 2. We, therefore, direct that four per cent. annual interest only be allowed on the subscriptions of members in excess of half the value of their annuities, and that their accounts with the fund be adjusted accordingly."

In the year 1851, the period having arrived when, according to the calculations made upon the institution of the fund, there ought to have been an accumulation sufficient to answer the four annuities, the trustees furnished to the Government of Madras, to be laid before the East India Company, accounts containing a review of the fund from its commencement down to that date, from which it appeared that the fund was wholly deficient. In these accounts, the refunds already mentioned, and several others (there were in all nine refunds), appeared. The Court of Directors had before this time, in a dispatch dated the 20th of August 1851, communicated to the Madras Government, and through that Government to the trustees, their determination that refunds of excess of subscriptions were in no case to be made at the expense of the Government; and, after the receipt of the last-mentioned accounts in the month of October, 1852, they addressed another despatch to the Madras Government, dated the 20th of October, 1852, which contained this passage:—

" 19. We must here remark upon the practice which has been allowed at Madras, of refunding to retiring subscribers any balance of subscriptions standing at their credit in excess of the half-value of their annuities. The original rules, as sanctioned by us, made no provision for that purpose. It would [443] appear, however, that in 1838, the trustees inserted, in a new edition of the rules, a clause to the effect that, if the contributions of any subscriber be in excess of the half value, 'such excess shall be refunded.' But this clause, so far as we can ascertain, was never submitted to the subscribers, as required by the rules. It certainly never received our sanction; it was not even reported to us; and yet it has been acted upon as if it had been duly authorized. We observe that, since the institution of the fund of 1825, there have been nine cases in which this refund has been granted, to the aggregate amount of Rs. 1,89,529. 7p., and that in the last year, 1850-51 (which, being the twenty-sixth year of the fund's existence, is not embraced in the present calculations) there was a further repayment allowed to the amount of Rs. 9,623. 6a. 10p. The sums refunded have, of course, contributed to swell the deficit of the fund.



This deficit has been made up from the Government treasury, upon which, consequently, has fallen exclusively the charge of the refunds. Of the whole number, no less than three, aggregating Rs. 86,749. 7a. Sp., were granted in the year 1849-50, when there was a deficiency (irrespective of the amount refunded) to the extent of Rs. 1,02,654. 1a. 2p. In that year, therefore, when the contribution from the State was augmented to the sum of Rs. 2,52,654, a further burden, which raised that sum to the large total of Rs. 3,39,403,\* was thrown on the public, for the im-[444]-proper object of making refunds; an object which, even in the most prosperous condition of the fund, could not be pursued without weakening and ultimately destroying it. In every case in which a refund has been granted, there was a balance of subscriptions to the old fund at the credit of the party before the year 1825. The result is, therefore, that the fund has absolutely paid away as refunds, sums which it never received, and which, moreover, in accordance with the provisions of the deed of the fund of 1818, ought not to have been refunded to any of the subscribers to that fund. We regard with strong feelings of disapprobation the whole of this most irregular proceeding; and we repeat the desire we have recently expressed, that no refunds be upon any account allowed in future."

With this despatch, the Court of Directors also forwarded to the Madras Government proposed new rules for the regulation of the fund, in which the provision for refund, contained in the rules published in 1838, was omitted; the 8th of these rules being as follows:—

"8. Every subscriber to whom an annuity shall be assigned shall be required, in order to entitle him to the full annuity fixed by Article II., to pay, on or before the date from which the annuity is to commence, the difference between one-half of the value of the annuity and the accumulated amount of his contributions, whenever the latter shall be less than the former."

These rules were taken into consideration at a special general meeting of the subscribers to the fund, which was held on the 17th of June 1853, and were then adopted by the subscribers, and the differences [445] between the Company and the trustees appear then to have ceased.

The Respondent, Robertson, however, was a subscriber to the fund of 1818, and upon the institution of the fund of 1825 became a subscriber to that fund. In the years 1842, 1843, 1844, 1850, and 1851, he was informed by letters from the secretary of the fund that annuities were open for acceptance, and was invited to state whether he would accept an annuity of £1000. Each of these letters contained a passage in these words:—

"4. In order to entitle you to the full annuity of £1,000, it is necessary that before the time of the commencement of your annuity, you shall pay the difference between one-half of the value of an annuity of £1,000 for your life, and the accumulated value of your previous contributions, these values being determined in the manner provided by the rules of the institution. In the event of your not paying that difference, you will only be entitled to an annuity diminished in proportion to the sum by which the accumulated value of your contribution is less than one-half of the actual value of an annuity on your life."

The Respondent does not appear to have taken any notice of these letters, but, on the offer being again made to him in the year 1852, by a letter from the secretary of the fund, dated the 15th of October, 1852, in the same terms, he wrote to inquire whether, in the event of his accepting an annuity, the trustees would refund him the excess of his subscriptions beyond the amount payable for the annuity, the amount of his subscriptions having, it appears, equalled the half-value of the annuity in or about the year 1848. In answer to this inquiry, the Respondent was [446] referred by the secretary to the despatch of 1851, prohibiting the refund of subscriptions unless the existing state of the fund would permit it, which he was informed

|  | " Company's Rs. |
|--|-----------------|
| " * Contribution of East India Company . . . . . | 1,50,000        |
| Deficit . . . . .                                | 1,02,654        |
| Amount refunded . . . . .                        | 86,749          |
| Total . . . . .                                  | 3,39,403 "      |

it would not then do. The Respondent then returned the secretary's letter of the 15th of October, 1852, with the following memorandum, signed by him, at the foot of it:—

"I agree, on the terms above specified, to accept the annuity conditionally tendered to me, provided that on retirement the excess which may be paid by me, with interest, beyond the half-value of an annuity of £1,000, payable to the date of decease, and by quarterly payments, be refunded to me; not otherwise. *Vide* separate letter transmitted with this.

It is my wish to have the said annuity made payable by quarterly instalments, and to the date of decease. Waltair, November 17, 1852. A. Robertson."

And he at the same time wrote to the secretary as follows:—

"To S. D. Birch, Esquire, Secretary to the Civil Fund, Madras.

"Waltair, November 17, 1852.

"Sir,—I have the honour to acknowledge the receipt of your letter under date the 9th instant, informing me that the despatch of the Honourable the Court of Directors, No. 16 of 1851, prohibits the refund of excess subscriptions, unless the existing state of the annuity fund permit of it, which it does not at present; and transmitting a memorandum exhibiting the probable amount which will have been paid by me on the 1st of May, 1853, beyond the half-value of an annuity of £1,000, payable to the date of decease, and by quarterly payments.

"Together with this communication, I transmit [447] my acceptance of one of the four annuities open to the service, on condition of my being allowed the refund of the excess of my subscriptions beyond one-half of the value of an annuity, etc.; and I beg leave to prefer a claim to this on the fundamental principles of the constitution of the fund, as laid down by the Honourable Court.

"I would here observe, with all respect, that when I became a subscriber to the annuity fund, I did not become a party to a joint assurance association, the benefits to be derived from which were contingent on the future prosperity of the fund, but I subscribed to certain terms, the principle of which, as laid down by the Honourable Court, was, that 'all servants, upon becoming annuitants, would have to pay half the value of their respective annuities, and no more.' That the civil annuity fund is exclusively the fund of the Honourable Court, and not of the civil service, was shown in the proceedings on the admission of Mr. Hutt and others to annuities not provided for by the original terms on which the fund was established.

"It is unnecessary to revert to all that has been advanced, and might be advanced again, to show that those who agreed to become parties to the Honourable Court's annuity fund did so on the plain and simple understanding that, under no contingency whatever, were they to pay more than half the value of an annuity, according to age, when entitled to it, after a certain period. It is necessary for me only to observe, that I have fulfilled the agreement, on my part, which entitles me to one of the four annuities now open as guaranteed by the Court. It is upwards of thirty-five years since I arrived in the country (26th June, 1817); my actual [448] residence in the country much exceeds the period required; and my subscriptions to the fund are greatly in excess of half the value of an annuity of £1,000.

"Having fulfilled the conditions of the agreement on my side, I respectfully solicit the fulfilment of them on behalf of the Honourable Court. I now prefer a claim to an annuity of £1,000, at half its value, and I ask that I may have it at half its value, 'and no more,' the surplus of interest and subscriptions, appearing at my credit with the fund, being repaid to me on my retirement from the service, between the 1st of May and 1st of July, 1853.

"I seek for this from the known justice of the Honourable Court, and the consideration they evince for their servants in every department. I may assuredly trust that subscribers to the civil service annuity fund will not be regarded in a light less deserving consideration than were subscribers to the Native pension fund, who, when that fund could no longer meet its engagements, received back from the justice of the Court their subscriptions, with interest, the annuities already granted being, at the same time, continued at the expense of Government.

"I would, in conclusion, request that the trustees will do me the favour to submit this letter for the consideration of the Right Honourable the Governor in Council.



when reporting the names of those gentlemen to whom annuities may fall this year.—  
I have the honour to be, Sir, your most obedient Servant,

“ A. Robertson.”

The trustees, it appears, sent a copy of this letter to the Government, but nothing appears to have been [449] done upon it, and in September, 1853, the annuity was again offered to the Respondent, with reference to the revised rules of the fund. To this offer the Respondent replied as follows:—

“ To the Secretary of the Civil Fund, Madras.

“ Waltair, October 11, 1853.

“ Sir,—I have the honour to acknowledge the receipt of your letter, tendering for acceptance one of the annuities declared to be available from the 1st of May next.

“ Until the receipt of that communication I was under the impression that no change had taken place in the rules already in force, the changes which had been proposed to the service not having been ratified by the Honourable the Court of Directors, as required by rule 30 of the Regulations of the fund.

“ As introduction of the proposed new rules before the allotment of the annuities at present under offer might be hereafter advanced as a technical objection to my claims, I beg leave to enter my protest against the enforcement of them before they receive the formal sanction of the Honourable Court.

“ Under this protest, I request that you will inform the trustees that I am ready to accept one of the annuities now tendered, provided they are prepared to pay to me, on my retiring from the service, the amount which may be at my credit in the accounts of the fund in excess of the half-value of an annuity payable by a civil servant at the age which I shall then have attained. I have, etc., A. Robertson.”

The trustees, however, declined to receive a conditional acceptance of the annuity, and upon their [450] refusal to do so, he again wrote to the secretary in these terms:—

“ To the Secretary to the Civil Fund, Madras.

“ Waltair, September 25, 1854.

“ Sir,—I have the honour to acknowledge the receipt of your letter under date the 19th instant, tendering for my acceptance one of the annuities which will be available on the 1st of May, 1855, and to request that you will inform the trustees of the civil fund that I am quite ready to avail myself of this offer, on the condition of their allowing me the refund of the amount overpaid by me to the fund, together with interest, as formerly allowed to those members of the civil service who obtained a refund of over subscriptions. I do not conceive that any votes of the majority of the civil service for the introduction of new regulations can affect a right acquired and asserted before the recent changes in the civil fund rules were even proposed. I have, etc., A. Robertson.”

The trustees, however, still declining to accept the conditional offer, he ultimately, on the 17th October, 1854, wrote to them as follows:—

“ To the Secretary to the Civil Fund, Madras.

“ Waltair, October 17, 1854.

“ Sir,—I have the honour to acknowledge the receipt of your letter under date the 7th instant, and, in consequence of the trustees again declining to entertain a conditional application for an annuity, to apply for one of the annuities available on the 1st of May, 1855, under protest, and with the full reservation of all my rights.

“ It is my desire to secure the full amount of annuity.

[451] “ I was born on the 28th of November, 1799. Should this form of application be objected to, which I do not expect, I request that you will send an answer to my address by the 30th instant, under cover to Mr. Will. Arbutnot, at Madras. I am, etc., A. Robertson.”

In reply to this letter the Secretary wrote to him thus:—

“ To A. Robertson, Esquire.

“ Sir,—With reference to your application dated 17th of October, 1854, I am

desired by the trustees of the civil fund to acquaint you that an annuity of £1000 has devolved on you by rotation. The statement showing the amount of subscription paid by you, together with the document which will enable you to draw your annuity by quarterly instalments, and to the date of decease from the Honourable the Court of Directors, will be forwarded in due time.

" S. D. Birch.

" November 8, 1854."

The Respondent having thus accepted the annuity under protest, and with full reservation of his rights, on the 28th of March, 1857, filed his bill in the Supreme Court of Judicature at Madras, against the Company and the trustees, to recover the excess of his subscriptions beyond the half-value of the annuity, and it is upon this bill the decree under appeal was made.

Three points arise, and were argued upon the appeal :

First. Whether, according to the original constitution of the Madras civil service annuity fund, as established in 1825, the Respondent was entitled to [452] have refunded to him the excess of his subscriptions to the fund beyond one-half of the value of his annuity ?

Secondly. Whether, if the Respondent was not so entitled, according to the original constitution of the fund, he afterwards became so entitled by virtue of any contract, or by reason of any course of dealing or conduct on the part of the East India Company, or of the trustees ? And

Thirdly. Whether, if the Respondent was so entitled, either according to the original constitution of the fund, or by virtue of any subsequent contract, course of dealing, or conduct, the right which he thus acquired has been in any manner lost or destroyed ?

The first of these questions appears to their Lordships to be open to very serious doubts, and in the view which they have finally taken of the case, it might not be necessary for them to pronounce any opinion upon it : but the point was so fully and ably argued at the Bar, and it is so difficult fairly to estimate the weight which is due to the subsequent transactions, without first considering the position in which the parties originally stood, that their Lordships think it right to state the conclusion at which they have arrived on this part of the case.

The rules and regulations of the Madras civil service annuity fund, as established in the year 1825, were derived from the rules and regulations of the Bengal fund then lately established, modified only so far as was necessary to meet the difficulties arising from the existence at Madras, of the funds created by the deeds of 1800, 1814, and 1818, and from the obligations consequent upon those deeds. The modifications which were introduced to meet these dif-[453]ficulties and obligations, do not appear to their Lordships to affect the question as to the refunding of the excess of subscriptions, otherwise than as they would affect the fund out of which the refund, if any, would be to be made : and the East India Company must, of course, be taken to have foreseen to what extent the fund would be thus affected. It is, indeed, plain, from the evidence, that they did foresee the effect which the modifications would have upon the fund. In considering this first question, therefore, it appears to their Lordships that these modifications may be laid out of the case, and that the question must depend upon the interpretation to be put upon the despatch of the 8th of December, 1824, and the regulations for the Bengal fund as altered by the Court of Directors : for their Lordships do not agree to the Appellant's argument, that a part only of this despatch is to be looked at. Both the despatch and the regulations were forwarded to the Madras Government, and delivered to the trustees of the then existing Madras funds. Both of them formed the basis of the contract with the Madras subscribers, and each of them must, in their Lordships' opinion, be looked as [at] in its entirety in determining what that contract was.

This despatch, in paragraph 4, notices the fact that, according to the constitution of the then existing funds at Madras, the grantees of annuities either paid in subscriptions to the fund a certain aggregate sum, or paid the difference between that sum and the amount of their subscriptions.

In paragraph 41, in pointing out the advantages derived from the Company's contributions, the despatch speaks of the civil servant when he retires [454] having,



in addition to his own savings, whether accumulated in the shape of contributions to the fund, or in any other mode, an annuity proportional to his share of the Company's contributions to the fund.

In paragraphs 53, 54, 55, in treating of the purchase-money of the annuities, it fixes the amount at the difference of half the value of the annuity and the accumulated value of the subscriber's previous contributions; and in paragraph 57, it states broadly, that according to the mode proposed, all servants upon becoming annuitants would pay half the value of their respective annuities, and no more; and in the same paragraph 57, it refers to the advantages which the subscribers would possess of accumulating a fund for the purchase of the annuity, by gradual deposits, improved at a fixed and favourable rate of interest; and rule 11 of the regulations as altered, provides for subscribers who may accept annuities, paying to the Institution the difference between half the value of the annuity, and the accumulated value of their previous contributions, in case the latter quantity shall be less than the former. These provisions certainly point at half the value of the annuity as the sum which each subscriber, on becoming an annuitant, was to pay for the purchase of his annuity, paying it either by contributions, or by making good the deficiency of his subscriptions. But, on the other hand, the expression "no more," in paragraph 57, so much relied upon the part of the Respondent, may, as was suggested on the part of the Appellants, have meant only that the subscribers were to pay one-half, and not two-thirds of the value of the annuity, the proportion which in paragraph 54 is mentioned to have been proposed by the Bengal civil [455] servants, although the context does not appear to their Lordships to favour this conclusion; and whatever the meaning of these words "no more" may have been, there is certainly no limit to the payment by subscribers of their annual contributions, and no provision for refunding any excess of those contributions beyond the half of the value of the annuity; and by paragraphs 61 and 63, what the Company are to contribute, is expressed to be whatever sum may be required in addition to the contributions of subscribers, to enable the fund to grant such number of annuities as may be accepted under the prescribed regulations, not exceeding nine per annum, and the obligation of the Company is expressed to be a virtual guarantee of the nine annuities, and a contribution limited to the amount necessary for the accomplishment of that object; and all these latter provisions indicate that all the subscribers' contributions, whatever the amount of them might be, were to go into and remain in the fund.

It is very difficult to collect from a despatch and from rules thus loosely worded on so important a point, and plainly imperfect in other respects, what the real meaning of the parties was; but it is to be observed that the object which they had in view was, as appears by sections 35, 36, and 42, to provide a fund for the payment of annuities to the civil servants who should retire from the service, and that the payments of each subscriber were not merely for the purpose of purchasing his own annuity, but of providing annuities for the other subscribers. The payments made by each subscriber were to go into the funds, to be applied for the benefit of all the subscribers; and they were to do so equally, whether [456] the subscriber who made the payment, had or had not paid the half-value of his annuity, or had or had not had the option of an annuity. There cannot, as it seems to their Lordships, be any reasonable doubt, that each subscriber was intended to go on paying his subscription until he had the option of an annuity; and if the option did not reach him before the amount of his subscription exceeded the half value of his annuity, their Lordships find it difficult to suppose that it could have been intended that a refund should be made to him when the amount which he had paid would or might have been applied to the payment of other annuities; and if it was not so intended in the case suggested, their Lordships think it scarcely less difficult to suppose that it could have been so intended when the subscriber had had the option of the annuity and had refused it, in which case it is to be observed that his refusal would bring upon the fund the charge to which his payment was applicable. If the half-value of the annuity was in all cases to be the limit of the subscriptions, there seems to be no reason why the payment of the subscriptions was to continue after the half-value of the annuity had been paid; for the annuity would, of course, decrease in value as the subscriber advanced in age, and the benefit of accumulation held out to the subscribers in the despatch is confined to accumulation for the purchase of the

annuity. It is to be observed, too, that the calculations on which the despatch proceeds, are founded upon the assumption that each subscriber would, after the expiration of the first few years, become entitled to an annuity at the age of forty-five, in which event, according to the calculations, he would in no case have paid half the value of his [457] annuity; and it seems probable, therefore, that it was not thought necessary to provide for the excess of the subscriptions.

In that view of the case, what has occurred in this instance and in others, would be left unprovided for by the contract; and it being clear that the subscription was properly payable into the fund, there would seem to be no ground for taking it out again.

The case does not appear to their Lordships to be one to which the doctrine of resulting trust could be applied.

After weighing all these considerations on the one side and the other, the better opinion appears to their Lordships to be, that if this case was to be decided upon the first point only, the decision ought to be in favour of the Appellants, the East India Company; but their Lordships have not come to this conclusion without great doubt and hesitation, and they very much incline to the opinion that this contract does not provide for the event, which has occurred, and that in order to determine the rights of the parties, what has subsequently occurred must be looked at, not, indeed, for the purpose of varying the contract, but for the purpose of supplying what has been left unprovided for by it. They proceed, therefore, to the consideration of the second point: Whether the Respondent became entitled to the refund of his excess of subscriptions by virtue of any subsequent contract, or by reason of any conduct or course of dealing on the part of the East India Company or of the trustees!

It is material in considering this point, in the first place, to observe the position in which the East India Company stood under the contract. By the contract, [458] (whatever its effect may have been in other respects), the annuities were to be provided for by the contributions of the subscribers and the contributions of the Company. These contributions were to be received by the trustees, and applied by them to make good the annuities, and the deficiency was to be supplied by the Company. The Company, therefore, had a direct and immediate interest in the application of the funds by the trustees. The trustees were responsible, not merely to the subscribers, but to the Company, for the due application of the funds. The Company, then, being in this position; having the right to call for the accounts of the trustees, and to check and control those accounts, we find, that the practice of refunding to subscribers the excess of subscriptions beyond the half value of the annuity, commenced as early as the year 1834, for in that year there was a refund to Mr. Harris on this account. We then find, that, in the year 1838, accounts of the trustees in which this refund appeared, were laid before the Government of Madras, and that, in the same year, 1838, the rules of the fund were published at Madras, and that, by the 16th of those rules, as published, it was expressly stated that the contributions of the subscribers in excess beyond the half value of their annuities, were to be refunded. We further find that this course of refunding to subscribers the excess of their subscriptions was continued by the trustees in the years 1837, 1843, 1845, and 1848; that accounts of the trustees, showing these refunds, were laid before the Court of Directors, and that no objection was made to them, although on other minor points objections were raised and the accounts were required to be rectified; and although, [459] in the year 1841, the attention of the Government was directly called to the point, and in the years 1844 and 1847 they were required to make, and did make, additional payments to the fund. We also find, that it was not until the year 1850, that any question was raised as to this practice of refunding, and that the question then raised was not as to the right of the subscribers to the refund, but as to the expediency of continuing the practice: that the Company then, so far from asserting that the subscribers were not entitled to the refund, desired the Madras Government to adopt such measures as might induce the subscribers to abrogate the practice; that, with this view, they submitted the question to the consideration of the subscribers; and that, upon the subscribers adhering to the practice, they did not, in the first instance, persist in objecting to it otherwise than by threatening to reduce the interest upon the excess of the subscriptions: a threat which it appears they did not carry into effect. Ultimately, we find that, later in



the year 1851, they objected to the refunds being made at their expense, and that in the year 1853, the system of refunding was put an end to by the new rules proposed by them, and adopted by the votes of the subscribers.

Upon these facts, this part of the case appears to their Lordships to present two questions for their consideration: First, whether, assuming the practice of refunding to the subscribers the excess of their subscriptions beyond the half value of the annuity not to have been warranted by the original rules, there was not such an alteration of those rules as was sufficient to warrant it; and, secondly, whether, even if there was no such alteration of the rules, [460] the Company have not, by their conduct, precluded themselves from disputing the right of the subscribers to the refund.

With respect to the first question, by rule 30 of the Bengal regulations, all questions proposed at a general meeting, whether annual or special, were to be determined by a majority of three-fourths of the members, and upon all general questions, involving, amongst other things, any essential addition to or alteration in the original rules and principles of the institution, all subscribers in India were to be allowed to vote, but no decision upon such question was to be valid, or to have any effect, until sanctioned and approved by the Court of Directors of the East India Company, whose decision was in all cases to be final. This rule became part of the original rules of the Madras fund. The rules of that fund, published in 1838, having contained the provision that the excess beyond the half value of the annuity should be refunded, the question whether that practice should be abrogated was put to the vote at a special general meeting of the subscribers, held on the 26th of September, 1850, and it was determined by a majority of more than three-fourths that the practice should not be abrogated. There was here, therefore, upon the assumption that the original rules did not warrant the practice, a clear alteration of those rules, made in conformity with the 30th of the original rules, and this alteration, if sanctioned and approved by the East India Company, was valid and effectual.

Now, how did the Court of Directors deal with this alteration of the rules? They did not repudiate it, but they directed the interest upon the excess of [461] the subscriptions to be reduced; a direction, however, which was not carried into effect. If the case had rested here they might, in the opinion of their Lordships, well be taken to have sanctioned and approved this alteration of the rules; but, it appears that they afterwards in the same year, 1851, protested against any further refunds being made at their expense, and although they did not rest upon this protest, but subsequently, in the year 1853, in some measure treated the alteration as valid by again, in effect, submitting the question to the votes of the subscribers upon the new rules which they at that time proposed, and which were then adopted, they do not appear ever to have withdrawn their protest, and the course which they adopted in proposing the new rules may well be regarded as having been resorted to for the more conclusive settlement of the question. If the subscribers had not adopted these rules, the Company could not, as their Lordships think, be held, in the face of their protest, to have sanctioned and approved this alteration; and, upon the whole, therefore, their Lordships consider that, whatever effect may be due in other respects to what passed as to the alteration of the rules, it would be going too far to hold that the resolution of the subscribers in 1851 effected such an alteration as rendered it obligatory upon the Company to refund the excess of the subscriptions.

There remains, then, on this second head of the case, the question as to the effect of the course of dealing and conduct on the part of the Company and of the trustees.

Now, it appears to their Lordships, to be put beyond all doubt, by the evidence in this case, that [462] the Company sanctioned the refunds which were made, and sanctioned them, not merely with reference to the individual subscribers to whom they were made, but, generally, as having been made in the due course of practice. The Company's despatch of the 6th of February, 1850, admits this to have been the case. Their course of proceeding, in submitting the question to the votes of the subscribers in that year, involves the same admission; and there is, indeed, hardly a step in all their proceedings, from the time of the institution of the fund in the year 1825, which does not lead to that conclusion. In determining the consequences which are to follow from this conduct on their part, we must again

revert to their position, and to that of the trustees. The Company stand in the position of the ultimate beneficiaries of the fund with which we have, in this case, to deal, subject to prior trusts for the benefit of the subscribers.

The fund, as established in 1825, was instituted on their suggestion, and for the purpose of carrying out their views of promoting a more rapid succession among the civil servants of their establishment. The trustees were bound not to them only, but to the subscribers also, for the due management of the fund, according to the rules. If those rules did not authorize the refunds being made, it was a breach of trust on the part of the trustees to make them, and in that breach of trust the Company were concurring. It was admitted on their part that with respect to the refunds actually made, they had no right to complain: but it was argued that the consequences of their conduct went no further, and that they cannot be held to have sanctioned the right of the subscribers [463] to the refund in other cases. Their Lordships, however, find themselves unable to give their assent to this argument. By the rules of the fund, published in the year 1838, the trustees held out to the subscribers generally that they were to be entitled to the refund of the excess of their subscriptions beyond the half value of the annuity. The Company, as appears from their answer, knew of the publication of these rules very soon after they were published. By allowing the refunds which were made, more especially after their attention had been called to the subject in the year 1840, they must, as their Lordships think, be considered to have authorized the trustees to continue this rule as to refund, as part of their rules. It is to be considered, then, how the subscribers were affected by the publication and continuance of this rule, and it appears to their Lordships that their position was much altered by it.

To take, for instance, the case of this Respondent: He was a subscriber to the fund of 1818, and, according to the rules of that fund, would have been entitled to an annuity of £600 a year after payment of a specified sum. Is he not justly entitled to say that he paid the larger subscription to the fund of 1825, and continued that subscription, upon the faith that he would be entitled to the larger annuity of £1000, and also to the repayment of the excess of his subscriptions beyond the half value of his annuity? And further, is he not also justly entitled to say that had he been aware that the trustees or the Company would resist the repayment of the excess of his subscriptions, he would have accepted his annuity on the first opportunity which offered after he had paid the half of its value, or even before that time, when his interests or [464] his views rendered it advisable or convenient for him to do so; and is not his having been deprived of these opportunities the result of the Company's conduct?

The true result of this case, with reference to the point now under consideration, appears to their Lordships to be that the ultimate beneficiaries under the trust have authorized the trustees to hold out to the prior beneficiaries advantages which were not warranted by the trust, and have thereby altered the position of the prior beneficiaries; and their Lordships think that, under such circumstances, both the trustees and the ultimate beneficiaries must be liable to make good to the prior beneficiaries the advantages which have been so held out to them.

The case was to some extent argued on the part of the Company as if the question had been simply this: whether the trustees could recover at law against the Company any deficiency of the fund for payment of the annuities occasioned by this practice of refunding; but their Lordships do not take that view of the case: they consider that, whatever might be the case at law, there is, under the circumstances of this case, an equity by which the Company is affected. It was also argued, on the part of the Company, that their conduct, and the conduct of the trustees throughout, proceeded upon a mistaken supposition that the original rules of the fund, resting upon the Bengal rules, required this excess to be refunded, and that they ought not to be bound by conduct resulting from such a mistake.

It would, perhaps, be a sufficient answer to this argument to say that there is no Bill to rectify any such supposed mistake; but their Lordships do not desire to rest their judgment upon so narrow a point.

[465] Supposing the case to be entirely open upon this point, could the Company, and could the trustees, under the circumstances of this case, be relieved from the consequences of this alleged mistake? Their Lordships are of opinion that they



could not. They think that it would be an answer to such a case of alleged mistake, that when the trustees made the representation as to the refund of the excess which is contained in the rules of 1838, and when the Company sanctioned that representation being made, they had possession of all the documents, and the full means of judging whether the Bengal Regulations did or did not give the right of refund; and further that, whether the Bengal Regulations did or did not give that right, the Company had the power of determining whether it should or should not be given at Madras; and yet further that the conduct of the Company, and of the trustees, has altered the position of the subscribers. They think also that if this case was at all to be dealt with upon the footing of mistake, it would follow that the contract must be wholly undone, and the parties be restored to their original rights, and that the conduct of the Company has placed the subscribers in a position in which they cannot be restored to those rights. The subscriptions which have been paid beyond what ought to have been paid might, indeed, be refunded, but the parties could not be set right as to the period when they would have taken the annuity. It is hardly necessary to add that the case appears to their Lordships to be more strong against the Company from their having been parties to the contract, and having bound their civil servants by covenant to the observance of it.

Upon this second head of the case, therefore, their [466] Lordships are of opinion, that the Company, though not bound by any positive alteration of the rules, are precluded by their conduct from disputing the right of the Respondent to have the excess of his subscriptions beyond the half-value of his annuity refunded to him.

We come then to the third question, whether the right to the refund of the excess of his subscriptions which the Respondent acquired has been in any manner lost or destroyed. It was contended on the part of the Appellants that it had been lost or destroyed, because the revised rules of 1853 did not contain the provision for refund which was contained in the rules of 1838, and the Respondent being a subscriber to the fund was bound by those revised rules; but it does not appear to their Lordships that the revised rules could operate retrospectively to destroy rights which had been acquired before they were passed.

Upon this point, therefore, the question, as their Lordships view it, is, whether the Respondent had or had not, before the revised rules were passed, acquired a title to the refund of the excess of his subscriptions; and their Lordships are of opinion that he had; for in the year 1852 he had accepted the annuity on condition that the excess of his payments should be refunded to him. The trustees, it is true, refused to receive this conditional acceptance, but in their Lordships' judgment, for the reasons already given, it was an error on their part not to have done so, and the Respondent cannot, as their Lordships think, be affected by this erroneous judgment of the trustees. They think, therefore, that the Respondent's title to the refund was complete in 1852, and was conse-[467]-quently unaffected by the revised rules of 1853. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss their appeal, and, their judgment agreeing with that of the Court in India, to dismiss it with costs.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, o, *Other matters*; tit. INDIA, I. ADMINISTRATION OF GOVERNMENT. S.C. 7 Moo. Ind. App. 361; 7 W.R. 695. See *Secretary of State for India v. Underwood*, 1870, L.R. 4 H.L. 584.]

## ON PETITION FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA.

JOSEPH BOSWELL,—*Appellant*: CHARLES ALEXANDER KILBORN and OZRO MORRIL,—*Respondents* \* [Feb. 1, 1859].

By section 30 of the Act of the Legislative Council of Lower Canada, passed in the 34th Geo. III., c. 6, called "The Judicature Act," an appeal lies from the Court of appeals in Canada, to the Queen in Council, when the matter in dispute exceeds £500 sterling, and this provision was continued upon the substitution of the Court of Queen's Bench for the Court of appeals, by the Act of the Legislative Council of Canada, passed in the 12th Vict., c. 37.

In an action for non-performance of a contract a verdict was given for £600 currency (under £500 sterling), and the Court of Queen's Bench in Canada refused leave to appeal to England on the ground that the sum was under the appealable value. Upon special petition to Her Majesty in Council for leave to appeal, such leave was granted, first, because by the law of Canada interest ran with the judgment, which would bring the subject-matter within the appealable value; and, secondly, because important questions of mercantile law were raised, and an action of a similar nature was still pending, the transaction being a continuing contract.

By an Act of the Legislative Council and Assembly of Lower Canada, passed the 34th King George III., c. 6, called "The Judicature Act" (see also Act 31 Geo. III., c. 31, referred to in *Cuvillier v. Aglwin*, 2 Knapp's P.C. Cases, 72), it was by the 30th [468] section enacted, that the judgment of the Court of appeals in Canada should be final, where the matter in dispute should not exceed £500 sterling; but in cases exceeding that sum, an appeal should lie to His Majesty in his Privy Council, provided security be first given by the Appellant.

By a subsequent Act passed by the Legislative Council and Assembly of Canada, and assented to by Her Majesty in the 12th year of Her reign, entitled, "An Act to establish a Court having jurisdiction in appeals and criminal matters for Lower Canada," the Court of Queen's Bench was established as a Court of record for Lower Canada, from which an appeal should lie to Her Majesty, in Her Privy Council, in every case in which an appeal might, before that Act, have lain from the Provincial Court of appeals to Her Majesty in Council in Her Privy Council, in the manner and form, and subject to the restrictions, rules, and regulations established with respect to appeals from the Provincial Court of appeals.

An action was brought against Boswell in the Superior Court of Quebec by Kilborn and Morrill, for recovery of the sum of £600 currency for an alleged breach by the Defendant of a contract for the supply of hops. That Court gave judgment in favour of the Defendant, dismissing the action with costs. The Plaintiffs appealed from that judgment to the Court of Queen's Bench in Lower Canada, and that Court reversed the judgment of the Superior Court of Quebec. The [469] Defendant applied to the Court of Queen's Bench for leave to appeal to Her Majesty in Council, and on cause being shown by the Plaintiffs against the granting of such leave, it was contended that, according to the true construction of the matter in dispute and the judgment of the Court of Queen's Bench, the value in dispute did not exceed £500 sterling, and the Court refused the application.

A petition to Her Majesty in Council for leave to appeal was now presented by Boswell, which set forth that the contest between the parties turned upon and was limited to the quality of certain hops tendered by him; that the contract upon which the action was brought was a continuing contract for the delivery of hops in the years 1855, 6, 7, and that the action was brought in respect of the hops deliverable in 1856; that a similar dispute had arisen between the parties in respect of the hops deliverable in 1857, and that the parties were about to bring another action in which the same question would arise as in the first action. That by an Act of the

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. Dr. Lushington, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Taylor Coleridge.



Legislative Council and Assembly of Canada, 22nd of Vict., regulating the rate of interest, it was enacted that six per centum per annum should continue the rate of interest in all cases where, by the agreement of the parties or by law, interest was payable, and no rate had been fixed by the parties or by law; and it was submitted, first, that the judgment debt with interest brought the case within the appealable value; and, secondly, that the questions of law involved in the case were of very high importance and of general application in mercantile transactions, and that it was desirable to have those questions determined by the highest Court of appeal.

The petition was heard *ex parte*.

[470] Mr. M. Smith, Q.C., for the Petitioner.

Their Lordships granted the application, upon terms of lodging in the Registry of the Privy Council the sum of £100 sterling, as security for costs of the Respondents, in case the appeal should be dismissed.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 2. *Appealable value*; 3. *Leave to Appeal*. See for later stages 2 S.C. 13 Moo. P.C. 476; 15 Moo. P.C. 309.]

## ON PETITION FROM THE SUDDER DEWANNY ADAWLUT OF CALCUTTA.

MUSSUMAT AMEENA KHATOOR and others,—*Appellants*; RADHABENOD MISSER,—*Respondent* \* [Feb. 1, 1859].

In estimating the appealable value, restricted by the Order in Council of the 10th of April, 1838, for regulating appeals from the Supreme and Sudder Dewanny Courts in the East Indies to Rs. 10,000, as the amount in dispute, regard should be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered.

A suit was brought to recover a Zemindary in the possession of different persons under deeds of sale in execution of decree. The value of the property sued for was, by Ben. Reg. X. of 1829, sec. 17, stated in the plaint to be Rs. 14,325. The Sudder Court upheld the sales so far as related to the claim of some of the Defendants. The other Defendants applied for leave to appeal to England, which the Sudder Court refused, on the ground that, as the value of their portion was only Rs. 8215, it was not within the appealable value prescribed by the Order in Council of the 10th of April, 1838. Such construction overruled, and leave to appeal granted by the Judicial Committee.

Whether the stamp upon the plaint required by Ben. Reg. X. of 1829, sec. 17, being for fiscal purposes only, is conclusive of the value of the property sued for, *Quære*.

The petition stated that the Respondent brought a suit in the Zillah Court of Dinagore against the Appellants to obtain possession of a Zemindary held [471] by them in different portions, as purchasers under deeds of sale and under a sale in execution of a decree. That the value of the lands sought to be recovered was stated in the plaint as provided by Ben. Reg. X. of 1829, sec. 17, to be Rs. 14,325 1. 3. 1. That a decree was pronounced by the Zillah Court in favour of the Respondent. That the Appellants appealed to the Sudder Dewanny Adawlut of Calcutta, which Court, on the 21st of July, 1856, reversed the Zillah Court's decree with respect to two only of the Appellants, sustaining their respective right to possession. That the Court refused to allow the other Appellants leave to appeal to England, on the ground that the value of the lands held by those Appellants was only Rs. 8215, and that the Order in Council of the 10th of April, 1838, required the sum to be Rs. 10,000. That the actual value of the lands in question held by the Appel-

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lants was more than the sum prescribed by the Order in Council, and that the Sudder Court proceeded upon an erroneous ground, taking the value by the stamp required by Reg. X. of 1829, which they submitted was only for fiscal purposes, and also that the Sudder Court was wrong in not adding the mesne profits; and the Petitioners further submitted that the words "the value of the matter in dispute in any such appeal to Her Majesty in Council" related to the whole matter involved in the suit which was the subject of judicial inquiry in the Court below. That the right of possession of the Respondent in respect of his ancestral Zemindary was one of many questions in the suit and appeal, and that the sum of Rs. 14,325. 1. 3., the estimated value of the Zemindary as stated in the plaint, and not merely a proper-[472]-tionate part thereof, ought to have been adopted by the Court in estimating the appealable value.

This petition was heard *ex parte*.

Mr. R. Palmer, Q.C., and Mr. Leith, in support of the petition, urged the same grounds as those contained in the petition.

The Right Hon. Dr. Lushington.—Leave to appeal will be granted, subject, however, to this reservation, that if the facts contained in the petition are not correct, the petition is to be dismissed. Security for £300 to be lodged with the Registrar of the Privy Council within six months from the date of their Lordships' report.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 2. *Appealable value*.

#### [473] ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

MARY LORD.—*Appellant*: THE COMMISSIONERS FOR THE CITY OF SYDNEY,

—*Respondents* \* [Feb. 7, 1859].

A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water.

In 1810, the Crown made a grant to R. of 135 acres of land in New South Wales, described as bounded on the west by N. farm, on the north by an east line of thirty chains, on the east by a south line to a small creek, and on the south by that creek and the water of Botany Bay at the mouth of Cook's river. It was not necessary to include any portion of the creek to make up the quantity of land specified in the grant. In 1823, the Crown made a grant of 600 acres of land higher up the creek, to L., in which the land was described as bounded on the north-west by a line from the south-east corner of R.'s farm to the south-west corner of W.'s farm; on the north-east by W.'s farm, on the south-east by a line bearing west, south to Botany Bay a creek and R.'s farm. This grant contained a reservation, that the Crown was to be entitled to "any quantity of water and any quantity of land; not exceeding ten acres, in any part of the said grant, as might be required for public purposes." L. afterwards became owner of the land comprised in the grant to R. The water of the creek was used for turning a mill erected on R.'s land, and for other beneficial purposes.

On resumption by the Crown, under the powers of an Act of Council of New South Wales, 17th Vict., No. 35, of a portion of such lands, and diversion of the stream flowing in the creek—Held:—

First. That the grant by the Crown in 1810, to R., of land bounded by the creek, passed the soil of the creek *ad medium filum aquarum*, as the description of boundaries in the grant did not exclude from it that portion of the creek,

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which by the general presumption of law, would go along with the ownership of the land on the banks of it [12 Moo. P.C. 498].

Second. That the right to the use of the flowing water of the creek in respect of the land below, originally granted to R., was not lost by the acceptance of L. of the land above, although in the latter grant the Crown had reserved the right to take the water, the only effect of the reservation being that L. waived his own rights as riparian owner to the use of the water as it flowed past his land [12 Moo. P.C. 499, 500].

In construing grants, the words used must be taken in the sense which the common usage of mankind has applied to them as well in reference to the context in which they are found, as the circumstances in which they are used [12 Moo. P.C. 497].

This rule of construction equally applies, whether the subject-matter be a grant from the Crown or a subject [12 Moo. P.C. 497].

This was an action brought by the Appellant against the Respondents, to recover compensation in [474] respect of certain lands and tenements of the Appellant resumed by the Crown, and taken and used by the Respondents, the Commissioners of the City of Sydney, under the powers of an Act of the Council of New South Wales, 17th Vict., No. 35, entitled "The Sydney Water Act of 1853." The legality of the resumption was not at issue, the only question raised by the appeal being the right of the Appellant to compensation by reason of the Respondents subtracting the water of a creek above the Appellant's lands, which diminished the quantity of water below, which water the Appellant claimed to have the undisturbed use of.

By the above Act, it was (among other things) enacted, that the Respondents should be Commissioners for the purpose of providing a plentiful supply of pure and wholesome water for the City of Sydney and the suburbs thereof, and for the shipping in the port of Sydney, and for carrying into effect the whole of the purposes of the Act: and that it should be lawful for the Governor of New South Wales, by and with the advice of the Executive Council, if the Governor and Executive Council should think fit so to do, at any time, and from time to time, in the name of Her [475] Majesty, to resume and take into Her Majesty's hands either the whole or such parts of the watercourse or stream therein mentioned, with its tributaries and affluents, and also such parts of the alienated lands adjacent thereto, as he and they should think it expedient to resume, for the purpose of carrying the Act and the objects thereof fully into effect: and upon any such resumption being notified by order of the Governor, in the New South Wales Government Gazette, the watercourse and stream, with its tributaries and affluents, or such part or parts thereof as should be notified as having been so resumed, and also all such parts of the adjacent lands as should be notified as having been resumed, should immediately, and without any deed or instrument of conveyance or surrender thereof, become and be vested in Her Majesty, Her heirs and successors, for the uses of the Government of the Colony of New South Wales. And the Commissioners were thereby authorized and empowered for the supply of water to the City, suburbs, and shipping, to divert, take, and use, not only the waters arising from or flowing through the lands in the possession of the Crown, then known as the "Sydney water reserve," but also the waters arising from or flowing into or from the stream or watercourse extending from the reserve to the shore of Botany Bay, and all the tributaries and affluents of the stream or watercourse, and all swamps, morasses, or other sources of water in the neighbourhood of the stream or watercourse, and its tributaries and affluents, or so much thereof as might, from time to time, be necessary for the purpose. And it was provided that all persons whose lands should have been so resumed [476] and taken into Her Majesty's hands, or whose lands might have been taken, used, or prejudiced by the Commissioners, under any of the provisions therein contained, or who should have sustained any loss or damage whatever in or by the execution of the Act, should be entitled to reasonable compensation for the loss or injury sustained by them, and such compensation should be ascertained, assessed, or awarded, as therein mentioned, and that in fixing the amount of such compensation, reference should be had to any reservation contained in the grants by which the lands of the parties claiming such compensation were alienated by the Crown. By the 16th section it was further provided that in all cases in which compensation was

claimed, in case the Commissioners and claimant should not agree, the amount to be paid should be determined in the Supreme Court, by an action for damages, to be brought by the claimant against the Commissioners, or upon an issue agreed to by the claimant and Commissioners respectively.

The lands in question were comprised in a grant by Mr. Macquarie, the then Governor-in-Chief of New South Wales, dated the 1st of January, 1810, to Edward Redmond, his heirs and assigns, under the description of all those "135 acres of land, lying and situate in the District of Sydney, bounded on the west side by Mary Lewin's Newcastle farm, bearing north thirty-seven chains, on the north side by an east line of thirty chains, on the east side by a south line to a small creek, and on the south side by that creek and the water of Botany Bay at the mouth of Cook's River, a road of one chain reserved on the west side, to be known by the name of John's Town, conditioned not to sell or alienate the same for the space of [477] five years from the date hereof, and to cultivate twenty acres within the said period, and reserving to Government the right of making a public road through the same, and also reserving, for the use of the Crown, such timber as may be deemed fit for naval purposes."

The creek mentioned in the grant was an unnavigable stream of fresh water which flowed into Botany Bay. Redmond entered into possession, and afterward sold the lands, the subject of his grant, to one Simeon Lord. Possession was taken by Lord, but the lands were not conveyed to him until after the date of the grant by the Crown hereafter mentioned.

On the 27th of May, 1823, the then Governor-in-Chief of New South Wales granted unto Simeon Lord, his heirs and assigns, "All those 600 acres of land situate, lying, and being in the County of Cumberland and District of Sydney, bounded on the north-west side by a line from the south-east corner of Redmond Johnston's farm, to the south-west corner of Winder's farm, on the north-east by Winder's farm, bearing east  $40\frac{1}{2}$  degrees south, 67 chains on the south-east by a line bearing west, 25 degrees south to Botany Bay, and on the south-west and west sides thereof by Botany Bay, a creek, and Redmond's farm, saving and reserving to His Majesty, his heirs and successors, such timber as might be growing or to grow thereafter upon the said land which might be deemed fit for naval purposes, also such parts of the said land as were then or should thereafter be required by the proper officer of His Majesty's Government for a highway or highways: and further, any quantity of water and any quantity of land not exceeding ten acres of land, in any part of the said grant, as might [478] be required for public purposes: Provided always, that such water or land so required should not interfere with, or in any manner injure or prevent, the due working of the water-mills erected or to be erected on the lands and watercourses thereby granted: and to build, within the term of five years, a water-mill of a 12-horse power. To have and to hold the land to Simeon Lord, his heirs and assigns for ever."

After Simeon Lord had taken possession of this grant from the Crown, and also of Redmond's land, he built a flour mill, with an undershot water-wheel, at the south end of Redmond's grant, the water-power being derived from the creek, a part of which creek was the boundary, on the south side, of Redmond's grant. Simeon Lord by his Will devised the lands contained in Redmond's grant to his widow, the Appellant, and his other land, being his own grant from the Crown, to his son, Edward Lord.

On the 16th of July, 1855, Sir Henry Young, the then Governor of New South Wales, with the advice of the Executive Council of the Colony, and under the authority given to him by the above-mentioned Act, 17th Vict., resumed and took into Her Majesty's hands part of the lands belonging to Mary Lord, the subject of the original grant of the 1st of January, 1810. He also resumed on behalf of Her Majesty certain lands belonging to Edward Lord, forming part of the grant to Simeon Lord, which adjoined the Appellant's lands and were bounded by the same creek, but situated higher up its course. The Commissioners for the City of Sydney (the Respondents), appropriated the water of the creek for the purposes of the Act, and by diverting the water as it flowed by Edward Lord's lands, materially [479] diminished the quantity, withdrawing the supply by which the mill was worked, and the stream in general, which was used for woolwashing and other



purposes besides that of turning the mill. No question was raised as to the necessity or formality of the resumption of the lands, the dispute being as to the right to compensation for taking the water.

In accordance with the provisions of the Act, the Appellant brought an action against the Respondents, in the Supreme Court of New South Wales, for damages sustained by the taking and resuming of the lands in question and subtracting the water. The action was tried by a special jury. At the trial, evidence was given of the value of the property resumed. By the Judge's direction the jury made several assessments. For compensation for the loss of her land the sum of £4860; for the buildings and machinery, £3600; for so much water and use of machinery as would be left to the Appellant's land, after the Commissioners had taken away Edward Lord's property, £3000; and for the water and use of machinery lost by taking away water from Edward Lord's land, the jury awarded £7200 conditionally. The jury found a verdict for the Appellant on all the issues, and assessed the damages at £11,460; with the reservation, that if the Court should be of opinion that the Appellant was entitled to the undisturbed use of the water in the creek mentioned in Redmond's grant, on the lands and hereditaments taken and used by the Respondents, for other purposes than its use as a motive power, then and in such case the jurors contingently assessed the damages of the Appellant, over and above her costs, at £18,660, being £7200 in addition to the before-mentioned damages of £11,460.

[480] The Appellant afterwards moved the Supreme Court for leave to increase the damages by the sum so contingently assessed, to £18,660, upon the ground that she was entitled to the undisturbed use of the water in the creek mentioned in Redmond's grant. The sum of £11,460 found for the Appellant included the sum of £3000 awarded as compensation for the loss of the motive power aforesaid. A cross motion was also made by the Respondents that the verdict be set aside, and for a new trial, or new assessment, or that the amount of damages absolutely awarded to the Appellant for the water taken and used by the Respondents might be reduced by the sum of £3000, or such less amount as the Court should think fit.

Mr. Justice Dickinson delivered the judgment of the Court upon these motions. After stating the facts of the case, he proceeded as follows:—"We have considered this case, and are of opinion, that the Plaintiff is not entitled to the damages contingently assessed. We are of opinion, that the Plaintiff is not entitled to compensation for the subtraction by the Defendants of any water from that part of the creek which formed a portion of Redmond's boundary; for the Plaintiff had only the same right in the land that Simeon Lord had, from whom he derived it, and his privileges against the Crown could have been no other than those which Redmond enjoyed. As the grant to Redmond stated his land to be bounded by the creek, we think that he had no possession of such boundary, and, therefore, was not entitled to the land over which the creek flowed. The Plaintiff, therefore, not having even the *prima facie* right to the land over which the creek flowed *ad medium filum aquae*, we think has no [481] riparian right to use the water which flows by her land, and is, therefore, entitled to no damages for its appropriation by the Defendants. For we think the law on this point is correctly propounded by Mr. Justice Story, in his judgment in *Tyler v. Wilkinson* (4 Mason's U.S. Reps. 397), cited in Gale and Whatley On Easements, 131:—'*Prima facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction.' We are of opinion also, that the Plaintiff is not entitled to compensation for the Defendants' disturbance of the water which flowed over her land. For though she derives her title to it from Redmond, in whose grant there was no power reserved to the Crown to withdraw water from off it, she also claims it from Simeon Lord, who accepted a grant of the land next above it, in which such a power was reserved to the Crown for the public purposes of this City. That reservation could not be exercised by the Crown, without disturbing the water in Redmond's land. Simeon Lord, by assenting to the reservation in the Crown grant to himself, assented, as far as he was concerned, to the Crown doing everything without which that reservation could not be affected. His assent to the reservation in his own land could not, of course, be binding upon

Redmond as long as the latter retained his rights in the land granted to him. But after Simeon Lord became possessed of the two properties he had no right to complain of the withdrawal of water from the land [482] which had been Redmond's by the Crown's exercise of a reservation to which he had assented in other land derived from the Crown. The maxim, '*volenti non fit injuria*,' would have applied to him if the Commissioners had exercised their powers while he was possessed of the said properties. He would, therefore, have been entitled to no compensation for the disturbance of the water which had been Redmond's, even had it been Redmond's, and the Plaintiff who claims under him can be in no better position. We are of opinion, that the Plaintiff is not entitled to retain the sum of £3000 awarded to her for so much of the water, and of the use of the machinery, as would be left to the Plaintiff's land after the Commissioners had taken away the water from Edward Lord's land. For if the Commissioners took away all the water in Edward Lord's land, though they would be liable to compensate him for so much water as would be available for his mill, by reason of the stipulation to that effect in the grant to Simeon Lord, nevertheless, as Simeon Lord would not, had the Defendants taken all the water in his time below his mill before it arrived at Redmond's land, have been entitled to any further compensation for the withdrawal from the land which had been Redmond's, of the water, it is clear that the Plaintiff, who claims under Simeon Lord, cannot be entitled to such last-mentioned compensation, which the jury estimated at £3000. Unless, therefore, the Plaintiff consents that her compensation shall be reduced to £8460, there must be a new trial."

From the Order discharging the motion to increase the damages, the present appeal was brought.

[483] Mr. Rolt, Q.C., Mr. M. Smith, Q.C., and Mr. Homersham Cox, for the Appellant.—According to the true construction of the grant of 1810, the Appellant is owner of the bed of the creek, mentioned in the grant, up to the middle thread of the stream, or in the alternative, to the common riparian rights, as proprietor of the banks of the stream in respect thereof, and is consequently entitled to the undisturbed use and enjoyment of the water of the creek for all purposes, subject to the rights of other riparian proprietors.

The first question turns on the construction of the grant of 1810. The land in question is there described as bounded on the south side by the creek; no exception is made regarding the creek or the water in it, nor is there any reservation of the water of the creek as is contained in the grant of 1823. The land, therefore, covered by water in the creek *ad medium filum aquæ* passed by the grant, and is the property of the Appellant. As a general rule, the owner of land on the banks of a stream is entitled to a moiety of the bed of the stream. The law upon this point is acknowledged by the Court below to be correctly stated by Mr. Justice Story in *Tyler v. Wilkinson* (4 Mason's U.S. Reps. 397), and is relied upon in *Gale and Whatley On Easements*, p. 131, in illustrating that rule of law; yet the judgment of that Court is in direct contradiction of such rule. The Court below was mistaken in supposing that the question was confined to one of property dependent upon the right to the land over which the water flowed. If a man has lands adjacent, he is entitled to the use of the water, [484] so that he does not interfere with the rights of others. In *Embrey v. Owen* (6 Exch. Rep. 369), Baron Parke states it as a clear proposition that "The right to have the stream to flow in its natural state without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession;" and he refers to *Mason v. Hill* (5 Barn. and Ad. 24) and proceeds, "But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." So in *Sampson v. Hoddinott* (1 Com. Ben. N.S. 590) the Court of Common Pleas held that every proprietor of land on the banks of a natural stream has a right to the use of the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream.—

[Lord Kingsdown: In *Miner v. Gilmour* (2 Moore's P.C. Cases, 131) the same doctrine



was upheld here.]—*Wood v. Waud* (3 Exch. Rep. 775) also recognizes the right a riparian proprietor has to the stream of water flowing through the land in its state. The Chief Baron Pollock in his judgment (*ib.* 774-5) in that case refers with approbation to *Mason v. Hill*, and *Tyler v. Wilkinson*, and quotes Kent's Comms. Vol. III. p. 439, [485] to the effect that "every proprietor of lands on the banks of a river has naturally an equal right to the use of the water." In *Rex v. The Inhabitants of Landulph* (1 Moo. and Rob. 393) it was held by Mr. Justice Patteson, that where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. We have also the right by user for twenty years, and if the Appellant should be held not entitled to the soil of the bed of the creek up to the middle thread, under the grant we certainly have an easement in the water by prescription. Statute, 2nd and 3rd Will. IV., c. 71, sec. 2. Long previously to the resumption by the Crown, there was upon the land comprised in the grant a mill erected on the banks of the creek worked by the water thereof running in its natural course, and by other water diverted from the creek so as to run wholly through the Appellant's land to the mill. It was also used by the several persons in possession of the land, not only as a source of motive power, but also for industrial and beneficial purposes. The diversion of the water in the creek renders the mill useless. Is not that a ground for compensation anticipated and provided for by the Act?

But, secondly, the Appellant's right to the water of the creek was not affected by the acceptance by Simeon Lord of the grant of the land above, with the reservation of the Crown's right to take the water in that grant, as was erroneously supposed by the Court below, as that grant had nothing to do with the right to the water contained in Redmond's grant. Lord was the owner of Redmond's grant, and had a right to the water privileges under that grant common with other riparian owners. The reservation in the [486] Crown's grant of the right to take any quantity of water, did not at all alter the rights of Lord under Redmond's grant, or of any other proprietors of land below. The assent by Simeon Lord to the Crown's reservation in the grant to himself could not affect rights under Redmond's, the subject of which he was not then in possession of, so as to give the Crown a right to the water in the creek below the land granted to him, although that land afterwards became vested in him by a different title. Had he been in possession of the subject of both grants, he would have been entitled to compensation in respect of the water taken from Redmond's land, and the Appellant, as his devisee, is entitled to the same right. The damages ought to have comprised compensation for loss of water rights, which were properly estimated by the jury at £7200, above the value of the property resumed.

Mr. R. Palmer, Q.C., and Mr. Stammers, for the Respondents.—This case is to be considered under two heads. First, we contend that the Appellant had no title to the bed of the creek, or to the water flowing therein; and, secondly, if she had such a right, we submit that the acceptance of the grant from the Crown in 1823, precluded Simeon Lord, and all persons claiming under him, from objecting to anything that might be done by the Crown in conformity with the reservation in that grant.

First. As this is a Crown grant, it cannot be construed by intendment, but according to the express terms of the grant, for nothing can pass by implication in a Crown grant. *The case of the royal fishery of* [487] *the Banne* (Sir J. Davies' Reps. 157). (Dublin Edit. 1762.) The language of the grant, "bounded on the south side by that creek," is positive, and being a Crown grant, must be construed strictly against the grantee, and necessarily excludes the right to any part of the bed or water of the creek. It is nowhere shown that the quantity of 135 acres is made up by the soil of the creek. With respect to rivers on borders of States, Angell, On tide waters, lays it down, p. 7, that "The well-settled rule of the law of nations is, that where an arm of the sea or a river is the boundary between two nations or States, if the original right of jurisdiction is in either, in the absence of any convention respecting it, each holds to the middle of the stream. But where one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-established State extends to the river only, and the low-water mark is its boundary." This was held by the Supreme

Court of the United States in reference to the river Ohio, of which the State of Virginia was the original proprietor, and had granted the territory on one side only to Kentucky. So with respect to navigable rivers. Where the terms of a grant of a several fishery are unknown, the owner of the fishing may be presumed to be the owner of the soil; but where those terms appear, and are such as to convey an incorporeal hereditament only, the presumption is destroyed. *The Duke of Somerset v. Fogwell* (5 Barn. and Cr. 875). In *Rec v. The Inhabitants of Landulph* (1 Moo. and Rob. 393), cited by the Appellants, Mr. Justice Patteson held, in reference to the question of boundary, that where two [488] parishes are separated by a river, and there was no positive evidence of the boundary line between them, it was to be presumed to coincide with the middle line of the channel. But the presumption in that case only arose in the absence of a grant, and is rebuttable. The proposition of the Appellant upon this point, that the owners of the land on either side of a stream are entitled to the soil "*ad medium filum aquae*," cannot be sustained, as it is only a presumption of law, which ceases where an express grant exists, even in the case of a subject, *a fortiori* as regards the Crown. Best, On principles of evidence, at p. 492, clearly puts it so; he says, "So the soil at the bottom of a navigable river is presumed to be in the Crown; but where the river is not navigable it is presumed to be the property of the owners on each side, '*ad medium filum aquae*,' " and he refers to *Rec v. The Inhabitants of Landulph* (1 Moo. and Rob. 393). The same rule holds in the case of a highway, the soil of which is taken, *prima facie*, to belong to the owners of the adjoining lands, *usque ad medium via*. *Berry and Goodman's Case* (2 Leon. 147), *Grose v. West* (7 Taunt. 39), *Anon.* (Lofft, 358), *Cooke v. Green* (11 Price 736). Lord Cranworth, in *Wishart v. Wyllie* (1 Macqueen's Sco. App. Cases, 389), lays it down, "that if a stream separates properties A and B, *prima facie*, the owner of the land A, as to his land on one side, and the owner of the land B, as to his land on the other, are each entitled to the soil of the stream *usque ad medium aquae*—that is, *prima facie* so. It may be rebutted, but, generally speaking, an imaginary line running through the middle of the stream is the boundary, just as if a road separates two [489] properties, the ownership of the road belongs half-way to one, half-way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption." Again, Phear, On rights of waters, p. 12 (Edit. 1859), says, "This presumption of the *medium filum* being the boundary line between two riparian proprietors presupposes that the land upon which the water lies or flows is shared between them; it cannot, therefore, arise at all in those cases where there is an antecedent presumption of law that the bed of the stream, or piece of water, belongs to a third party." *Wright v. Howard* (1 Sim. and Stu. 203) is one of the earliest decided authorities upon this branch of the case. The Vice-Chancellor, Sir John Leach, held that, *prima facie*, the proprietor of each bank of a stream was the proprietor of half of the land covered by the water, but that there was no property in the water. This case was followed by Lord Tenterden in *Mason v. Hill* (3 Barn. and Ad. 304). The soil of the creek in question is clearly in the Crown, as the *alveus*, or bed of a public navigable river is *inter regalia*. *The Lord Advocate for Scotland v. Hamilton* (1 Macqueen's Sco. App. Cases, 46). Now, riparian rights depend solely upon the right to the soil; and if there is no right to the bed of the river, no riparian rights exist. Lord Ellenborough, in *Bealey v. Shaw* (6 East, 214), distinctly lays it down that the general rule of law, as applied to this subject, is that, "independent of any particular enjoyment used to be had by another, every man has the right to have the advantage of a flow of water in his own land without diminution or alteration." So in *Liggins v. Inge* (7 Bingh. 695), Chief Justice Tindal says, "By the law of [490] England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates against any other." The principles enunciated by these cases apply only to water which flows over the proprietor's own land. Where there is no right to the bed of the river no riparian rights exist. This is, however, a novel case. New South Wales being a newly-settled country, where the whole of the territory originally belonged to the Crown, the land and rivers were in the Crown, and it is moreover a creek with a running stream, so that there is strictly no parallel with the cases relating to navigable rivers in this country. It is not in dispute that parties may be entitled to the river only, and the banks on



both sides belong to other proprietors, as in the case of the New River.—[The Lord Justice Knight Bruce: That is only an artificial canal.]

Secondly. Even if Redmond was entitled either to the soil of the creek, *ad medium filum aquae*, or as a riparian proprietor to the use of the water, yet, after Simeon Lord became the purchaser of Redmond's grant, and while Simeon Lord was possessed thereof, he accepted a grant from the Crown of the land next above Redmond's grant, in which grant to Simeon Lord there was reserved to the Crown a power to resume and withdraw any quantity of water that might be required for public purposes. Now such reservation could not be effectually exercised by the Crown without disturbing the water on the boundary of Redmond's land in the creek. Simeon Lord accepted his grant with the reversion of the Crown's right to take any quantity of water, and, as a necessary incident, the right to take water from Redmond's land was included. Simeon Lord having conceded the [491] right to take the water on his land, which could not be taken away without diminishing the flow of it lower down, could not, therefore, claim compensation for an act which was necessary to the completeness of his own grant. The Appellant, as his devisee, is bound by his acts. It is laid down, in Shep. Touch. (Atherley's Edit.) P. 100, that "when anything is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them if he desire to sell them; and he and the vendee may cut them, and take them away. And by such exception, the lessor will have the boughs, fruit, herons, and hawks that breed in them." Again at P. 89, he says, "When anything is granted, all the means to attain it, and all the fruits and effects of it are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words '*cum pertinentiis*,' or any such like words. '*Circumque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*.'" The same principle is found in 1 Saund. 322, b., and 2 Roll. Abr. N. pl. 1, 2, 3. *Roberts v. Karr* (1 Taunt. 495), *Morris v. Edgington* (3 Taunt. 24), *Abson v. Fenton* (1 Barn. and Cr. 195), *Hodgson v. Field* (7 East, 613), *Gerrard v. Cooke* (2 Bos. and Pul. N.R. 109), are authorities in support of this doctrine. Baron Parke, in delivering the judgment of the Court of Exchequer in *Dand v. Kingscote* (6 Mee. and Wels. 174), speaking of a reservation in a deed, says *ib.* p. 197, "This reservation is to be construed, according to the rule laid down in Sheppard's Touchstone, [492] 100, in the same way as a grant by the owner of the soil of the like liberties: for what will pass by words in a grant, will be excepted by like words in an exception." Upon the same principle are ways of necessity. It is a principle of law that the grant of a thing shall carry all things included, without which the thing granted cannot be had. Woolrych, On ways, 29, citing Hob. 234. Therefore, if A. have an acre of ground in the middle, and surrounded by other of his lands, and enfeoff B. of that acre, here of necessity a convenient way arises on B.'s behalf to go over A.'s ground as a necessary incident. Oldfield's case (Noy, 123). The strongest case upon this point is *Hinchliffe v. Earl of Kinnoul* (6 Scott, 650. S.C. 5 Bingh. N.C. 1). There Chief Justice Tindal (6 Scott, 675) says, "The question which arises, and that upon which the determination of the present case rests, is whether the right of passing and re-passing over the soil of the passage, and using it for the purposes above mentioned, did also pass to the lessees under this lease, and we are of opinion that upon the facts found in this special verdict, such right did pass as a necessary incident to the subject-matter actually demised, though not specially named in the lease." The rule laid down in Plowden's Comms. (16 a) is, that by the grant of anything, *conceditur et id sine quâ res ipsa habere non potest*, as if one grants his trees, the grantee may enter upon his land for cutting down and carrying them away, for which authority the Year Book, 2 Ric. II., is cited. Again, Justice Twysden, in *Pomfret v. Ricroft* (1 Saund. 323), lays down the rule of law to be, "When the use of a thing is granted, everything is granted by which the grantee may have and enjoy [493] such use, as if a man gives me a license to lay down pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me." Mr. Justice Bayley in *The Duke of Somerset v. Fogwell* (5 Barn. and Cr. 885), puts this question in the true light. He says, "This is the case where the grant is made between subject and subject, and, consequently, is to be construed against the grantor, a principle inapplicable to grants made by the Crown, whereby nothing

passes, unless the intention that it should pass is manifest." Lastly, The reservation in Simeon Lord's grant was not in derogation. But if so it is not bad as against the Crown. After an easement has been extinguished by unity of possession, a new easement is not created by a grant of a messuage and land with a common appurtenant. *Clements v. Lambert* (1 Taunt. 205), *Nicholas v. Chamberlain* (Cro. Jac. 121). So in a Court of Equity, where a condition is annexed to a grant or a bequest. *The Att.-Gen. v. Christ's Hospital* (3 Bro. C.C. 165), *Messenger v. Andrews* (4 Russ. 478), *Egg v. Darcy* (10 Beav. 444). These authorities, though analogous to, are not in reality cases of election, the principle enunciated in those cases being equally applicable to a grant by deed, in which anything in the nature of a condition annexed, or stipulation of reservation, is implied. Under the circumstances, we submit, that the Appellant was not entitled to have the damages increased by the amount contingently assessed.

Mr. Smith, Q.C., in reply.—There is no case which has expressly turned upon the fact of the bed of a river being in one person, and [494] the soil of the adjoining land belonging to another. If it had been copyhold, the Lord of the Manor would have been entitled to the river and the *cursum fulminis*. The authorities relied upon by the Respondents relating to a navigable river do not apply. Upon the true construction of the grant to Redmond, the boundary of the lands must be held to extend to the middle thread of the stream. Failing that, as a common riparian proprietor, the Appellant was entitled to compensation for loss of the water. Again, the parties have enjoyed the use of this water for twenty years, and consequently have an easement, which, by the Statute, 2nd and 3rd Wm. IV., c. 71, sec. 2, binds the Crown equally with the subject.—[The Right Hon. Sir John Coleridge: Does that Statute extend to the Colony?]

—The Colony adopts the English law.

Judgment having been reserved, was now delivered by

The Right Hon. Sir John Coleridge (Feb. 12, 1859).—This appeal arises out of a claim for compensation for the alleged loss of certain valuable water-rights, occasioned by the acts of the Commissioners for the City of Sydney, under a Colonial Act, the 17th Vict., No. 35, entitled, "An Act for supplying the City of Sydney, and portions of the suburbs thereof, with water." No question arises upon the nature of the acts done, nor on the power of the Commissioners; but the Respondents deny, first, that the Appellant had any such rights as she alleges; and, secondly, they insist that even if she had, she cannot, under the particular circumstances hereinafter detailed, claim any compensation for the deprivation of them.

Under the Colonial Act, questions of disputed compensation are tried in the form of an action [495] brought against the Commissioners. The Appellant accordingly sued them, and her claim substantially embraced three matters; compensation for land and buildings taken; for the deprivation of water used as the motive power to a mill, which stood on her land; and for the deprivation of water for the use of machinery, and other purposes, in consequence of the Commissioners having taken away the water from the land of one Edward Lord, higher up the stream. The jury found for the Plaintiff on all these claims, and separately on each by direction of the learned Judge who tried the cause. The Respondents do not question the verdict on the first claim, and the Court below having directed a new trial, unless the Appellant would agree to reduce the amount of the damages by the sum awarded on the second, has consented to that reduction: the only question, therefore, which remains, is, as to a sum of £7200, which has been awarded by the jury conditionally, on the last head.

The property now belonging to the Appellant, and in respect of which this claim is made, was originally granted on the 1st of January, 1810, by Mr. Macquarie, then the Governor of New South Wales, to one Edward Redmond. It is described as "135 acres of land lying and situate in the district of Sydney; bounded on the west side by Mary Lewin's Newcastle farm, bearing north 37 chains; on the north side by an east line of 30 chains; on the east side by a south line to a small creek; and on the south side by that creek and the water of Botany Bay, at the mouth of Cook's River." It thus appears, that partly on the east, and partly on the south, the land is bounded by the creek, and it is as riparian owner that the Appellant's claim is made. The argument in opposition to this [496] was, that in respect to water-



rights, a riparian owner was only one who was also the owner of the soil *ad medium flum aquae*; but that by the terms of this grant, the creek, which bounded the land, was necessarily excluded from the land itself comprised in the grant. It was urged that grants from the Crown were to be construed strictly against the grantee, and that nothing would pass under such a grant by mere inference; that here 135 acres of land specifically were granted, and that it had not been shown that it was necessary to include any portion of the soil of the creek in order to make out that quantity.

Their Lordships do not think it necessary to express any opinion on the first step in this argument. They desire only that it may not be taken for granted that they accede to it. It is a question of some nicety, and it so constantly happens that the owner of the bank is also the owner of the land *ad medium flum*, that it is dangerous to attribute too much importance to the language either of judicial decisions or text-books, which seem to define the right, where the foundation of it has not come specifically in question.

Mr. Chancellor Kent, in his Commentaries (Ed. 1840), part 6, Lect. 52, p. 438, writes thus:—"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream 'adjacent to his lands'"; and a few lines lower down, speaking of the same person, he adds, "Though he may use the water while it runs over his land, he cannot unreasonably detain it."

But it is unnecessary for their Lordships to say more on this point, because they are clearly of opinion, that upon the true construction of this grant, the creek where it bounds the land is, *ad medium flum*, [497] included within it. In so holding they do not intend to differ from old authorities in respect to Crown grants; but upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown, or from a subject: it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances.

The learned Counsel for the Respondents contended that, according to the plain and literal meaning of the words, which must alone be looked to, that which was described as bounding the subject-matter of a grant, must be something beyond the limits, and excluded from it. But this will not be found to be a test which can be practically applied. Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found. If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium flum*, in the far greater majority of cases wholly unprofitable.

This consideration shows that it never can be a question to be determined by the literal meaning of the words, without reference to the circumstances in which they are used. The same learned author who has been already cited, and who may be safely relied on in any question of general principle, lays it down (vol. iii. p. 433, part 6, Lect. 52), that "it may be [498] considered as the general rule, that a grant of land bounded upon a highway or river, carries the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent." Tried according to these principles, it appears clear to their Lordships that the description of the boundaries in this grant does not exclude from it that portion of the creek which, by the general presumption of law, would go along with the ownership of the land on the bank of it. The Crown had the power of granting it; no reason can be assigned why it should have reserved what might be directly and immediately useful to the grantee, and could scarcely have been contemplated as of any probable use to the Crown, and this too in an infant Colony, where it was the manifest and avowed policy to encourage settlement and the cultivation of land by grants on the easiest and most favourable terms.

It may not be immaterial to refer here, by way of illustration, to another Crown grant, shortly to be noticed more fully, of lands on the opposite side of this same creek. The boundary on the south-west and west sides is there described as being "bv Botany Bay, a creek, and Redmond's farm." It is obvious how differently the

word "boundary" may be understood with reference to these three things. But in this latter grant the Crown expressly reserves to itself a power of taking any quantity of water which may be required for public purposes. If the creek had been excluded from the grant, the reservation would not have been requisite; and if it be excluded, and be also excluded from the grant to Redmond, the argument founded on the improbability and uselessness of such a reservation is so much the stronger.

[499] But, it is next to be seen whether, if the Appellant had the ordinary rights of a riparian owner, there is anything in the circumstances of her title to exclude her from compensation, as alleged. It appears that some little time before the date of the grant last referred to, which was the 27th of May, 1823, Simeon Lord, the grantee under that grant, had contracted for and become the equitable owner of Redmond's grant; subsequently he became the legal owner, and Mary Lord, the Appellant, is his devisee of that grant. In the grant of 1823 there is a saving and reserving to the Crown of any quantity of water, and any quantity of land not exceeding ten acres, in any part of the grant, as may be required for public purposes. The Commissioners have acted on this reservation, and it is in so doing that they have necessarily abstracted the water from the Appellant, and done her the injury for which she seeks compensation. But it is said that Simeon Lord could have claimed no compensation for an act which was necessary to the completeness of his own grant; that, as he had conceded the right to take the water on this land, which could not be taken thence without interrupting the flow of it by the land on the opposite side, and lower down, of which he was then the equitable owner, he must be taken to have conceded it equally in respect of those lands, and, if so, that the Appellant is bound by the same presumption, having taken them as his devisee.

It appears to their Lordships that this argument is founded on a misapplication of a well-known and admitted principle of law. If you grant anything, you are presumed to grant, to the extent of your power, that also without which the thing granted can-[500]-not be enjoyed. But what is the effect of this reservation? Ten acres of land in any part of the grant are reserved, at the election of the Crown, if required for public purposes; these are not to be granted to the Crown by Lord, but are provisionally saved out of the grant to him. As to the water, Lord, as owner of the land, had no power to grant it to the Crown; the Crown could not grant any property in it to him, nor he to the Crown; the effect of the saving is only that he waives his own rights as riparian owner to the use of it as it flowed. If the lands below or opposite had been owned by a stranger, this saving would have had its full effect, although the stranger had insisted upon compensation for the consequential loss to himself; and so it would have been if there had been any number of lower proprietors, all of whom were to be compensated; for the intention and effect of it was only to enable the Crown to take the water at any time, without compensation to Lord in respect of the injury to that land. Lord's insisting upon compensation in respect of other land would not have interfered with the operation, or the completeness of the saving in respect of this land; but for the saving, the Crown must have paid two compensations, or made agreements in respect of two rights; now it is free as to the one, and has only to compensate the other.

On these grounds their Lordships will advise Her Majesty that the judgment of the Court below ought to be reversed, in respect of the sum of £7200, by which amount the damages of the Appellant ought to be increased; and they will further recommend that she be allowed the costs of this appeal.

[Mews' Dig. tit. CROWN, D. CROWN GRANT; tit. DEED AND BOND, C. CONSTRUCTION, 1. *In General*; tit. WATER, C. STREAMS, ETC., 1. *Rights and Incidents of, a. Generally*, 2. *Acquisition of Rights*, b. *By Grant*. S.C. 33 L.T. (O.S.) 1; 7 W.R. 267. See *Beckett v. Corporation of Leeds*, 1872, L.R. 7 Ch. 424; *Burclough v. Metropolitan Board of Works*, 1872, L.R. 5 H.L. 452; *Micklethwait v. Newlay Bridge Co.*, 1886, 33 Ch.D. 146; *Cooper v. Stuart*, 1889, 14 A.C. 294.]



## [501] ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

THOMAS FALLE,—*Appellant*; PHILIP LE SUEUR and GEORGE LE HUQUET,—*Respondents* \* [Feb. 9, June 22, 23, 1859].

The Royal Court of Jersey having refused to hear witnesses tendered by a Defendant to an action, in support of one of his pleas, and great delay having occurred from the course pursued, the Judicial Committee, under the powers of the Statute, 3rd and 4th Will. IV., c. 41, sec. 7, appointed a Special Examiner to take further evidence in the Island, confining his inquiry to certain facts, and directing him to report the same within a limited time: the appeal to stand over for the production of his report and to be argued with reference only to the effect produced upon the entire case by such additional evidence [12 Moo. P.C. 519, 520].

H. entered into a contract with F. for certain work to be done by H. to houses in Jersey, payment to be made by F. at stated periods. Two other agreements were contemporaneously made between the same parties for the purchase of pieces of land adjoining, for building other houses. These contracts were to be passed "*devant Justice*" within one year (which was not done). H. commenced the work, and F. paid him a first instalment. H. being unable to complete the work, transferred his contract to L., and F. assented to the transfer, upon condition that the agreements for the purchase and sale between him and H. should be passed before the Royal Court. H. afterwards became a Bankrupt, and F. was declared *tenant apres décret* to his estate. L. finished the work, F. having recognized L. as being substituted for H. F. refused to pay L. on the ground that the completion of the other agreements with H. was a condition precedent to the right to recover for the work done.

Held, in the circumstances, that as F. had recognized and suffered the work to be completed by L., and had the benefit of the contract, he could not refuse payment to L. for the work done, on the ground of the non-performance of the agreements made by him with H. [12 Moo. P.C. 535].

Held further, that by the law of Jersey, an *Acte* of the Royal Court, calling in the aid of Experts, or sworn appraisers, to view the work done, was the proper course [12 Moo. P.C. 525].

This was an appeal from a judgment of the full number of the Royal Court of the Island of Jersey, [502] whereby the Appellant was condemned to pay to the Respondents the sum claimed by them for work done to certain houses, amounting to £2000 old Jersey currency (equivalent to £1846 3s. 1d. British money), deducting therefrom the sum of £116 13s. 4d. Jersey currency (equivalent to £107 13s. 10d. British money), with interest on the sum of £1883 6s. 8d. Jersey currency (equivalent to £1738 9s. 3d. British money), from the 3rd of July, 1852, the date of the first act in the procedure to the day of payment, and to pay them the further sum of £120 British by way of damages, with the costs, the whole without prejudice to the claim of the Respondents for the balance which might be owing to them by the Appellant relative to the completion of the houses.

The facts of the case were these:—

On the 5th of September, 1850, Aaron Hacquoil entered into an agreement with the Appellant, by which Hacquoil contracted to find materials, labour, and everything requisite for the carpenters', joiners', and glaziers' work for fifteen houses, which the Appellant was to build; namely, one house on a piece of land called "Springfield," and the fourteen other houses on a piece of land called "Le Ruffel," near Rouge Bouillon. The sum of £200, Jersey currency, for each of the houses was

\* Present: The Right Hon. Lord Kingsdown, the Right Hon. The Lord Justice Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. Sir John Taylor Coleridge.

to be paid in three equal payments, the first, when the front and back windows should be glazed and fixed; the second when the carpenters' work should be entirely finished for plastering; and the third and final payment, when the whole should be entirely completed and approved.

The Appellant and Hacquoil contemporaneously entered into two other agreements, for the purchase [503] and sale of certain land and the building of houses thereon. One of the conditions of the latter agreements was, that possession should be given immediately, and that the necessary contract for carrying it out should be passed "*devant Justice*" within a year. Afterwards, on the 25th of March, 1851, Hacquoil agreed to sell a piece of land to the Appellant. On the 7th of May, 1851, an exchange was made between them by substituting other plots for some of those sold to Hacquoil by the agreements of the 5th of September, 1850; but no alteration was made in the conditions of the agreement of that date. Hacquoil commenced the execution of the carpenters' and glaziers' work agreed to be done by him; but being unable to complete the work, he was desirous of transferring his contract to the Respondents, and the Appellant was applied to for his consent to the transfer. At this time, however, Hacquoil had received advances from the Appellant, who refused to consent to the transfer of the agreement to the Respondents otherwise than conditionally; and ultimately, on the 23rd of July, 1851, the Appellant signed a memorandum of such consent at the foot of the transfer, as follows:—  
"1851, July 23rd. The above transfer has been made with my consent, but it is not to be binding upon me till the contracts for the purchase and sale of the pieces of ground between Mr. A. Hacquoil and myself have been passed before the Royal Court the time required by law to render them valid, when an agreement between Messrs. P. Le Sueur and George Le Huquet and myself is to be made on the same conditions."

The Respondents proceeded with the work with the full knowledge and permission of the Appellant; [504] extra work and materials being furnished by the Appellant's directions; and when they considered one of the houses sufficiently advanced to justify them in asking a payment by the Appellant, they applied to him for the purpose; but this he refused, denying that he had in any way recognized them as the parties with whom any contract existed.

The Respondents then commenced the present action on the 31st May, 1852, by "*ordre de Justice*," in which they relied on the agreement of the 5th of September, 1850, with Hacquoil, and the transfer to them. The Appellant pleaded that the Respondents had no right of action against him; that the agreement was not obligatory upon him by reason of the above-mentioned contracts with Hacquoil not having been passed *devant Justice*, according to law, and that no new agreement had been made with the Respondents. To this the Respondents replied, first, that the condition attached to the transfer was illegal; second, that the Appellant was the cause of the contracts not having been passed; and, thirdly, that he had recognized them as contractors, and had received the keys of the houses. The Appellant rejoined that the agreement was legal, and could not be contradicted by evidence, and reserved to himself the right to bring in an allegation in denial of the matters of fact alleged by the Respondents.

The Respondents, in support of their pleas, produced evidence to the following effect: that in the year 1851, Hacquoil had caused a deed to be prepared for execution by himself and the Appellant for the conveyance of the land, referred to in the conditional acceptance of the transfer of the contract to the Respondents; that instead of executing the deed so [505] prepared, the Appellant brought an action against Hacquoil, the object of which was to obtain authority from the Royal Court to hypothecate Hacquoil's real estate, so as to secure an indemnity for any damage which might result from the alleged refusal of Hacquoil to execute the requisite deed; that this action was defended by Hacquoil; and the Court, by a judgment in the suit of "*Falle v. Hacquoil*," dated the 13th of September, 1851, ruled as follows: "Considering that the Defendant (Hacquoil) offers to pass before the Court this day the contract that he had obliged himself to pass in conformity with the two before-mentioned agreements, the Court accedes to his offer, provided the said contract contains all the conditions stipulated in the said agreements, of which judgment, as regards the registration of the two agreements the registration of which is



refused, the Plaintiff (Falle) has been allowed to appeal before the full Court." That in consequence of the above decision, Hacquoil, in 1852, caused another deed to be prepared in conformity with the agreements he had entered into with the Appellant; but the Appellant having refused to execute the deed, Hacquoil, on the 19th of May, 1852, took out a writ, the object of which was to compel the Appellant to execute the deed, or to pay the penalties consequent upon his refusal. That on the 3rd of July, 1852, being the last day of term, the cause of "*Hacquoil v. Falle*" was postponed to a future day; since which period neither the appeal entered by the Appellant against the judgment of the 13th of September, 1851, nor the action of Hacquoil, had been proceeded with, in consequence of the bankruptcy of Hacquoil. Two documents were produced by the Respondents, dated respectively the 5th of June, 1852, [506] and 23rd of August, 1852, both in the handwriting of the Appellant, and in which he demanded the keys and possession of the houses, subject to objections as to the character of the work. Also a third document, dated the 7th of June, 1852, being the report of the examination of the work in the house No. 6, in the presence of the Appellant, and his satisfaction thereof. These documents were produced by the Respondents in support of their allegation that the Appellant had acknowledged them as contractors, subsequently to the signing of the transfer of the agreement, and had received from them the keys of the several houses on which the work was done, as they were completed. The Respondents further proved that the Appellant had, subsequently to the service of their writ, accepted and taken possession of the houses on the 5th of June, 1852, and 23rd August, in the same year; and that it was admitted by the Appellant that he had rented the houses, and had ever since been in receipt of the rents thereof. It was also proved that before the transfer of the contract to the Appellant was made, certain arbitrators appointed by the Appellant and Hacquoil were unanimously of opinion that Hacquoil was liable to no penalty for the houses not being completed at the time specified.

On the 9th of October, 1852, the inferior number of the Royal Court gave judgment; after stating that it resulted from the arguments, that the contracts in question had not been passed between Hacquoil and the Appellant in consequence of the opposition of the latter, and that notwithstanding that no new agreement had been concluded between the Appellant and the Respondents, it was alleged that the Appellant [507] had acknowledged the Respondents as contractors, having received from them the keys of his houses as they were finished, reserving to himself the right only of discussing the manner in which the work had been executed, and that workmen had been named on both sides to ascertain the state of the work in the houses, the Court, therefore, rejected the Appellant's plea. This judgment was affirmed on the 9th of June, 1856, by the full number of the Royal Court.

Subsequent to this judgment a decree of bankruptcy was declared against the property of Hacquoil, and the Appellant was declared tenant to the property of the bankrupt, by virtue of his rights under the judgment of the 13th of September, 1851.

The cause was further heard before the inferior number of the Royal Court on the 23rd of April, 1853, when the Appellant pleaded a denial of his having acknowledged the Respondents as contractors, and set out matters in support of such plea, and alleged that the Respondents and Hacquoil, by reason of their quarrels, in consequence, as he alleged, of the Refusal of the Respondents to pay Hacquoil the value of the work done, were the cause of the contracts not having been passed; but the Court, on the 6th of September, 1853, rejected the plea, and refused to admit any evidence upon it, and on the 9th of June, 1856, the full number of the Court affirmed that judgment.

These pleas having been rejected, the Appellant, on the 17th of September, 1853, pleaded that the works were not finished, that they were badly executed, and of inferior materials; that he had paid Hacquoil a larger sum than credit was given for; [508] that when the Respondents began the work, there had already been executed by Hacquoil work to the amount of about £500 sterling, which ought to go to secure the sums which Hacquoil owed to the Appellant, as well as to guarantee the passing of the contracts for sale of the lands; but the Court, without going into evidence upon these points, ordered, upon the Respondents' application, that the Viscount should go on the premises to ascertain the state of things, and report thereupon.

The Viscount having made his report, the inferior number of the Royal Court, on the 13th of September, 1851, ordered, upon the Respondents' application, notwithstanding the opposition of the Appellant, that the full Court should go upon the premises, when the parties should produce proofs and evidence. This decision was afterwards, on the 9th of June, 1856, affirmed by the full number of the Court, and acted upon, and witnesses examined.

After numerous other proceedings taken in the cause, the Respondents, on the 1st of December, 1856, moved the Court as follows:—"Considering that the course adopted by the Defendant in the examination of his witnesses renders it certain that this cause will never be brought to an end, Plaintiff asks that the Court order the Viscount to go on the premises with the parties and appraisers (Experts) to make an examination of the houses, to ascertain the defects, if there are any, to fix the sum which should be necessary to remedy them, and upon the whole to make a report to the Court, as being the only efficacious mode which remains in order to arrive at a solution of the suit which is before it."

On the 11th of May, 1857, the Court delivered [509] judgment on this motion. After referring to the agreement of the 5th of September, 1850, and the transfer thereof of the 23rd of July, 1851, to the Respondents, with the consent of the Appellant, the judgment proceeded thus:—"Considering that, after the work which was to be done at the houses was finished, the Defendant took possession of them and let them for his own benefit; that the Plaintiffs not obtaining payment of the sum stipulated in the agreement, sued the Defendant before the Court, who raised several objections to the non-fulfilment of the agreement, and that thereupon the Viscount was sent upon the premises to ascertain or state the conditions of things, and the reasons of the parties, and subsequently the Court, upon the motion of the Plaintiffs, decided to assemble there in a body and to hear the witnesses; that in consequence of that decision the Court went there several times without being able to proceed, and, after much delay, when it went to examine the witnesses, the Defendant asked that the Greffier should take a note of their depositions, and that nearly five days had been devoted to the taking down in writing of the deposition of the first witness, who has only deposed principally as to the work done at one of the said houses, and without the Plaintiffs having as yet put a single question to him; that this suit has been in existence near five years, and that if it be necessary to devote the greater part of five sittings of the Court to hear the deposition of a single witness, with few exceptions, as to one house, whilst there are fourteen other houses respecting which there are difficulties between the parties, and that more than sixty witnesses are called to depose, it is evident that such a proceeding can only [510] tend to interminable delays and to the ruin of the Plaintiffs, who are workmen, and have expended considerable sums for the purchase of the materials and for the work done to the houses; that it is, therefore, indispensable in the interests of justice to adopt measures which shall have the effect of rendering the proceeding shorter, and which shall enable the Court to give a solution of this cause. For these motives it is ordered that the Viscount shall again go upon the premises, when he shall call Experts, to whom he shall administer oath, to make an examination of the houses, to indicate the defects, if there are any, to fix the sum which it would be necessary to deduct from the amount claimed, if any deduction ought to be made: the previous report of the Viscount, containing the reasons and allegations of the parties respectively being produced to the Experts to serve as the basis of the examination and appraising of the said houses, and upon the whole to make a report to the full Court. And upon the demand of the Defendant to be permitted to appeal directly to Her Most Excellent Majesty in Council, the Court has allowed him to appeal at the end of the cause only."

On the 7th of July, 1857, the parties proceeded with the Deputy-Viscount to the premises, accompanied by six sworn appraisers. The appraisers reported, that they had valued minutely what had appeared to them to be still required and to be furnished to complete the carpenters' work, and the glazing of the house in Springfield Road, according to the conditions and specifications between the parties, and had valued that work, with the necessary materials, at the [511] sum of £24 14s. 8d. sterling, to be deducted from the £200 that the Respondents were to receive, thus leaving a sum of £175 5s. 4d. sterling, due to the Respondents for the work and



materials for this house; and further, that they had examined the fourteen houses known as Victoria Crescent minutely, and were of opinion, that deduction should be made from the amount claimed by the Respondents, of £30 11s. 2d.; and also that they had valued the extra work of the Respondents at £43 9s. 11d. The appraisers moreover reported that there were some differences in the levels, dimensions, and projections of the houses as built, and the plans and specifications, but that they considered that these differences were very trifling, and not of a nature to cause any prejudice to the Appellant, or to diminish the value of his houses, and that, with the exception of the defects above mentioned and valued, the work that the Respondents had executed in the houses, and seen by the appraisers, had been well done, and that all the materials which they had been enabled to examine appeared to have been of a good quality, although the houses had been neglected in respect to the painting of them, since they had been in the possession of the Appellant; and as to the remainder, the appraisers were of opinion that the objections of the Appellant were without any importance, and made without reason. The Deputy-Viscount returned that it resulted from the appraisement that the Respondents were entitled to receive from the Appellant as follows:—For the house in Springfield Road, £175 5s. 4d.; for the fourteen houses called Victoria Crescent, £2774 11s. 6d.; extra work, £43 9s. 11d. [512]—£2993 6s. 9d.—Less the sum credited in the action, £116 13s. 4d.—£2876 13s. 5d.

On the 13th of November, 1857, the cause being proceeded with, the Appellant objected that the report of the Deputy-Viscount, not being made in the customary form, ought not to be received, as the Deputy-Viscount, not satisfied with merely reporting the opinion of the appraisers, had taken upon himself to reject or correct their opinions, and to adjudicate in the cause between the parties, and prayed that the parties might again be sent before the Deputy-Viscount, in order that his report might be amended. The Court, however, considering that the variation in form existing in the report of the Deputy-Viscount was of no moment, and could not prove injurious to either of the parties, unanimously disallowed that first part of the Appellant's plea; and with reference to the remaining portion of that plea, the Court not finding that the Deputy-Viscount had exceeded his authority, was also unanimously of opinion to reject the same.

The Appellant afterwards moved that his witnesses, whose names were stated, should be heard, in order to substantiate the facts alleged on his behalf in the report of the Deputy-Viscount, of the 19th of January, 1854, and in his several pleas previously stated in the *Actes* of the Court, and this in pursuance of the *Acte* of the Court of the 13th of September, 1854, which ordered the evidence to be adduced thereupon. Upon this the Court gave judgment as follows: "Considering that the motion of the Defendant is in contradiction to the provisions of the *Actes* of the Court of the 11th of May, 1857, and [513] 17th of November, 1857, the Court unanimously rejects the same."

On the 3rd of December, 1857, the Court gave final judgment in the cause as follows: Touching the first part of the allegation—"Considering that the Plaintiffs in the special writ served upon the Defendant have stated to him that they will account to him for the sum of £116 13s. 4d. sterling, old Jersey currency, in deduction of their claim; that the Defendant has neither made any objection to that sum nor in any manner contested it; that the Defendant has produced no document in support of his allegation; that if nevertheless the Defendant has any just and legal demand against the Plaintiffs, he will be at liberty to establish them in deduction of the balance he may have in hand, after the payment of the amount claimed by the Plaintiffs in this suit." For the above reasons the Court unanimously overruled the first part of the allegation. Touching the second part of that allegation in support of which the Defendant had produced an agreement between him and Hacquoil, dated the 5th of September, 1850, in virtue of which the Defendant was entitled to retain a sum of £28 sterling, old Jersey currency, for each of the fifteen houses which Hacquoil was to complete, and the completion whereof by the Respondents, in lieu of Hacquoil, forms the ground of the present action. The Court proceeded, "Considering that it has not appeared that the Plaintiff were parties to the agreement; that the agreement of the 23rd of July, 1851, which substituted them for Hacquoil, and which they effected with the knowledge and consent of the Defendant,

makes no mention thereof; that the agreement between the Defendant and Hacquoil, dated the 5th of September, 1850, [514] and the withholding of the £28 on each house, relates to conditions depending on the purchase of a piece of land to be made by Hacquoil from the Defendant; that if the Defendant did intend to subject the Plaintiffs to the conditions of the agreement of the 5th of September, 1850, he ought to have had it reproduced and included in the agreement of substitution of the 23rd of July, 1851; that moreover the Respondents not being parties to the agreement of the 5th of September, 1850, could not compel the Defendant and Hacquoil to carry out the stipulations relative to the contracts specified by the Defendant; that hence there exists no grounds for the second part of the said allegation: The Court, therefore, has unanimously overruled this second part of the allegations of the Defendant." The Court then gave judgment on the merits, condemning the Defendant to pay to the Plaintiffs the sum of £2000 Jersey, equivalent to that of £1840 3s. 1d. sterling, British, less the sum of £116 13s. 4d. Jersey, paid by the Defendant to Hacquoil, equivalent to that of £107 13s. 10d. British, with interest on the sum of £1883 6s. 8d. Jersey, equivalent to the sum of £1738 9s. 3d. British, from the 3rd day of July, 1852, the date of the first act in the procedure to the day of payment, and to pay them the further sum of £120 British, by way of damages, with costs, the whole without prejudice to the claim of the Plaintiffs for the balance which may be owing to them by the Defendant relative to the completion of the houses.

This was the final judgment in the cause. The present appeal was from this judgment, which included several other interlocutory judgments, given in [515] the course of the suit, which had been reserved *en fin de cause*.

Mr. R. Palmer, Q.C., and Mr. W. Field, for the Appellant.—The substantial question is, whether the Appellant, by the law of Jersey, is liable in any shape to the Respondents. *Monro v. Butt* (4 Jur. N.S. 1231) was a similar case to the present: there it was held by the Court of Queen's Bench, that where a building was to be erected, or repairs done upon, or alterations made to, a building on a man's own land, under a special contract, containing a condition precedent, which is unperformed by the contractor, the mere fact of the owner taking possession does not raise any inference of waiver of the condition precedent, or of the entering into a new contract, and, therefore, in such a case an action will not lie either upon the special contract, or upon an implied contract to pay for the work done according to its value. In delivering judgment, Lord Campbell said, "We are pressed, of course, with the argument of hardship; it was said to be unjust that the Defendant should enjoy the labour expended and materials furnished by the Plaintiff. The argument of hardship in this particular case is always a dangerous one to listen to: but the truth is, there is neither hardship nor injustice in the rule, with its qualification: it holds men to their contracts; it admits, under circumstances, the substitution of new contracts." This reasoning applies to the present case. There is no proof that the conditions of the contract upon which alone the transfer from Hacquoil to the Respondents [516] was to take effect, has ever been performed, or that the non-performance was caused by the Appellant, or had been in any way waived or excused by him. The agreement with Hacquoil was to execute the work, and the Appellant's motive for building the houses comprised in the contract was, that he might dispose of other building ground belonging to him in the immediate neighbourhood, and Hacquoil, in order to obtain the contract, contemporaneously entered into the other agreements with the Appellant to purchase in fee several plots of land, and to build houses on them, and until those houses were built the Appellant was, by the third agreement of the same date, authorized to retain a certain sum in respect of the work to be done upon each of the houses comprised in the first agreement. Now, one of the conditions of the second agreement was, that the necessary contract for carrying it out should be passed, *devant Justice*, within a year. There was also an agreement by Hacquoil with the Appellant to sell and exchange some land, and as the contract was not passed *devant Justice*, according to the agreement, the Appellant refused to consent to the transfer by Hacquoil to the Respondents, otherwise than conditionally. The Respondents, therefore, not having performed this condition, cannot recover. Another objection to the decision of the Royal Court is, that the Appellant has been precluded from going into evidence in answer to the



Respondents' case, which refusal amounts to a denial of justice, a course which this Court will not sanction. *Jeswant Sing-jee v. Jet Sing-jee* (2 Moore's Ind. App. Cases, 424). We were prepared to have established, by the testimony of witnesses, had we been allowed so to do, [517] first, that the contracts for the purchase of the lands between the Appellant and Hacquoil were not passed *devant Justice* in consequence of the opposition of Hacquoil; and, secondly, that the Appellant had constantly and invariably refused to recognize the Respondents as the contractors until the conditions precedent to the adoption of the contract had been performed.

Mr. Rolt, Q.C., and Mr. W. W. Mackeson, for the Respondents.—In the first place, as the Appellant adopted and had the sole benefit of the work done by the Respondents, he is bound to pay for it. No question can be raised as to the amount to be paid, as the value of the work was regularly ascertained by Experts, according to the practice of the Royal Court in Jersey, Le Quesne, Const. Hist. of Jersey, p. 24, Houard's *Dict. de Droit Normand. Tome II. tit. "Experts;"* which course was not only just in itself and called for by the necessities of the case, but is sanctioned by precedents of the Royal Court. *Le Boutillier v. Le Greleys (a), Mallet v. Gallichan (b)*. So it is by the law of France. *Cod. de Proc. Civ.* 302, 323. The same rule prevails in England. Statute 6th Geo. IV., c. 50, sec. 23. In the next place, as to the alleged defects in the work, deductions have been made fairly by sworn [518] appraisers, properly appointed, and after a personal inspection by them as well as by the Court and the Viscount, in the presence of the parties. The alleged condition precedent in the agreement of the 23rd of July, 1851, was not binding on the Respondents; but had it been, it was waived by the conduct of the Appellant. His case is, that the non-performance of the condition that the contracts should be passed between him and Hacquoil absolves him from liability to pay the Respondents for the work done by them. An ungracious defence, and wholly untenable, as that was a matter solely between Hacquoil and the Appellant, over which the Respondents had no control. The Appellant, however, was alone to blame, for not obtaining the completion of the collateral agreement. Hacquoil was always ready to pass these contracts, but through the default of the Appellant they never were passed. Again, when a decree of bankruptcy was declared against the property real and personal of Hacquoil, the Appellant was declared tenant of the property of the bankrupt, in virtue of his rights under the judgment in the suit of *Falle v. Hacquoil*, and we submit that by the law of Jersey the Appellant, by this act, conclusively precluded himself from relying on the plea set up by him as to the contract between himself and Hacquoil not having passed "*devant Justice*." Moreover, the Appellant has precluded himself from setting up this condition by his own conduct, in settling with Hacquoil for past work up to the 23rd of July, 1851, and in permitting the Respondents immediately to continue the work, without any objection urged by him in regard to the condition, and in finally accepting the work, subject only to the question of its having [519] been properly done. The Appellant fully recognized the Respondents, he overlooked the work, in some instances complained of the manner in which it was done, and by such conduct tacitly undertook to pay the Respondents for the work done. The Respondents are in possession of unanimous judgments, which this Court will not reverse unless clearly shown to be contrary to the Norman law. *Thornton v. Robins* (1 Moore's P.C. Cases, 450).

The Lord Justice Knight Bruce (9th Feb. 1859).—Their Lordships do not think it right at present to dispose of this appeal.

By the Statute, 3rd and 4th Will. IV., c. 41, for the better administration of justice in the Privy Council, section 7, it is enacted:—"That it shall be lawful for the said Judicial Committee, in any matter which shall be referred to such Committee, to examine witnesses by word of mouth (and either before or after examina-

(a) This case was decided by the Royal Court of Jersey on the 21st of October, 1788, and the 7th of February, 1789, when damages claimed for the illegal arrest of a vessel were estimated by sworn appraisers.

(b) The Royal Court of Jersey, in Actes of that Court from the 8th of November, 1844, to the 25th of September, 1846, referred the case to sworn appraisers to report the value of the work claimed, and acted upon their report.

tion by deposition); or to direct that the depositions of any witness shall be taken in writing by the Registrar of the said Privy Council, to be appointed by His Majesty as hereinafter mentioned, or by such other person or persons, and in such manner, order, and course, as His Majesty in Council, or the said Judicial Committee, shall appoint and direct: and that the said Registrar, and such other person or persons so to be appointed, shall have the same powers as are now possessed by an Examiner of the High Court of Chancery, or of any Court Ecclesiastical."

Their Lordships are of opinion that it will, certainly or probably, be more consistent with the due and safe administration of justice to direct that such witnesses, on either side, as the parties respectively may wish to [520] produce on the question of the liability or absence of liability on the part of the Appellant to the Respondents in respect of the work done by the Respondents on the houses in question, shall be examined, than to take any other course.

Their Lordships mean, accordingly, that witnesses should be examined upon that question, and that alone, without reference to any question of *quantum*. When this evidence shall have been taken (confined as has been said), their Lordships intend to resume the consideration of the appeal, which is then to be additionally argued, with reference only to the effect upon the whole case, of the new evidence to be thus introduced. The matter, therefore, will not go back to the Court in Jersey: it will receive final adjudication here, subject, of course, to the pleasure of Her Majesty.

Their Lordships also think it safe and expedient, acting on the powers conferred by the Statute already mentioned, to depute an Examiner of their own, for the purpose of taking the new evidence. They will, in an Order to be hereafter issued (*a*), more distinctly [521] explain the particular point, or points, to which the evidence is to be addressed.

(*a*) The following Order was issued:—

"At the Council Chamber, Whitehall, the 9th day of February, 1859.

"By the Right Honourable the Lords of the Judicial Committee of the Privy Council.

"Whereas, by virtue of an Act passed in the third and fourth years of His late Majesty's reign, entitled, 'An Act for the better administration of justice in His Majesty's Privy Council,' it was enacted by the seventh section of the said Act, that it shall be lawful for the Judicial Committee, in any matter which shall be referred to such Committee, to examine witnesses by word of mouth (and either before or after the examination by deposition), or to direct that the depositions of any witness shall be taken in writing by the Registrar of the Privy Council, or by such other person or persons, and in such manner, order, and course, as His Majesty in Council, or the said Judicial Committee, shall appoint and direct, and that the Registrar, and such other person or persons so to be appointed, shall have the same powers as were then possessed by an Examiner of the High Court of Chancery, or of any Court Ecclesiastical;

"And whereas Her Majesty, by Her general Order in Council of the 4th of November, 1857, hath been pleased to refer unto this Committee the humble petition and appeal of Thomas Falle, of St. Saviour, in the Island of Jersey, Esquire, against Philip Le Sueur and George Le Huquet, from certain decisions of the Royal Court of the Island of Jersey;

"And whereas the Lords of the Committee, in obedience to Her Majesty's said general Order of reference, have this day taken the said appeal into consideration, and have heard Counsel on both sides; their Lordships are now pleased to order, and it is hereby ordered, that Philip Hemery Le Breton, Esquire, Barrister-at-law, do proceed as their Lordships' Examiner, specially appointed for the purpose, with all convenient despatch, to the town of St. Helier's, in the Island of Jersey, for the purpose of taking in writing the depositions of such witnesses as the parties in this appeal respectively may wish to produce, but only on the question of the liability of the Appellant to the Respondents in respect to the work done by the Respondents, for which compensation was sought in the original suit in the said Royal Court, and the said proceedings had: and the said Philip Hemery Le Breton is hereby



The agents of the parties will receive notice in due [522] time as to the appointment of the Examiner, and the question, or questions, to which the evidence is to be addressed, as to the time at which the Examiner is to proceed to the Island, and as to the time within which (should there be no extraordinary difficulty) their Lordships will require the evidence to be closed.

As has already been said, when the evidence shall be complete, their Lordships will have the case argued upon the mere effect of the new evidence upon the entire case. Their Lordships do not think it right to say more on this subject at present.

In pursuance of this Order, the Examiner took further evidence on both sides. From the testimony of the witnesses produced by the Respondents, it appeared, that the Appellant fully recognized them, and that he had found fault with their work, and had made them make additions and alterations. Evidence was also given, that the Appellant had been asked, on the [523] part of Hacquoil, to pass the contract, which he refused so to do, without assigning any reason. It was further shown that the Appellant had declared himself *tenant apres décret* to the estate of Hacquoil, in respect of his insertion of the Acte of the 13th of September, 1851, and that by the law of Jersey, the Appellant by becoming *tenant apres décret*, he was entitled to the real and personal estate of the person *in décret*, or cessionary possessed at the time of the cession. Evidence was also gone into by the Appellant, which consisted of testimony to conversations between the Respondents and the Appellant, in which the latter said he would not acknowledge the Respondents till the contracts with Hacquoil were passed. The effect of this evidence is stated in the judgment.

The appeal now came on to be heard upon the additional evidence (June 23, 1859).

The same Counsel appeared.

The Lord Justice Knight Bruce.—The Lords of the Committee having heard Counsel on both sides on this appeal on the 9th of February, 1859, their Lordships were pleased to intimate that they did not think it right then to dispose of the appeal.

The Examiner appointed under the foregoing Order having taken the depositions of certain witnesses in the Island of Jersey, and having made his report to the Board, their Lordships have heard Counsel on the effect of the new evidence on the entire case.

It appears that in the year 1851, and the early part of 1852, the Respondents, tradesmen in the Island of Jersey, did some carpenters' and glaziers' work, and

authorized and required to take in writing the depositions of the said witnesses accordingly, and to report the same to their Lordships at this Board; and their Lordships are further pleased to order, that for this purpose the said Philip Hemery Le Breton shall have all the same powers as were possessed, at the time of the passing of the Act of His late Majesty's reign, by an Examiner of the High Court of Chancery, or of any Court Ecclesiastical; and their Lordships do further order, that the costs of this inquiry shall be costs in the cause, but that each party do forthwith deposit in the Registry of the Privy Council in London, the sum of fifty pounds sterling, to cover the fee and travelling expenses of the said Examiner and his clerk, whilst he is engaged in this inquiry, and that it be referred to the Registrar of the Privy Council to determine the amount of the said fee, with reference to the duration of the inquiry.

"And their Lordships are further pleased to direct that the appeal of *Falle v. Le Sueur* and *Le Huquet* do stand over until the 15th of May next, before which time their Lordships require that the evidence shall be closed, and the depositions laid before this Board, signed and sealed by the said Examiner; and their Lordships will then proceed (if necessary) to hear a further argument upon the mere effect of the new evidence upon the entire case.

"And their Lordships hereby further order, that notice of this order and appointment be forthwith served on the agents respectively of the parties.

(Signed) "Henry Reeve,  
"Registrar of the Privy Council."

supplied materials of kinds generally used in works of [524] that description upon houses in the Island belonging to the Appellant, a proprietor also residing there. Of the materials thus furnished, and the work so done, the Appellant has had the benefit.

In the year 1852, when a great proportion of the work had been done, the Respondents applied to the Appellant for payment, or for a payment on account. To this he objected. He said first (what probably would be the second objection in regular order), that the work was insufficiently done, was ill done, that the materials were bad, and that the charges were too high. But he also insisted that if the Respondents had any just demand, he was not the person liable; that if they were creditors of any one, it was not of him.

Upon this, at the end of May, 1852 (since which it is sad to recollect that more than seven years have elapsed, the dispute being only as to the amount and payment of a carpenters' and glaziers' bill), began the cause of litigation, almost, it is to be hoped, unexampled, but which there seems now at last some ground for expectation of seeing concluded.

The suit thus begun led and branched into various perplexities, the proceeding producing, as the matter involved itself and spread itself out, various judgments, from which, from time to time, notices of appeal were given, but which at last ended, so far as the Royal Court of Jersey was concerned, in the principal and final judgment now under appeal, which was made in the month of December, 1857, and by which the Court, expressing itself satisfied upon the evidence as to the just value of the work done and materials found, decided that for that work, and those materials, so far as they were the subject of the action, the Appel-[525]-lant was liable to pay accordingly, with damages and interest, but without prejudice to the right of the Respondents to proceed against the Appellant for the residue of their demand, not included in the action.

From this and various preceding judgments, the appeal now under consideration was brought. It was heard before their Lordships in the month of February last, and the points resolved themselves into two, that seemed not immaterial. The minor and subsidiary litigation may be dismissed from our attention.

One was (to take the second, first, as it ought to stand), whether the Appellant was indebted to the Respondents in respect of the materials furnished for his houses, and the work done upon them; and, next, if he was indebted to them, what was the amount of the debt. The amount of the debt had been ascertained by the Royal Court of Jersey, in what appeared to their Lordships to be not only a reasonable mode, but one consistent with the laws, usage and practice of the Island: namely, by calling in the assistance of Experts, or sworn appraisers, who viewed the houses and work, heard what could be said upon both sides, and reported to the Court.

The Court adopted their view of the amount, and their Lordships agreed in the propriety of that mode of proceeding, and in the result, and considered, that if the Appellant was liable to the Respondents at all, he was liable to them in the amount found by the Experts; agreeing so far with the Royal Court.

But then came what has already been described as properly the first question, namely, whether the Appellant was liable to the Respondents for the amount, whatever it might be? And the case had been so involved by the pleadings and otherwise in [526] Jersey, and the suit had taken, in some respects, so strange a course, that their Lordships thought the Appellant entitled to the benefit of the objection he urged, that he had not had full and ample opportunity of going into evidence in support of his case. And though considering, upon the whole of the materials then before them, including the evidence given by the witness, Tibôt, that the liability of the Appellant to the Respondents was shown; yet their Lordships deemed it reasonable, the Appellant desiring it, to give him an opportunity of adducing further evidence. Accordingly, the opportunity was given to him; the Order, it is true, gave liberty to examine witnesses to both parties, as it would, in their Lordships' opinion, have been unreasonable that the power of adding to the evidence upon the point remaining in dispute should be confined to one side only; yet there can be no doubt that the Order was made solely and alone because the Appellant desired to add to the evidence. Accordingly, their Lordships gave directions for issuing a Commission to the Island, to examine witnesses, confined to the point of



liability; the evidence has been taken, and the whole case is now before their Lordships.

The ground of denial of liability taken by the Appellant was this; that he had originally contracted in writing, for the work and materials, with a person named Hacquoil. For some reason, probably on account of the commencement of the embarrassments which ended speedily in insolvency and bankruptcy on the part of Hacquoil, he, after making some progress, was unable or unwilling to proceed with the work, and he seems to have applied to the Respondents at a certain point to undertake it for him for the future; or rather, it should be said, to undertake it [527] in his stead for the future. They did so. An arrangement was made with them accordingly, on the 23rd of July, 1851, the day succeeding that on which an agreement had been made between Hacquoil and the Appellant for the purpose of settling the account between them down to that time; and it seems that at the foot, or on the back, of the original contract between the Appellant and Hacquoil, a memorandum was written in these terms:—"This 23rd day of July, 1851, I hereby transfer the above agreement to Mr. Philip Le Sueur and Mr. George Le Huquet. (Signed) Aaron Hacquoil."

This was not signed by either Respondent. And underneath that, as it would seem, certainly upon the same paper, and in connection with it, is this memorandum:—"The above transfer has been made with my consent; but it is not binding upon me till the contracts for the purchase and sale of pieces of ground between Mr. Aaron Hacquoil and myself have been passed before the Royal Court the time required by law to render them valid, when an agreement between Messrs. Ph. Le Sueur and George Le Huquet and myself is to be made on the same conditions. Thomas Falle."

It is signed by Thomas Falle, the Appellant. The document was also signed by Aaron Hacquoil.

Now, the Appellant's proposition is this: there had been a collateral agreement between him and Hacquoil, relating to adjoining property, in the fulfilment of which the Appellant was considerably interested. For whatsoever reason, that collateral contract to which the memorandum refers had not been completed; the Appellant says it never has been completed; that he has never had the benefit of it; that, therefore, [528] Hacquoil, if he had completed all the work, could not have recovered from him without making good the collateral agreement, and that the Respondents are in the same condition, and are entitled to receive nothing.

To this the Respondents answer, that such is not the necessary result; and is not the proper construction of the memorandum; but if it were, they say to the Appellant, "You alone have been to blame for not having that collateral agreement with Hacquoil completed; you might have had it done if you had chosen; but, however that may be, whatever may have been the reason which prevented the completion of the collateral agreement, we went on with the work immediately; we supplied the materials; we supplied labour; you saw what was going on. You approved of our being there, though you found fault with the manner of executing the work; and must be understood as having encouraged us to proceed; and, tacitly at least, promised to pay the price and value."

Such is the contention between the parties.

Now, their Lordships are of opinion, that the construction which the Appellant puts upon the memorandum is not necessarily the true construction. The meaning of the document may have been that Hacquoil should not be released until certain acts had been done: the meaning may have been that there was not, for all the purposes of the law of Jersey, to be a complete substitution, until certain acts had been done: but what is there in this memorandum (even if the Respondents had been parties to it, which they were not), prohibiting them from saying, "If we go on with the work in the meantime we are to be paid for it?"

Their Lordships think, that even upon the assumption [529] that it binds the Respondents, there is nothing in the memorandum necessarily inconsistent with their claim.

Then let us see what takes place. From the date of this memorandum, the condition, as it is called, not having been performed; the collateral agreement of Hacquoil with the Appellant remaining as it was; the Respondents continue the work

at the expense and to the amount of many hundred pounds. The Appellant sees what is going on from day to day, and approves in a sense: that is, recognizes them as being lawfully there, supplying materials and work, though he finds fault frequently, with or without cause, with the manner in which the work is executed.

Now, the unavoidable presumption and inference of fact, and in law, from the circumstances which unquestionably took place, are these: that the Respondents never meant to work or supply materials gratuitously; that they furnished what they supplied, and did the work, in the expectation of being paid, and under, at least, a supposed contract for payment: that is, for being paid by the Appellant. Their impressions, however, upon the subject would, of course, not necessarily bind the Appellant; but what is to be necessarily inferred from the evidence as to the Appellant's belief?

Their Lordships think it in no degree less right, or less necessary to infer, and they are satisfied upon that point, that the Appellant was perfectly well aware that the Respondents were supplying materials and work in the expectation of being paid by the Appellant; and under, at least, a supposed contract, verbal or written, with him, that he would pay them according to the just amount of their demand: be-[530]-cause in the circumstances into which Hacquoil was in all probability falling in July, 1851, and into which he very soon afterwards fell, the notion that they were executing the work or supplying the materials upon his credit is almost absurd: at all events, it is one entirely to be rejected, as it is not warranted by any reasonable interpretation of any portion of the evidence.

What, then, was the obvious duty of the Appellant? It was plainly his duty, if he meant to take to himself the benefit of their labour and expenditure: and that, so far as he was concerned, they should lose their money upon a condition not being performed, over the performance of which the Respondents had no control, to tell them so—to say, “You are working at your own peril; leave the place if you like, for by me you shall not be paid, unless the agreement of Hacquoil, over the performance of which you have no control, shall be performed.” Not doing that, he must be held to have sanctioned their proceedings, and to have encouraged them in bestowing their labour and expending their money in the belief and expectation that he would pay them.

In support, however, of his case in this respect he has produced several witnesses, of whom for the present purpose, only four need be considered, for all the others speak merely to matters not bearing on the point now under our attention. The four are, Francis de la Mare, Jean Billot, John Hubert, and Samuel McKenny. The witness De la Mare says:—“I was acquainted in 1851, and before, with the Appellant, the Respondents, and Mr. Aaron Hacquoil. I went at Mr. Hacquoil's request to speak to Mr. Le [531] Sueur, one of the Respondents; in August or September, 1851—I do not remember the precise time. I was at work at St. Luke's Church. Mr. Hacquoil came to me, and said he was uneasy in his mind about a Bill falling due that day, and he wished me to go to Mr. Le Sueur, one of the Respondents, to ask him to endorse a note of hand. I asked him the reason, and Hacquoil told me he had transferred his contract to Messrs. Le Sueur and Le Huquet, the Respondents. I asked him on what conditions. He said it was made on the condition that he should pass some contracts for land to the Appellant. He told me that if Mr. Le Sueur, the Respondent, would not renew the Bill, he would not pass the contracts.” That is a conversation in the absence of these persons. He goes on: “I went to see Mr. Le Sueur about it: he was at work building a chapel in Vauxhall. I told my message. I asked Mr. Le Sueur if it was true what Hacquoil had told me: if it was true that the transfer of the contract was conditional on the passing of the contracts to the Appellant? Le Sueur, one of the Respondents, said it was correct, it was the case. I said to Le Sueur, it was his interest to sign the Bill, in order to induce Hacquoil to pass the contracts to the Appellant, so that the transfer of the contract might be confirmed. Mr. Le Sueur, one of the Respondents, said in case Hacquoil was obstinate, or if there was so much nonsense about it, they would arrange with the Appellant. After that I came away.”

Now this, it will be observed, is as early as 1851, while the work is going on: the conversation, however, acknowledges nothing but the terms of the [532] memorandum: it acknowledges nothing on the subject of the liability to pay; it says no more than this, that the Respondents were aware that there was such a memorandum.



Then, in a subsequent part of the evidence, he says:—"I remember a conversation passing between the Appellant and Mr. Le Huquet, one of the Respondents, at a public house called the 'Robin Hood.' It was in the month of August or September, 1857."

Let it be recollected that the suit had then been going on for several years (I do not say this upon the question of admissibility), and the Experts, as will presently appear, were at that moment valuing under the order of the Court; an order upon the footing of their valuation having been pronounced, as has been already said, in the following December. At this period of the suit, it is that De la Mare supposes the Respondents, or one of them, to have used this expression:—"The Appellant said to Le Huquet, 'Can you deny that I have often told you that I would not acknowledge you, or give you any money, until the contracts between myself and Mr. Hacquoil were passed?' Mr. Le Huquet denied this for a long time, and after the Appellant persisting, Mr. Le Huquet said, 'O, yes, but you would have been glad if we had left, to have all that work we have done there for nothing.' The Appellant told Le Huquet that he had all along said that he would not acknowledge or pay him, or words to that effect, until the contracts were passed." On cross-examination by the Procureur-General, on behalf of the Respondents, the witness deposed:—"At the conversation at the Robin Hood, there were several persons present besides those I have named. The [533] Experts were present. The discussion took place in a corner of the room; the Experts were trying to induce the parties to go to an arbitration."

Now, it is obvious that the whole force of this supposed conversation depends not only on the mere words he gives, but on a particular interpretation; and upon the assumption that the witness intends to say that they were uttered with the meaning and for the purpose which the Appellant's argument ascribes to them. If that is meant to be said, we think it impossible to trust to the witness; for, without any imputation upon his respectability, we cannot believe that, after the suit had been going on for years, when the parties were upon the eve of a final decision, and the Experts were valuing with that view, one of the Respondents would have said he had no case. To this supposed conversation their Lordships are unable to attribute the least weight.

The next witness is Jean Billot, and he says:—"I was acquainted with Mr. Aaron Hacquoil, who began the building of the houses in Victoria Crescent. Mr. Hacquoil used to come to me sometimes: he said he had given his work to Messrs. Le Sueur and Le Huquet—he was not satisfied with them. He said, in a moment of excitement, 'They are trying to cheat me. I will not pass the contracts. I hold them.' They were speaking about the houses in Victoria Crescent. Hacquoil and I have had several conversations on the subject. I have had some short conversations with Mr. Le Huquet, one of the Respondents, about the business with the Appellant. I said to Le Huquet, 'You had done better to have taken the ground.' He said, 'I know it.' No persons' names were mentioned. I cannot say what ground it was—no name was spoken [534] of. It was the ground that was in question between the parties."

And there is nothing more. Of course it needs not be said that that amounts to nothing at all with reference to the present question.

Then comes the witness, John Hubert, who says:—"I have had a conversation with Mr. Le Sueur, one of the Respondents. One day he said, 'I believe we shall be obliged to finish the houses before we are paid.' The conversation was not long. Le Sueur said he had asked Mr. Falle for the money, and he had refused him. I cannot exactly remember the time; I think it was in January or February, 1852." It needs scarcely be stated that this, also, amounts to nothing.

The only other witness of that class is Samuel McKenny, a plumber, and he says:—"I have worked at the houses in Victoria Crescent. When I was leaving the houses with my tools, I saw Mr. Le Sueur, one of the Respondents. He asked me whether I had finished. I said, 'I had, so far as I was concerned.' He asked me if I had been paid. I said I had. He replied, 'You are a lucky fellow, you are more lucky than we have been.' In coming along, I asked how that was. He said, 'We have been to him for payment, and he says he does not know us.' I said, 'Very strange.' Le Sueur said, 'We'll see.' I was paid by the Appellant. We had been

speaking of the Appellant when we were talking about the payment. It was on the 1st of May, 1852."

That which has just been read is, their Lordships consider, the whole of the evidence given by the Appellant, for the purpose of satisfying the obliga-<sup>[535]</sup>-tion which their Lordships deem incumbent upon him: the obligation, namely, of showing that he had given the Respondents notice that if they proceeded with furnishing materials and doing work upon the houses before the contract with Hacquoil was completed, they would not be paid. Of course no such thing is proved. And, without entering into the question through whose fault, if the fault of any one, or by what means, it happened, that the collateral contracts between Hacquoil and the Appellant were not performed, their Lordships are satisfied that, upon the whole of the materials on both sides, it is evident that the Appellant allowed and encouraged the Respondents to proceed with labour and expenditure on his property in the belief, on their part, known by him to exist, and encouraged by him, that they would be paid by him the just amount of their demand: consequently, in their Lordships' judgment, the decision of the Royal Court in Jersey is right upon each ground; is right in both respects, and the appeal must be dismissed, with all costs, including those of the recent examination of witnesses procured, as has been said, at the request of the Appellant, and their Lordships will humbly advise Her Majesty accordingly.

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 6. *Practice*, g. *New Evidence*: tit. CONTRACT, B. PARTIES TO CONTRACT, 3. *Assignees*. S.C. 7 W.R. 707.]





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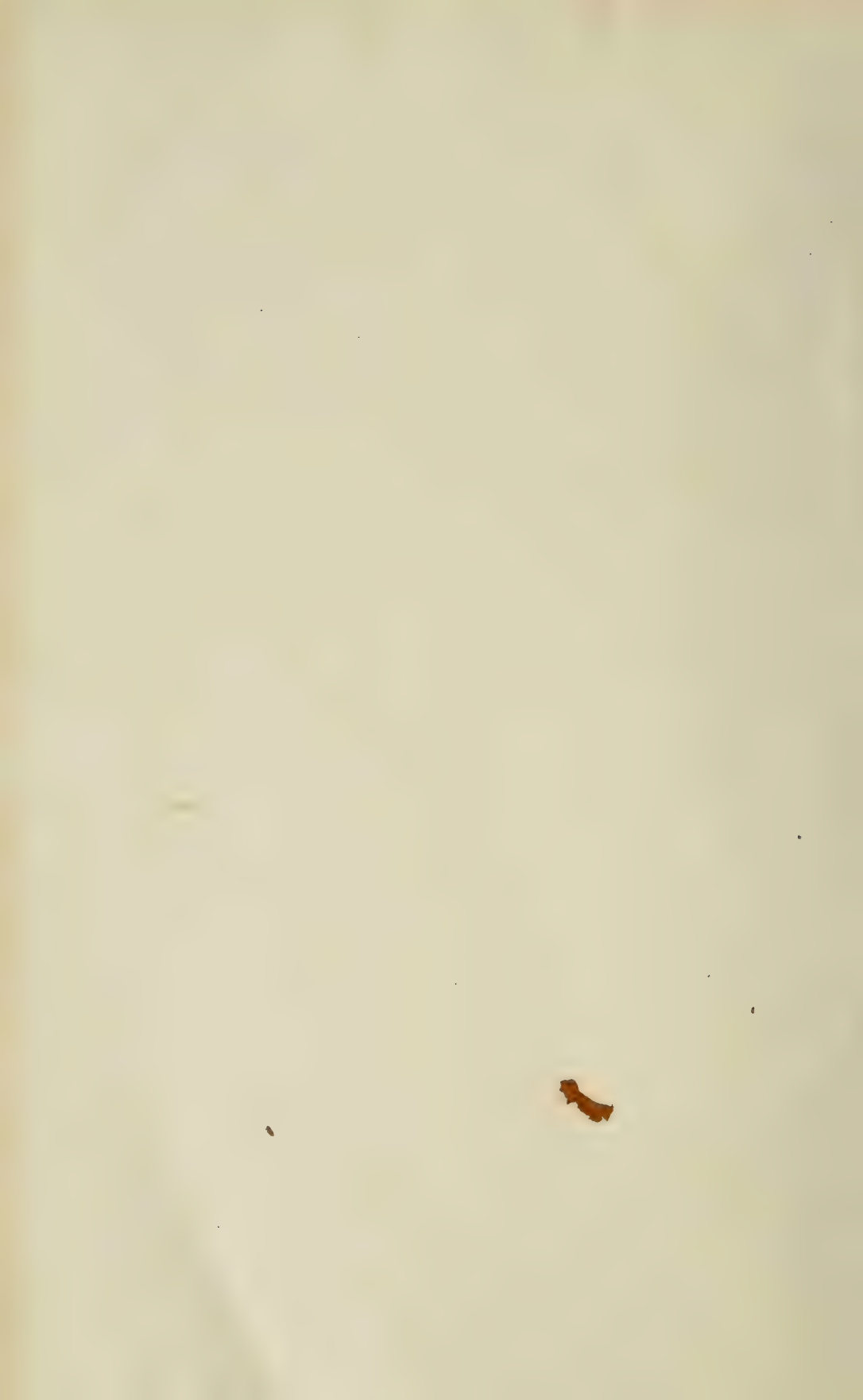


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